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Can The European Union Build A Bridge Over Troubled Waters? An Analysis of the Politicised and Depoliticised Legal Approach between the European Union and Cyprus

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A thesis submitted in partial fulfilment of the requirements of the University of Westminster
for the degree of Doctor of Philosophy

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Abstract

The Cyprus dispute accurately portrays the evolution of the conflict from ‘warfare to lawfare’ enriched in politics; this research has proven that the Cyprus problem has been and will continue to be one of the most judicialised disputes across the globe. Notwithstanding the ‘normalisation’ of affairs between the two ethno-religious groups on the island since the division in 1974, the Republic of Cyprus’ (RoC) European Union (EU) membership in 2004 failed to catalyse reunification and terminate the legal, political and economic isolation of the Turkish Cypriot community. So the question is; why is it that the powerful legal order of the EU continuously fails to tame the tiny troublesome island of Cyprus? This is a thesis on the interrelationship of the EU legal order and the Cyprus problem.

A literal and depoliticised interpretation of EU law has been maintained throughout the EU’s dealings with Cyprus, hence, pre-accession and post-accession. The research has brought to light that this literal interpretation of EU law *vis-à-vis* Cyprus has in actual fact deepened the division on the island. Pessimists outnumber optimists so far as resolving this problem is concerned, and rightly so if you look back over the last forty years of failed attempts to do just that, a diplomatic combat zone scattered with the bones of numerous mediators. This thesis will discuss how the decisions of the EU institutions, its Member States and specifically of the European Court of Justice, despite conforming to the EU legal order, have managed to disregard the principle of equality on the divided island and thus prevent the promised upgrade of the status of the Turkish Cypriot community since 2004.

Indeed, whether a positive or negative reading of the Union’s position towards the Cyprus problem is adopted, the case remains valid for an organisation based on the rule of law to maintain legitimacy, democracy, clarity and equality to the decisions of its institutions. Overall, the aim of this research is to establish a link between the lack of success of the Union to build a bridge over troubled waters and the right of self-determination of the Turkish Cypriot community. The only way left for the EU to help resolve the Cyprus problem is to aim to broker a deal between the two Cypriot communities which will permit the recognition of the Turkish Republic of

Abstract

Northern Cyprus (TRNC) or at least the ‘Taiwanisation’ of Northern Cyprus. Albeit, there are many studies that address the impact of the EU on the conflict or the RoC, which represents the government that has monopolised EU accession, the argument advanced in this thesis is that despite the alleged Europeanisation of the Turkish Cypriot community, they are habitually disregarded because of the EU’s current legal framework and the Union’s lack of conflict transformation strategy *vis-à-vis* the island. Since the self-declared TRNC is not recognised and EU law is suspended in northern Cyprus in accordance with Protocol No 10 on Cyprus of the Act of Accession 2003, the Turkish-Cypriots represent an idiomatic partner of Brussels but the relations between the two resemble the experience of EU enlargement: the EU’s relevance to the community has been based on the prospects for EU accession (via reunification) and assistance towards preparation for potential EU integration through financial and technical aid. Undeniably, the pre-accession and post-accession strategy of Brussels in Cyprus has worsened the Cyprus problem and hindered the peace process. The time has come for the international community to formally acknowledge the existence of the TRNC.

KEY WORDS: European Union, European Court of Justice, Cyprus Conflict/Problem, Republic of Cyprus, Turkish Republic of Northern Cyprus, Self-Determination, Secession, Democracy, Contextualised Law, Conflict Transformation/Resolution, Judicialisation, Protocol No 10 Act of Accession 2003.

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Foreword

'We definitely don't want to import new conflicts into the EU...'

Former EU Enlargement Commissioner, Stefan Füle.

Declaration

The work included in this thesis is the author's own. It has not been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

Note on Terminology

Writing about the Cyprus problem is not easy, every comment is generally analysed for bias. The terms and phrases that one uses whilst writing about such a sensitive area can also betray where one stands with regards to the Cyprus problem. This thesis will try to adopt a standard usage of the terms.

The RoC covers the entire island and is internationally recognised; yet, the truth is, the RoC only effectively controls the southern two-thirds of the island. In this thesis, the RoC will refer to the Greek Cypriot government which controls 63% of the island and is based in the south. The north of the island is controlled by the Turkish Cypriot administration and will be referred to as the TRNC, acknowledging the fact that the TRNC is only recognised by Turkey and the Organisation of Islamic Conference. So, the leader of the Greek Cypriots is the president of the RoC, whilst, the president of the TRNC is the leader of the Turkish Cypriots.

The term ‘Taiwanisation’ is habitually used in the thesis; it is a conceptual term used to highlight the importance of a separate Taiwanese culture, economy, society and nationality instead of classifying Taiwan as solely an attachment of China.¹ This thesis will use the term in relation to Northern Cyprus; hence, to ‘Taiwanise’ the TRNC via the lifting of restrictions and embargoes.

Juristocracy is a term which has been described by Ran Hirschl as judicial activism and constitutional review. Judicial interpretative argumentation claims to resolve legal uncertainty via the application of techniques of interpretation. Axiomatically, the application of these techniques is itself governed by uncertainty.

Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from

¹Lambert M Surhone, Miriam T Timpledon and Susan F Marseken, *Taiwanization: History of Taiwan, Geography of Taiwan, Culture of Taiwan, Formosan Languages, Taiwan Independence, Taiwan Name Rectification Campaign, Taiwanese Literature Movement* (Betascript Publishing 2010).

Note on Terminology

representative institutions to judiciaries ... a force of social change removed from the constraints of political power.²

The EU can be used as a case study for juristocracy as the European Court of Justice (ECJ) has in fact invented many of the central doctrines of EU law without overt textual guidance; for instance, direct effect, state liability, supremacy and a very liberal interpretation of common market principles. The ECJ refers to the aims of the EU Treaty order at an extremely high level of systemic unity and sidelines the text as an interpretive consideration; this is known as the meta-teleological approach.³ Throughout the thesis, the term juristocracy will be used in the context of the EU.

‘Europeanisation’ refers to the incorporation and institutionalisation of procedures, norms, rules, policies and styles belonging to the EU by the political structures, public policies and identities of Member States. It describes the process of adaptation of a (once) non-European subject and thus explains what the EU does to its members.

Europeanization is...understood as the change within a member state whose motivating logic is tied to a EU policy or decision-making process. The prime concern of any Europeanization research agenda is therefore establishing the causal link, thereby validating the impact of the EU on domestic change.⁴

The thesis will use this term in accordance with the meaning identified above and in relation to the Turkish Cypriot community.

² Ran Hirschl, *Towards Juristocracy: Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 1.

³ *Ibid*

⁴ Robert Ladrech, *Europeanization and National Politics* (Palgrave Macmillan 2010).

Abbreviations

AKEL Anorthotikon Komma Ergazomenou Laou-Progressive Party of the Working People.

AG Advocate General.

CEEC Central and Eastern European Country.

CFSP Common Foreign and Security Policy.

DIKO Dimokratiko Komma-The Democratic Party.

EA Europe Agreement.

EC European Community.

EEC European Economic Community.

ECJ European Court of Justice.

ECHR European Convention on Human Rights.

ECtHR European Court of Human Rights.

EU European Union.

FRY Former Republic of Yugoslavia.

GLR Green Line Regulation.

INTA Trade Committee of European Parliament.

IPC Immovable Property Commission.

JURI European Parliament Committee on Legal Affairs.

MEP Member of Parliament.

PACE Parliamentary Assembly of the Council of Europe.

RoC Republic of Cyprus.

Abbreviations

SAA Stabilisation and Association Agreement.

TAIEX Technical Assistance Information Exchange.

TEU Treaty on European Union.

TRNC Turkish Republic of Northern Cyprus.

U.K. United Kingdom.

UNFICYP United Nations Peacekeeping Force in Cyprus

UN United Nations.

U.S.A. United States of America.

Map of Cyprus



¹ Central Intelligence Agency, *The World Factbook* <<https://www.cia.gov/library/publications/resources/the-world-factbook/>> accessed 27 July 2015.

1. Introduction: The European Union and Cyprus

The history of the island of Cyprus¹ since 1960 has been a sad and extremely complex sequence of events, in which promises have not been kept, the lives of families and communities have been under severe strain and the numerous attempts to mediate between the Greek and Turkish Cypriot communities have as yet proved unsuccessful. Numerous academics, lawyers and politicians have published prominent work on the aspects of the Cyprus problem² since the violent events of 1963 on the island, and even more so since the Turkish Military intervention in 1974. Even so, all has not yet been said. There is room for further, detailed exposition and analysis of the legal aspects of the problem. The aim of this research is to deal with the recent history of Cyprus within the European Union (EU) and to examine the various legal issues that have been raised in connection with the various developments. The events in Cyprus since May 2004 and the period in which the island was preparing for EU accession raise a number of interesting issues of EU law and politics.

Undoubtedly, the Cyprus dispute accurately portrays the evolution of the conflict from 'warfare to lawfare' enriched in politics; this research has proven that the Cyprus problem has been and will continue to be one of the most judicialised disputes. Notwithstanding the 'normalisation' of affairs between the two ethno-religious groups on the island since the division, the Republic of Cyprus' (RoC) EU membership failed to catalyse reunification and terminate the legal, political and economic isolation of the Turkish Cypriot community. Pessimists outnumber optimists so far as resolving this problem is concerned, and rightly so if you look back over the last forty years of failed attempts to do just that, a diplomatic combat zone scattered with the bones of numerous mediators. The EU's legal system and its institutions have a role to play in decision-making and the law has provided a tool of advocacy for policy-makers. At times, EU law has been overshadowed by politics; as

¹ The term Cyprus will be used throughout this thesis to designate the island of Cyprus.

² The Cyprus problem will also be referred to as the Cyprus conflict throughout the thesis depending on the theoretical focus. However, the Cyprus problem is the norm throughout this thesis as it happens to be the most commonly found term in existing literature.

it is habitually said ‘law is the child of politics’.³ However, this thesis will simultaneously argue that the interpreters of the law need to keep abreast with developments and not ignore factual situations and the right of self-determination/secession of the Turkish Cypriot community whilst handling issues pertaining to the Cyprus problem. The thesis will discuss how the decisions of the EU institutions and specifically of the European Court of Justice (ECJ), despite conforming to the EU legal order, have managed to disregard the principle of equality on the divided island and thus prevent the promised upgrade of the status of the Turkish Cypriot community since 2004. Indeed, whether a positive or negative reading of the Union’s position towards the Cyprus problem is adopted, the case remains valid for the organisation of a rule of law and democracy to maintain legitimacy, clarity and equality to the decisions of its institutions.

Overall, this research will establish a link between the EU legal order and the right of self-determination of the Turkish Cypriot community. Thus, throughout this thesis, special consideration will be given to the judicialisation of the Cyprus problem by the external players and the right of self-determination/secession as portrayed by Harry Beran and its application to the situation in Cyprus.⁴ It is unacceptable for the political life of the Union to ignore the right of secession of the Turkish Cypriot community and fail to find tailor-made solutions to accommodate an international political problem within the EU legal order.

1.1. The Cyprus Problem- A Brief History

In order to fully understand the argument put forward in this thesis, a brief history of Cyprus is required.

At the crossroads of over ten thousand years of vibrant history touched by the Mycenaeans, Greeks, Persians, Egyptians, Romans, Byzantines, Crusaders, Venetians, Ottomans and the British, Cyprus occupies an important position on the international community’s agenda. Given the geopolitical and demographic circumstances since the days of Herodotus, the Greeks and Turks have been highly

³ Zaim M Necatigil, *The Cyprus Question and the Turkish Position in International Law* (OUP 1989).

⁴ Though I am not completely detached from the Cyprus issue, I have taken care to see that the information supplied is accurate and have tried to be as objective as possible and to give a balanced coverage to the views of the interested parties.

intermixed in their affairs.⁵ One example of how these two nations share a single interest is Cyprus. The two nations lived peacefully together on the island from 1571 until the late 20th century. In 1960, a partnership State between the Turkish and the Greek Cypriots was set up in accordance with the international agreements signed by the Turkish Cypriot and Greek Cypriot sides, as well as the Turkish, Greek and British governments.⁶ Cyprus was therefore declared to be an independent sovereign Republic on 16 August 1960. It was set up as a compromise between the claim of Greek Cypriots for *Enosis*⁷ and the Turkish Cypriot position that if the United Kingdom (U.K.) was to give up sovereignty over the island, then it should be returned to Turkey-its former owner.⁸

The 1960 RoC was labeled as neither a Greek nor a Turkish State; it was designed to be an equal affiliation of two ethnic communities guarded by the guarantorship of Turkey, Greece and the U.K. The bi-communal nature of the Republic is fundamental to the state of affairs established by the 1960 Treaties, and from its very commencement the RoC has never been a unitary State in which decisions are made only by one Cypriot community, except in regard to issues within the jurisdiction of the respective Communal Chambers. The two Cypriot communities were politically equal; ‘not in the sense that each had the same legislative or executive powers, for those accorded to the Greek Cypriots by the Constitution were greater by virtue of their numbers; but in the sense that each existed as a political entity.’⁹ Nevertheless, the Greek Cypriots regarded the Republic as a ‘transitory stage’ which was to transform into an independent Greek state.¹⁰ The emotional and physical head-on collision-which started on 21 December 1963-came as a result of the Greek struggle for ‘the union of Cyprus with Greece.’ *Enosis* was put forward within the structure of the *Megali Idea*. This idea aimed at recreating the Byzantine Empire at its

⁵See Cypnet.co.uk, ‘Cyprus History’ <<http://www.cypnet.co.uk/ncyprus/history/index.html>> accessed 28 November 2014.

⁶ The Constitution came into force on 16 August 1960, alongside the Treaties of Establishment, of Guarantee and of Alliance, which were also signed by the respective parties.

⁷The Union of Cyprus with Greece.

⁸ Necatigil (n 3) 13.

⁹Ibid.

¹⁰ Sedat Laciner, ‘Cyprus Problem and the European Union-Turkey Relations’ [2009] *The Journal of Turkish Weekly* <<http://www.turkishweekly.net/news/81109/cyprus-problem-and-the-european-union-turkey-relations.html>> accessed 29 November 2014.

zenith.¹¹ The Greek Orthodox Church was in charge of spreading the *Megali idea*¹² and it is a well-known fact that other European countries highly supported the Orthodox Church in order to attain this goal.¹³

The scheme of *Enosis* heavily occupied the Greek foreign policy; this in return deteriorated the relations between the two peoples of Cyprus.¹⁴ In 1963 Archbishop Makarios¹⁵ said to the *London Times* that '(T)he union of Cyprus with Greece is an aspiration always cherished within the hearts of all Greek Cypriots. It is impossible to put an end to this aspiration by establishing a Republic.'¹⁶ Nevertheless, the enthusiasm for *Enosis* was weakened when the ruling military junta in Greece staged a violent *coup* in Cyprus on 15 July 1974 in order to achieve immediate *Enosis*. Makarios, whose initial aim was to achieve *Enosis*, was overthrown. The *coupists* declared the establishment of 'The Hellenic Republic of Cyprus' and named Nicos Samson as the President of this new Republic. During the *coup*, more than three thousand supporters of Makarios were murdered in cold blood, and a destruction plan known as '*AKRITAS*' was put into effect to destroy the Turkish Cypriot community.

Makarios addressed the United Nations (UN) Security Council on 19 July 1974 and accused Greece of infringing the democratic rights of the two communities on the island and the sovereignty of the RoC. Furthermore, he called on the world to help stop this violence on the island. It was this call that caused Turkey to act. As a result, Cyprus has been a *de facto* divided Mediterranean island since 1963.¹⁷ Thus, the attempt to provide this island with a single federated State failed when Turkey¹⁸

¹¹ Sabahattin Ismail, *20 July Peace Operation: Reasons, Development and Consequences* (Kastas 1989) 18.

¹² The *Megali Idea* was an irredentist concept of Greek nationalism that expressed the goal of establishing a Greek state that would encompass all ethnic Greek-inhabited areas, including the large Greek populations that, after the restoration of Greek independence in 1830 from the Ottoman Empire, still lived under Ottoman occupation. See Necatigil (n 3) 5.

¹³ Ismail (n 11) 19.

¹⁴ *Ibid* 29.

¹⁵ Makarios III was the archbishop and primate of the autocephalous Church of Cyprus, a Greek Orthodox Church, and the first President of the Republic of Cyprus. Presidential terms: 16 August 1960 to 15 July 1974, 7 December 1974 to 3 August 1977.

¹⁶ Ismail (n 11) 54.

¹⁷ Metin Tamkoc, *The Turkish Cypriot State: The Embodiment of the Right of Self-Determination* (K. Rustem & Brother 1988).

¹⁸ The Republic of Turkey is one of the guarantor states, alongside the United Kingdom and Greece, under the London/Zurich accords of 1959, the Treaty of Guarantee of 1960 and the Constitution of the Republic of Cyprus of 1960.

militarily interfered on 20 July 1974 to halt this *coup* after having witnessed the ineffectiveness of calling upon Greece and Britain to stop the violence.¹⁹ Consequently, the Turkish military captured the entire island and then drew back, only seizing the north where the Turkish Cypriots were heavily populated.²⁰

It is important to acknowledge the divergent viewpoints of the 1974 Turkish intervention; the Hellenic community classifies the Turkish intervention and military existence on the island as an ‘invasion.’ Accordingly, they contended that Turkey violated Article 2(4) of the UN Charter²¹ by using armed force to solve the problem. The other side of the same coin portrays the image that Turkey was granted a legal right by the Guarantee Agreement to intercede and prevent the unification of the island with Greece. Article IV of the Guarantee Agreement stipulates that ‘each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs.’²² Additionally, the Treaty of Alliance signed in 1960 by Turkey, Greece and the RoC meant that they had all agreed to cooperate in military issues in order to preserve peace and stability on the island.

‘The right to take action’ has been interpreted in two different ways. The most favoured view is that the only ‘action’ that is permitted is one of intercession, on that account diplomatic representation and economic counter measures.²³ The alternative interpretation is that diplomatic measures would never suffice as to halt a *coup d’etat*.²⁴ Both the Treaties of Alliance and Guarantee accommodated the use of military action under the existing circumstances, otherwise they would have been futile agreements since any other State could have utilised the intercession right without being a party to these treaties.²⁵ Turkey’s intentions also aroused a polemic

¹⁹ The Turkish Cypriots had been pushed into enclaves.

Olga Demetriou, ‘EU and the Cyprus Conflict, Review of the Literature’ (2004) EU Border Conflicts Studies Working Paper Series 5/2004, 3<<http://www.birmingham.ac.uk/Documents/college-social-sciences/government-society/polsis/research/eu-border-conflict/wp05-eu-and-the-cyprus-conflict.pdf>>accessed 29 November 2014.

²⁰ Lacinier (n 10).

²¹ Charter of the United Nations, Chapter I: Purposes and Principles, Article 2(4):

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.

²² Tamkoc (n 17) 78.

²³ Deniz Sonalp, ‘Cyprus Conflict: Noncompliance with the 1960 Constitution and Treaties, Political Disagreements’ (MA thesis, University of Maastricht Faculty of Arts and Social Sciences 2009) 19.

²⁴ Necatigil (n 3) 80.

²⁵ Ibid 131.

in the international realm. The ‘right to take action’ as mentioned in the Guarantee Agreement was only considered to be necessary if the aim was to re-establish ‘the state of affairs’;²⁶ Turkey’s Prime Minister at the time, Bulent Ecevit, declared in July 1974 that the ‘Turkish armed forces have started a peace operation in Cyprus...to end decades of strife provoked by extremist and irredentist elements’²⁷ he followed on by highlighting that ‘this was not an invasion but act against an invasion.’²⁸ Consequently, Turkey as a co-guarantor of the constitutional order of Cyprus was simply abiding by her legal responsibility to safeguard the security of life and property of the Turkish Cypriot community and even that of many Greek Cypriots.²⁹ Unreasonably, the international organisations could not see how Turkey’s behaviour was not aggression but in fact an act to terminate the belligerence on the island.³⁰

After the Turkish intervention, the Greek Cypriot administration of the RoC lodged two applications contra Turkey for alleged violations of the European Convention on Human Rights (ECHR); namely, application number 6780/74 on 19 September 1974 and application number 6950/75 on 21 March 1975. In the report which the European Commission of Human Rights adopted on 10 July 1976, it found that there had been cases of deprivation of life, in breach of Article 2(1) of the Convention; cases of maltreatment, contrary to Article 3; confinement and detention of military personnel and civilian, in breach of Article 5; and deprivation of possessions, contrary to Article 1 of Protocol No 1, for which Turkey was responsible. Furthermore, the Commission claimed that Turkey had breached Article 8 of the Convention by refusing to allow the Greek Cypriot refugees to return to their homes in the north of the island. It should be reminded that these violations are all a

²⁶ Article IV Treaty of Guarantee:

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.

Treaty of Guarantee (signed at Nicosia on 16 August 1960) (The Republic of Cyprus, and Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland).

²⁷ See Salahi Ramadan Sonyel, *Cyprus: The Destruction of a Republic and its Aftermath* (CYREP 2003) 347.

²⁸ Ibid.

²⁹ Jacob M Landau ‘Johnson’s 1964 Letter to Inonu and the Greek Lobbying at the White House’ (1974) 1 *The Turkish Yearbook of International Relations* 48 <http://www.politics.ankara.edu.tr/dergi/tybook/14/Jacob_M_Landau.pdf> accessed 11 July 2015.

³⁰ Necatigil (n 3) 81.

consequence of the armed conflict which commenced as a result of an attempted *coup d'état* which terminated the last remnants of constitutional order on the island. According to Article 15 of the Convention, in situations of emergency jeopardising the life of the nation, 'a High Contracting Party can take measures derogating from its obligations under the Convention to the extent demanded by the exigencies of the situation.'³¹ Undeniably, Turkey did not officially communicate a notice of derogation to the Secretary-General of the Council of Europe regarding the island of Cyprus; *ipso facto* the majority of the Commission declared that 'in the absence of some formal and public act of derogation by Turkey, article 15 of the Convention was not applicable in respect of measures taken by Turkey with regard to persons or property in the north of Cyprus.'³² Turkey's policy in Cyprus was disparaged and the 1983 UN General Assembly commanded the 'withdrawal of all occupation forces from the Republic of Cyprus.'³³ Turkey has yet to obey.

As early as 1970 Turkey had contested that the island was to be reunited under the framework of the Constitution of the 1960 RoC; nonetheless, the Greek Cypriots did not permit the Turkish Cypriots to cross over to the south and assume their constitutionally indicated posts in the government institutions that they were forced to abandon. Logically, since the Turkish Cypriots were unable to participate in the governance of the island, in 1975 they adopted their own administration in the north under the title of '*Turkish Federative State of Cyprus*', but still without declaring independence since their hope for reunification prevailed.³⁴ Immediately, this was rejected by both the RoC and the international communities.

At this point, Greece was preparing itself for European Community (EC) membership and since Turkey was lagging behind with economical and political instabilities, Brussels had reassured her that the Community's positioning towards the Cyprus issue would not change once Greece had become a member. This

³¹ Ibid 97.

³² Ibid.

On 20 January 1979 the Committee of Deputy Ministers of the Council of Europe decided to remove the case from its agenda. Moreover, on 31 August 1979 it declassified the documentation relating to this case.

Resolution Number DH (79) of the Committee of Ministers of the Council of Europe adopted on 17 January 1979.

³³ UN General Assembly Resolution 37/253 (16 May 1983) A/RES/37/253 (1983).

³⁴ Laciner (n 10).

promise was broken;³⁵ Greece gained the power to shape the Community's policy *vis-à-vis* Cyprus upon accession.³⁶

Consequently, against the world's will and after years of constant failing negotiations, the single island separated into two States divided along Greek-Turkish ethnic lines; northern Cyprus and southern Cyprus. Southern Cyprus is ruled by the administration of the RoC, whilst northern Cyprus, which constitutes 37 per cent of the island, is controlled by the self-proclaimed Turkish Republic of Northern Cyprus (TRNC) declared in 1983.³⁷ Although the TRNC's unilateral declaration of statehood was a manifestation of the right of self-determination of the Turkish Cypriot people, the Republic has been rendered as 'legally invalid' by the Security Council of the UN³⁸ which also demanded the non-recognition of the Republic by other countries.³⁹ The EU and the UN have stipulated in a number of Resolutions that the northern part of the island is under an 'illegal occupation' since the Turkish army continues to uphold a hefty strength over the aforementioned side of Cyprus⁴⁰ -even though the elected government of the TRNC has no objection to this presence.

The stance taken by the international actors encouraged the Greek Cypriots to allege that Turkey's continued existence in Cyprus has created huge problems in human rights matters; for instance, they proclaim that Turkey has breached rights of displaced persons and right to life and liberty on the island. Furthermore, they argue that Turkey has failed to issue an effective remedy regarding property rights.⁴¹

³⁵ Greece joined the Union in 1981. Undoubtedly, the change of neutrality could be owed to Greece's success in juxtaposing the Cypriot situation to the implementation of the customs union with Turkey; hence, Greece blackmailed the Union to open negotiations with Cyprus if they wanted the customs union with Turkey to be put into practice.

³⁶ Laciner (n 10).

³⁷ On 15 November 1983, Rauf Raif Denktaş declared the TRNC and became the first President of the new republic.

³⁸ See UN Security Council, Resolution 541 (1983) of 18 November 1983 S/RES/541(1983) and UN Security Council, Resolution 550 (1984) of 11 May 1984 S/RES/550 (1984).

³⁹ Cypnet.co.uk, 'Cyprus History: 1983 Declaration of TRNC and aftermath' <<http://www.cypnet.co.uk/ncyprus/history/trnc/index.html>> accessed 30 November 2014.

⁴⁰ UN Security Council, Resolutions 353 (1974) of 20 July 1974 S/RES/353 (1974); 357(1974) of 14 August 1974 S/RES/357 (1974); 358(1974) of 15 August 1974 S/RES/358 (1974); 359(1974) of 15 August 1974 S/RES/359 (1974); 360(1974) of 16 August 1974 S/RES/360 (1974) and 365(1974) of 13 December 1974 S/RES/365 (1974).

⁴¹ Sonalp (n 23) 19.

Out of context, it should be noted that the UN-and-EU-conjured Cyprus peace settlement of 2004, which will be analysed further on in the thesis, did not completely eradicate the abovementioned property and residence problems, yet the settlement was found to be in line with all the fundamental human rights issues; this seems to be rather incongruous since Turkey has been internationally

Hoffmeister came to the conclusion that if Turkey is violating these fundamental rights, then these allegations will suffice as to show that the TRNC is not an independent State and therefore should not be recognised internationally.⁴² As previously contended by the government of the TRNC, the Security Council is simply a political organisation that has no aptitude in evaluating the validity of 'States'. Accordingly, there exist two democratic States in Cyprus; one which is recognised by international and regional organisations and the other which is only recognised by Turkey. Despite all of the attacks coming from the international players, Turkey went further and declared that it will not recognise the government of the RoC until the TRNC is internationally welcomed.⁴³

Unfortunately, the Greek Cypriot authorities have always fought to prohibit the Turkish Cypriots from having an international voice or declaring their independence; thus, the Turkish Cypriot community does not possess the basic rule of natural justice-right to be heard before a decision is taken.⁴⁴ Ergo, countless political, legal, cultural and social embargoes have been inflicted upon the Turkish Cypriot community as a result of the pressure coming from the RoC as regards to the new Republic's recognition. A decision rendered by the ECJ in 1994 prohibited the prospect of trade with the TRNC.⁴⁵ This decision austerey isolated the Turkish Cypriots in Europe and implicitly confirmed that the EU regards the Greek Cypriots as the 'sole owners' of Cyprus.⁴⁶ The Greek Cypriot dominion over Cyprus stops at

penalised for neglecting these matters, but when they are neglected by international organisations there seems to exist no problem.

⁴² Frank Hoffmeister, 'Cyprus v Turkey App No 25781/94 (in International Decisions)' (2002) 96(2) *The American Journal of International Law* 445, 450.

⁴³ Tamkoc (n 17) 33.

⁴⁴ Cypnet.co.uk(n 39).

⁴⁵ The ECJ outlined in its ruling that the export of oranges and potatoes from the north was outlawed. Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom - EEC-Cyprus Association Agreement - Directive 77/93/EEC - Non-recognition of movement and phytosanitary certificates originating from the part of Cyprus to the north of the United Nations Buffer Zone: Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex Parte SP Anastasiou (Pissouri) Ltd & others*[1994] ECR I- 3087, Case C-219/98 *Anastasiou II* and Case C-140/02 *Anastasiou III*.

Furthermore, Turkish Cypriots are not represented in EU Institutions. Direct Communication is not possible with the Turkish Cypriot community. All mail and calls to and from North Cyprus must go via Turkey. Turkish Cypriots are not allowed to participate or host international teams, or sporting events. Direct Travel from and to North of Cyprus is banned; travel to North Cyprus can only take place via Turkey. Academic institutions and education are not allowed to be a part of Bologna Process, Turkish Cypriot students cannot apply for Socrates / Erasmus Programs.

⁴⁶ Laciner (n 10).

the UN Buffer Zone, also known as the 'Green Line'.⁴⁷ Withal, these decrees do not suffice as legal grounds to ignore the right of self-determination of the Turkish Cypriots as one of the parties to the creation of the RoC according to the London and Zurich Accords of 1959.⁴⁸ It should be noted that northern Cyprus possesses an efficiently operating democratic government, parliament, independent judiciary and all other prerequisites of statehood.⁴⁹

For many years the politics of reunification have occupied the island's agenda. The EU arrested the concept of federalism in Cyprus once proposed by the Turkish Cypriots in 1975, since the concept hitherto was said to describe a league of States which each have a unique identity with divergent citizenry.⁵⁰ Yet, now the EU is more than willing to accept federalism on the island⁵¹ and the reason for this is that the term has been adjudicated a new definition, namely; a community in which citizens hold a dual identity whilst upholding a common national identity with a unitary but dual governmental system.⁵² The political wind of today's era blows in favour of cultural re-configuration; thence, the reunification of Cyprus will clash with the particles of contemporary history.⁵³ Intercommunal segregations have taken place across the world; therefore, the polarity of Cyprus should be appreciated given

⁴⁷ This buffer zone was established by the U.K. in 1963 and legitimised by the UN in 1964 in order to protect the Turkish Cypriots from subjugation.

See Kaya Arslan & Halil Güven, 'International Law in Cyprus Problem' (38th International Congress of Asian and North African Studies, Ankara, 10-15 September, 2007) <<http://cpc.emu.edu.tr/articles/Cyprus%20Problem%20in%20International%20Law%20-%20ICANAS38%20final%20Kaya%20Arslan%20and%20Halil%20G%C3%BCven.pdf>> accessed 1 December 2014.

Since 1 May 2004, the buffer zone has been open to the free movement of persons and with the approval of the European Council the Green Line Regulation No 866/2004 which enabled the passage of goods and services across the border.

Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession [2004] OJ L 161/128 (Hereafter known as Green Line Regulation) as last amended by Council Regulation (EU) 685/2013 [2013] OJ L 196/1.

See also European Commission, 'Turkish Cypriot Community' (30 November 2012) <http://ec.europa.eu/enlargement/turkish_cypriot_community/index_en.htm> accessed 1 December 2014.

⁴⁸ Kaya Arslan, 'Integrating North Cyprus into the EU' [2005] Turkish Policy Quarterly <<http://www.euractiv.com/enlargement/integrating-north-cyprus-eu/article-152509>> accessed 1 December 2014.

⁴⁹ Ibid.

⁵⁰ Abdulhaluk M Cay, *Kibris'ta Kanli Noel-1963* (Turk Kulturunu Arastirma Enstitusu Yayinlari 1989) 33.

⁵¹ European Commission (n 47).

⁵² David McKay, *Federalism and European Union* (OUP 1999) 6.

⁵³ Michael Moran, *Sovereignty Divided: Essays on the International Dimensions of the Cyprus Problem* (CYREP 1998) 157.

that neither side of the island wants to lose their free determination. It should be noted that there is no general consensus as to what the Cyprus problem actually is.⁵⁴ Thus, as famously remarked by Plato, how can it be possible to identify the correct solution?⁵⁵

1.2. The EU and Cyprus-A Strange But True Story

Since 1 May 2004, the Union has been dealing with a chain of incongruous anomalies as a result of allowing a divided island into the European family. It remains a mystery as to whether the EU was aware that the moment the divided island became a Member State the EU would have to face imminent contradictions. A few of these ambiguities are as follows: Cyprus is the first and only Member State that is ethnically segregated and represented at EU level by members of one of the ethnic communities; Cyprus is the only Member State that is partly occupied by a hefty army belonging to another EU candidate-Turkey; Cyprus is the only Member State that has a buffer zone safeguarded and controlled by UN peacekeepers; it is the only Member State that limits the implementation of *acquis communautaire* (*acquis*) to one half of its territory; it is the only Member State where both rival halves of the island recognise EU law and the legitimacy of the EU, yet reject one another's law and legitimacy; Cyprus is the only Member State that denies one segment of its citizenry the right to their land and deprives another segment of its citizens the right of involvement in the EU both politically and economically. Thus, the membership of Cyprus constituted an unexpected EU irregularity causing the Union to abandon its very own norms and values; *ipso facto*, damaging the meaning of harmonisation and warranting a consideration of the Union requirements.⁵⁶ Brewin indicated that the EU had problems with the approach it espoused prior to Cyprus' accession.⁵⁷ Indeed, Brewin's analysis is true; however, the Union's failures are not restricted to its position as a conflict transformer prior to the act of accession.⁵⁸ The EU's actions have had an unremarkable impact on the conflict ever since the island joined the

⁵⁴ Ibid 11.

⁵⁵ Tamkoc (n 17) 3.

⁵⁶ Carl Bildt, 'Open Wide Europe's Doors' *International Herald Tribune* (Stockholm, 7 November 2006) <http://www.nytimes.com/2006/11/07/opinion/07iht-edbildt.3430733.html?pagewanted=all&_r=0> accessed 3 December 2014.

⁵⁷ Christopher Brewin, *The European Union and Cyprus* (2nd edn, The Eothen Press 2001) 15.

⁵⁸ Erol Kaymak, 'Why the EU Catalyst Proved Insufficient to Solve the Cyprus Problem: The Politicization of European Values' (Cyprus Policy Center, the annual meeting of the International Studies Association, San Diego, 22 March 2006) <www.cypriuspolicycenter.org/dosyalar/may_erolkaymak.doc> accessed 3 December 2014.

family; but what remains unexplained is the driving force behind this conduct. The significant point to note is that alongside these obvious abovementioned anomalies lie even more understated ones, which have consequently brought the EU to conflict with itself.⁵⁹

Unfortunately, the Union habitually falls short in terms of credibility and subsequently loses its efficiency and effectiveness ‘when the conduct of its external relations is driven by political imperatives, operating beyond the blueprint of declarations, laws and contractual relations’.⁶⁰ The only way an EU conflict resolution policy will be fruitful is when the reward is granted to the party as soon as the obligations are fulfilled and the reward is automatically withdrawn if they are not fulfilled. Up until now, this automaticity has not taken place.⁶¹ Nonetheless, the EU is one of the most powerful players in the international arena; it aims to use norms which it has portrayed in a communicative way in order to civilise the other actors in this ‘game.’⁶² This process requires independent sources of enticement founded on objective justifications.⁶³ Thus, in the case of Cyprus, the impartiality of the ‘soft power’ utilised by the EU is highly questionable.⁶⁴ It must be noted however, that the role of the EU as a conflict resolver in Cyprus has not been simplified by the political pressure it is under from both sides of the island.⁶⁵

1.2.A. Can The EU Be Good For Cyprus?

According to the neo-realist paradigm, small and militarily weak States are unable to manipulate and shape international politics; and international institutions, such as the EU, simply fulfil the needs of the most powerful Member States. The EU’s legal, and at times, political framework, disproves the theory put forward by structural realists. The case of Cyprus is a robust example of how a small and feeble State can actually have considerable influence on EU policy making and external relations, as

⁵⁹ Harry Anastasiou, ‘Cyprus as the EU Anomaly’ (2009) 23(2) *Global Society* 129, 131.

⁶⁰ Nathalie Tocci, ‘Regional Origins, Global Aspirations: The European Union as a Global Conflict Manager’ in Stefan Wolff and Christalla Yakinthou (eds), *Conflict Management in Divided Societies: Theories and Practice* (Routledge 2012) 146.

⁶¹ *Ibid.*

⁶² Richard Youngs, *The European Union and the Promotion of Democracy: Europe’s Mediterranean and Asian Policies* (OUP 2001) 191.

⁶³ Helene Sjursen, ‘Changes to European Security in a Communicative Perspective’ (2004) 39(2) *Cooperation and Conflict* 107, 113.

⁶⁴ Stelios Stavridis and Natividad Fernández Sola, ‘Conceptualizing the EU as an International Actor after Enlargement, Constitutionalization and Militarization’ (PhD programme, University of Zaragoza 2005) 12.

⁶⁵ Kaymak (n 58) 3.

a result of its membership in the transnational political system of the EU.⁶⁶ Realists ‘have noticed that whether institutions have strong or weak effects depends on what states intend. Strong states use institutions, as they interpret laws, in ways that suit them.’⁶⁷ Yet, what is overlooked by this argument is the fact that power capabilities do not necessarily determine outcomes in the Union.

What is observed is that a Member State that does not exert control over 37 per cent of its territory, faces structural shortcomings as a result of its limited bargaining and voting opportunity, can in fact shape the policy formulating process of the Union and influence its agenda setting.⁶⁸ The RoC’s foreign policy has more freedom of manoeuvre than it had prior to her joining the European family. The reason for this is simple; the interstate relations are regulated via Union rules, principles and institutions and consequently, the security issues of the small States are adjusted.⁶⁹ The structural disadvantages of the RoC are smoothly eradicated via institutionalised coordination on a regional basis and strategic partnerships that are formed with the more powerful States.⁷⁰ Axiomatically, the size and power of a Member State does play a major role in shaping the politics of the EU; nevertheless, ‘neo-realist determinants of state behavior like power capabilities, anarchy and mistrust do not seem to stand within the context of European integration. European integration provides a clear evidence for a diminishing explanatory power of neo-realism...’⁷¹ Thus, the RoC can pursue its national and political interests as a result of integrating into the EU, by utilising the Union’s legal system, human rights and international norms.

⁶⁶ See George Koukoudakis, ‘Executive Summary of the Paper entitled: “European Integration and the Limits of the Realist Paradigm: The Case of Cyprus Membership in the EU” Cyprus Membership in the EU and its impact on international politics’ <<http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Events/2011-5th%20PhD%20Symposium/Koukoudakis.pdf>> accessed 3 December 2014.

⁶⁷ Kenneth N Waltz, ‘Structural Realism after the Cold War’ (2000) 25(1) *International Security* 5, 24 <http://www.columbia.edu/itc/sipa/U6800/readings-sm/Waltz_Structural%20Realism.pdf> accessed 4 December 2014.

⁶⁸ Paul Magnette and Kalypso Nicolaïdis, ‘The European Union’s Democratic Agenda’ in Mario Telò (ed), *The EU and Global Governance* (Routledge 2009).

⁶⁹ Costas Melakopides, ‘Cyprus, Small-Powerhood and the EU’s Principles and Values’ in Anders Wivel and Robert Steinmetz (eds), *Small States in Europe: Challenges and Opportunities* (Ashgate Publishing Limited 2010).

⁷⁰ Diana Panke, ‘The Influence of Small States in the EU: Structural Disadvantages and Counter Strategies’ (2008) UCD Dublin European Institute Working Paper 3/2008, 8 <http://www.ucd.ie/t4cms/WP_08-3_Diana_Panke.pdf> accessed 4 December 2014.

⁷¹ Koukoudakis(n 66) 6.

The EU surfaced as a player in the conflict resolution field at the beginning of the 21st century, *in tandem* with its blossoming foreign policy; however, it has also been argued that conflict resolution and peace building has been tied to the EU's very *raison d'être*.⁷² Jean Monnet is the author of the idea that 'peace and prosperity can be a positive-sum (+5+5) collective good enjoyed by all and not just a few, at least within the parameters of agreed membership.'⁷³ He rightfully believed that Europeans could achieve their ambitions without having to go to war, if the temperament of their interactions were reframed.⁷⁴ The outcome of this idea is that '(T)he European Union's "gravitational pull" has proved to be the ultimate conflict prevention strategy.'⁷⁵ It is now widely accepted that the inter-societal and interstate integration EU enlargement bestows, is an essential process of peace building for the epoch of globalisation.⁷⁶ This very process melted down the Iron Curtain and reunited Europe in the aftermath of the Cold War as it provided peaceful means for interstate polemics to be resolved.⁷⁷ Coppieters claims that the EU can manipulate the short term strategies of domestic players who are party to a conflict 'by linking the final outcome of the conflict to a certain degree of integration of the parties involved in it into European structures.'⁷⁸ The integration path changes Member States and the political landscape is altered by this very integration power.⁷⁹

The European integration process achieved astonishing success in appeasement via consecutive waves of enlargement; nevertheless, the peace building aptitude of EU enlargement has not always met with victory.⁸⁰ In 2004, the failure of the UN-led referendum in Cyprus meant that a divided island was to enter the Union and become the anomaly of the EU as mentioned earlier. As a result of this anomaly, the EU's

⁷² Nathalie Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace or Consolidating Partition in Cyprus* (Ashgate Publishing Limited 2004) 1.

⁷³ Dennis J D Sandole, *Peacebuilding* (Polity Press 2010) 94.

⁷⁴ Anastasiou (n 59).

⁷⁵ Sandole (n 73) 6.

⁷⁶ Thomas Diez, Stephan Stetter and Mathias Albert, 'The European Union and Border Conflicts: The Transformative Power of Integration' (2006) 60(3) *International Organization* 563.

See also Harry Anastasiou, 'The EU as a Peace Building System: Deconstructing Nationalism in an Era of Globalization' (2008) 12(2) *International Journal of Peace Studies* 31.

⁷⁷ Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces* (Stanford University Press 1968). See also Nathalie Tocci, *The EU and Conflict Resolution: Promoting Peace in the Backyard* (Routledge 2007).

⁷⁸ Bruno Coppieters, Michael Emerson, Michel Huysseune, Tamara Kovziridze, Gergana Noutcheva, Nathalie Tocci and Marius Vahi, *Europeanization and Conflict Resolution: Case Studies from the European Periphery* (Academia Press 2004) 22.

⁷⁹ Antje Wiener and Thomas Diez, *European Integration Theory* (2nd edn, OUP 2009).

⁸⁰ Anastasiou (n 59) 129.

conflict resolution capability has been drastically diluted in relation to inter-ethnic relations on the island, EU-Turkish relations and Cyprus-Turkish relations. This anomaly has brought about a multifaceted pattern of inconsistencies between the EU's legal system and the EU's political standpoint on the Cyprus problem in general.⁸¹ Before 2004, it could be strongly argued that the EU had the catalytic power to promote peace on the island; the augmenting reconciliation between the sworn enemies Greece and Turkey since 1999, the inter-ethnic peace construction efforts in Cyprus and Turkey's gradual Europeanisation⁸², all suggested that the future would be bright for the historically chaotic region.⁸³ Nonetheless, the EU unintentionally re-ignited a slowly dying flame.

The postmodern features of the Union give actors the opportunity to reconceptualise their identities and relations between each other. Diez argues that;

Although this framework does not automatically and in itself bring about change, the history of European integration illustrates the potentially subversive character of integration that makes the EU a particularly good framework within which the Cyprus conflict can be settled.⁸⁴

Diez also highlights that 'there is no automatic mechanism in the social world. Ultimately, changes have to be brought about by the people in Cyprus...'⁸⁵ The success of the EU as a framework in the Cyprus problem predominantly depends on its use by the actors involved and unfortunately, it has not been used efficiently in the case of Cyprus..⁸⁶

The underlying argument in this thesis is that, while the EU as an actor has had a negative impact on the Cyprus problem, the EU as a framework has the potential to transform the Cyprus problem via a process of 'postmodernisation'. Even though the effectiveness of the Union's framework will highly depend on the way it has been utilised by the players, it *could* still 'have an indirect effect on both the actors

⁸¹ Ibid 130.

⁸² 'Europeanisation' explores the domestic aspect of the European integration variable. It covers the political, legal and social integration and unification of a country that has joined the Union. See *ibid*.

⁸³ Harry Anastasiou, 'Negotiating the Solution to the Cyprus Problem: From Impasse to Post-Helsinki Hope' (2000) 12(1) *Cyprus Review* 11.

⁸⁴ Thomas Diez, 'Why the EU Can Nonetheless Be Good for Cyprus' (2002) 2 *Journal on Ethnopolitics and Minority Issues in Europe* 1 <http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2002/nr2/Focus2-2002_Diez.pdf> accessed 5 December 2014.

⁸⁵ *Ibid* 2.

⁸⁶ *Ibid* 15.

themselves and the larger discursive and social context in which they are embedded.⁸⁷ This process tends to take place unconsciously, which subsequently weakens the barriers that stand before a lasting settlement on the island ‘and can therefore, although only in the long run, break through the circularity of conflict...’⁸⁸

Simply put, the Union’s framework, according to Diez, is one which is subversive. For instance, the fact that the government of the U.K. failed to prevent the conclusion of the Single Market initiative, is evidence of the subversive character of European integration; it was the actual process of integration which enabled the concrete actors to carry out this programme and prevented the U.K. from achieving its aim—even though it could be argued that the U.K. wanted the adoption of the Single Market initiative. With regards to the Cyprus problem, the subversive character of integration could only eradicate the conflict if both sides of the island are within the EU either in a united manner or as permanently separated.⁸⁹ The EU’s framework can remove borders, but at the same time it can establish ‘rightful’ borders in place of ‘good’ borders and promote peace via acknowledging the right of self-determination/secession of communities. As it stands, *de jure* EU membership embraces the entire island, nevertheless, *de facto* solely the south of the island can enjoy fully the rules and rights deriving from the Union; meaning that the advantages that could be provided for by the framework of the EU cannot be fully utilised.

1.2.B. *The EU is Nonetheless Good for Cyprus: Integration Theory*

The EU cannot unambiguously be described as being a ‘postmodern polity’; in fact, the characteristics of the Union will not fall under the umbrella of one single concept; ‘what the EU is, depends a lot on how we see it.’⁹⁰ The EU is not ‘either/or’, there is always an ‘and’ added to the equation whilst describing this unique organisation as dispersion is replaced by integration; this, in Wassily Kandinsky’s terms, is a transformation from a politics of ‘either/or’ to a politics of ‘and’.⁹¹ Simultaneously, there are many interpretations of the Cyprus problem, as it stands these divergent narratives need to stand side by side in the EU; so, once again it is not a matter of ‘either/or’ but one of ‘and’. Only at this point will the Union

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid 2.

⁹¹ Terry W Knight, ‘Either/Or And’ (3rd International Space Syntax Symposium, Atlanta, 2001) <http://www.ucl.ac.uk/bartlett/3sss/papers_pdf/07_knight.pdf> accessed 5 December 2014.

fully understand how to tackle the problem it has dragged into the European family. European integration is habitually described as a ‘force for peace’ by policy architects,⁹² yet realistically how much peace has integration itself actually brought about in Europe in last half century?⁹³ For instance, in Northern Ireland, even though full integration has taken place and there are open borders, identity definition and militancy still prevails in some regions; in the U.K., despite de-centralisation, regional independence is not a concept of the past.⁹⁴ Furthermore, in Germany’s border regions, borders are no longer segregating lines but in fact lines of identification ‘in the form of “Euregios”, administrative units to promote trans-border regional life’.⁹⁵

Indeed, this does not mean that peaceful transformations have not taken place throughout Europe within the context of European integration. Identity constructions and institutional developments which have been initiated by integration have successfully eradicated border conflicts. Nonetheless, it is hard to draw a direct correlation between the EU in general and the erosion of border conflicts; thus integration should be classified as being an indirect influence which provides opportunities for border transformations.⁹⁶ Undeniably, EU membership has not solved the Cyprus problem, and this should not have been expected; however, the EU should have remained outside the problem as a neutral third party. The EU policy on Cyprus has made the Union part of the problem which has consequently led to the reinforcement instead of the transformation of the border on the island.⁹⁷ Perhaps then the solution to the problem is actually the acceptance of this border.

⁹² Ole Wæver, ‘Insecurity, Security and Asecurity in the West European Non-war Community’ in Emanuel Adler and Michael Barnett (eds), *Security Communities* (CUP 1998).

⁹³ It should be noted that other influences such as, democracy and prosperity have also contributed to peace; so European integration is not the sole factor.

Ibid.

⁹⁴ For instance, the Scottish independence referendum took place in Scotland on 18 September 2014. The independence referendum question, which voters answered with ‘Yes’ or ‘No’, was ‘Should Scotland be an independent country?’ The ‘No’ vote was 55.3% and the ‘Yes’ vote was 44.7%. Thus, nearly half of Scotland wanted independence from the U.K.

⁹⁵ Diez (n 84) 6.

⁹⁶ *Ibid.*

⁹⁷ Angela K Bourne, *The EU and Territorial Politics within Member States: Conflict or Co-operation?* (BRILL 2004) 107.

Nevertheless, it should be noted that the subversive and discursive skeleton that the Union provides, encourages the re-articulation and the representation of divergent identities.⁹⁸ The Westphalian system with its linear, rational and unequivocal structure is an example of a ‘modern’ system, as it operates on the notion of absolute sovereignty, it juxtaposes territory and identity and it highly values the idea of having definitive borders. This system is in complete contradiction to the framework of the EU, which has overlapping authorities and institutions, numerous playful decision-making centres and differing identities under one roof.⁹⁹ So, how exactly could this ‘postmodern polity’ provide a framework that will help dilute the Cyprus problem?

The Union’s framework provides for multiple representations, which means the highly contested issue of *who* should represent the island in the international arena is resolved. The EU allows representatives of sub-national entities to represent their Member State in the Council of the EU, as long as they are permitted to do so on behalf of the entire Member State. Two prominent examples of this would be the ‘Belgium Model’ and Germany; ‘The German Länder have also been among the first to open their own representations in Brussels in order to lobby policy-makers, and have been followed by an increasing number of regional offices.’¹⁰⁰ Under Article 305-307 Treaty on the Functioning of the European Union (TFEU),¹⁰¹ the Committee of Regions, with representatives from sub-Member State regions, has consultative powers with regards to policies which affect the regions in question.¹⁰² The problem however arises when permission has not been given to that entity to speak on behalf of the entire Member State even if it is a matter specifically pertaining to that entity. With the case of Cyprus, the RoC until now, has not allowed the north to represent itself internationally in a detached manner from the south of the island and unfortunately, the EU has not encouraged change from this norm due to legal reasons. However, there is a political solution to this problem; the recognised democratic secession of the Turkish Cypriot community within the EU.

⁹⁸ Diez (n 84) 6.

⁹⁹ David Harvey, *The Condition of Postmodernity* (Wiley-Blackwell 1991).

¹⁰⁰ Diez (n 84) 7.

¹⁰¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/0001.

¹⁰² Diez (n 84) 7.

The *hard* concept of sovereignty is *softened* within the EU.¹⁰³ Internal and external sovereignty is shared within the Union and this is in complete contradiction to how the concept is perceived on a national level. Internal sovereignty is directly undermined by the direct validity of EU regulations, whilst it is indirectly undermined with the existence of the principle of subsidiarity- where national parliaments preserve certain legislative powers.¹⁰⁴ As a result of the Common Foreign Security Policy (CFSP), foreign affairs are being officially and unofficially coordinated by the Union, meaning that the idea of external sovereignty is also equally undermined by the Union.¹⁰⁵ In the EU, it is impossible for a single country or people to make or change a single European law. If a nation or State decides to transfer its sovereign powers to the bloc, it simply exchanges the sovereignty of a small State for participation in decision-making in a greater supranational EU.

The concept of shared sovereignty is accompanied by the acknowledgement of multiple identities. The Union promotes multiple identities via the array of symbols and institutions that it has introduced; for instance, with the EU citizenship, the EU automobile number plate, the EU passport, the EU flag, the Schengen zone and the Euro, the Member States are in fact under a single '*Euroscope*'. Indeed, the Member States will always maintain their own unique identities and the one created by the Union is nothing but an additional identity. Nonetheless, by being a part of the European family, the island of Cyprus is in fact being shared by the rest of Europe and even more so once it joins the Schengen area.¹⁰⁶ Unfortunately, this is being overlooked by the two Cypriot parties as it is the very concept of sovereignty that prevents peace on the island.

European integration thrives on the scheme of reducing borders between Member States; the concept of borders within the Union drastically changed with the creation of the Single Market and the Four Freedoms.¹⁰⁷ Other efforts to unify those who have been segregated by a State border and to invigorate areas that used to be

¹⁰³ Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).

¹⁰⁴ Article 5 (ex Article 5 TEC).

Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13.

¹⁰⁵ Kenneth Glarbo, 'Reconstructing a Common European Foreign Policy' in Thomas Christiansen, Knud Erik Jørgensen and Antje Wiener (eds), *The Social Construction of Europe* (Sage 2001).

¹⁰⁶ Diez (n 84) 8.

¹⁰⁷ TFEU, Article 45 (ex Article 39 TEC), Article 49 (ex Article 43 TEC), Article 56 (ex Article 49 TEC), Article 57 (ex Article 50 TEC).

unimportant in relation to their infrastructure, have been made by the EU; the predominant programme in this respect is the Interreg-programme, ‘which provides financial assistance to a large number of so-called “Euregios”, trans-border regions within EU territory or on the EU’s own borders.’¹⁰⁸ Additionally, the Commission has also been involved in supporting numerous projects that aim to encourage peace and resolution in conflict regions; one example of this is the Programme for Peace and Reconciliation (PEACE I and II) in Northern Ireland. Noteworthy in the context of Cyprus is the famous Green Line Regulation.¹⁰⁹ The Regulation aims to indirectly eradicate the *de facto* division on the island by allowing the movement of persons and goods across the border. The fact that the ‘Green Line’ is monitored by the authorities each on their own side of the border means that the indirect aim of the Regulation somehow loses significance.

The legal provisions found in the body of EU law ensure that communities are protected against discrimination. Even though the EU cannot actually prevent physical violence, the Union has exclusive legal strategies to fight against ethnicity based discrimination. For example, Member States are obliged to conform with Articles 18-19 TFEU, and thus any discrimination on the grounds of nationality is prohibited. If a Member State habitually breaches this rule, it may face the Commission’s infraction procedure under Articles 258 and 260 TFEU and if the issue still remains unresolved it could face the possibility of suspension in line with Article 7 TEU.¹¹⁰ Several directives¹¹¹ are also juxtaposed to Articles 18-19 TFEU, which safeguard non-discrimination directly. As a result, the widespread fear amongst the Turkish Cypriots that the crimes committed against members of their community in the 1960s, alongside social and economic discrimination, could

¹⁰⁸ Diez (n 84) 9.

¹⁰⁹ Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession [2004] OJ L 161/128 as last amended by Council Regulation (EU) 685/2013 [2013] OJ L 196/1.

¹¹⁰ Article 7 TEU (ex Article 7 TEU).

Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C 115/13.

¹¹¹ See also Council of Europe, The European Convention on Human Rights (ECHR) Article 14: Prohibition of Discrimination, 4 November 1950, as amended by its Protocol 14 CETS 194 as from 1 June 2010 <<http://www.hri.org/docs/ECHR50.html>> accessed 11 December 2014.

The enjoyment of the rights and freedoms set forth in this 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.

Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177 <<http://www.refworld.org/docid/3ddd0cb44.html>> accessed 11 December 2014.

recommence in Cyprus if the island is reunified, will be controlled by the EU with these abovementioned measures. It should be noted that the Greek Cypriots are equally protected from such discrimination.¹¹² Even if the island is not reunified and the TRNC is recognised and welcomed by the EU, such fears will be rendered non-existent thanks to the Union.

The majority of the Turkish Cypriots feel as though they will be suppressed as a result of the Four Freedoms¹¹³ because they are the smaller community on the island, in terms of population. They also contend that the Turkish Cypriot identity will be jeopardised by the financial superiority of the Greek Cypriots if there is to be a federal settlement on the island; to them, this will be equivalent to the *Hellenification* of the island. The Union has indeed proven on many occasions that it can prevent such fears from surfacing by enabling derogations from its law and extensive transition periods for the enactment of its law- as long as such acts do not undermine the spirit of the Treaties as a whole. A case in point is Malta; in the accession negotiations, Malta gained a permanent derogation¹¹⁴ on the purchase of second homes on the island. Another example is the twelve year transitional period that was set in Poland in 2004, for the buying of agricultural and forest land, by foreigners.¹¹⁵ The distinct fear in Poland was that the markets for land in certain areas of the country would be taken over by foreigners as the prices of property and land in those regions are considerably low in comparison to the standards of foreigners.¹¹⁶ With regards to Cyprus, it is important to reference the temporary and permanent derogations from EU law that were envisaged in the Annan Plan; the Plan incorporated ‘a request for substantial derogations from the *acquis* relating, inter

¹¹² Diez (n 84) 9.

¹¹³ These are four of the EU’s fundamental founding principles. Under the 1957 Treaty of Rome, goods, services, capital and people are supposed to be able to move freely across the Union’s internal borders.

¹¹⁴ Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia signed in Athens on 16 April 2003 - Annexes V to XIV [2003] OJ L 236; Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 6 on the acquisition of secondary residences in Malta [2003] OJ L 236.

¹¹⁵ Treaty of Accession (n 114).

¹¹⁶ Jerzy Bański, ‘Changes in Agricultural Land Ownership in Poland in the Period of the Market Economy’ (2011) 57(2) *Agricultural Economics* 93, 95 <<http://www.agriculturejournals.cz/publicFiles/35544.pdf>> accessed 12 December 2014.

alia, to property and residency rights',¹¹⁷ more explicitly, limitations in free movement of Greek Cypriots to the north of the island and restrictions in purchasing property in the north.¹¹⁸ Moreover, the Plan stipulated that the Greek Cypriots were only permitted to visit the north in percentages with maximum quota.¹¹⁹ The corollary of this is that the EU is willing to enact such arrangements in order to secure peace in its region. Whether or not such arrangements will be accepted by the Cypriot parties is another issue.

Diez has identified two divergent methods that can be implemented by the EU to help 'postmodernise' modern conflicts. Firstly, it can promote the direct utilisation of the EU framework which is full of financial and discursive resources. The reason the framework is discursive is because politicians can use it 'to justify policies that would otherwise be more difficult to justify.'¹²⁰ Direct engagement can also take place via advice, cooperation and direct political pressure exerted on the leaders of the conflict parties. Direct involvement is only genuinely fruitful when directed at the official representatives of the conflict parties during the pre-accession process of membership.¹²¹ Secondly, the EU can use the tool of socialisation which will help indirectly dilute the conflict by bringing together the political elite and representatives of the conflicting parties. 'Social constructivist literature argues that participants in institutions change their identity through the interactions within those institutions...'¹²² Therefore, even though it is hard to imagine that there will ever be a general consensus across Cyprus on norms such as, democracy, self-determination and sovereignty, with the push of the EU, the political elite of Cyprus will gradually learn to work alongside such concepts if they sincerely want to eradicate the Cyprus problem.

¹¹⁷ Stephanie Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Martinus Nijhoff Publishers 2010) 246.

¹¹⁸ Consequently, some of these rights would have been steadily reinstated in order for them to have fully exercised their effectiveness. Inclinations could start from three years and span for up to twenty years, whilst others would have been completely avoided.

¹¹⁹ Christos A Neophytou, 'A Critical Analysis of the Proposed UN Annan Plan for the Settlement of the Cyprus Problem and the Importance of International and European Law in the Shaping of the New Proposed Constitution for Cyprus' (CPE PgDL thesis, London Metropolitan University 2003) 9 <<http://agrino.org/unannanplan/DISSERTATION.pdf>> accessed 10 December 2014.

¹²⁰ Diez (n 84) 10.

¹²¹ Ibid 11.

¹²² Ibid.

As research on the domestic implementation of human rights demonstrates. See Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).

As Diez has strongly argued, the EU does have an influential robust framework; however, what the EU lacks *vis-à-vis* Cyprus is the acknowledgment of the role that ethnopolitics plays on the island. Identity is regarded as a serious issue on both sides of Cyprus. In particular, the majority of the Turkish Cypriots feel as though their identity is intimidated by the Greek Cypriots and now by the Union; this crucial factor has been neglected by the EU. For instance, during the pre-accession period of Cyprus, the EU believed that the possibility of economic prosperity within the Union would act as a catalyst for reunification.¹²³ This economic carrot, although attractive, is never enough. Obviously, due to the economic isolation, the gross domestic product per capita in the TRNC is substantially below the figure in the RoC, however, societal security occupies a more predominant space than economic security in northern Cyprus.¹²⁴ So, even if the EU's framework brings the two conflicting parties closer together, it will not be able to encourage a lasting societal transformation.

As a result, this thesis will be arguing that the impact of the EU on the Cyprus problem (pre and post -accession) has been either ambiguous or seriously detrimental.¹²⁵ Due to the fact that the EU's role in the Cyprus conflict is viewed differently by the conflict parties, there is a limitation on what the Union can actually do to help resolve the dispute.¹²⁶ On the one hand, the Greek Cypriots tend to view the Cyprus problem as a case that fundamentally concerns the violation of the legality and territorial integrity of the RoC. This legalistic interpretation neglects the fact that the misfortune the Greek Cypriots experienced as a result of the Turkish invasion was also the end of a decade and a half of inter-ethnic bloodshed, of inter-Greek violence and of the Athens-led *Coup d'état* against the RoC. These facts are strategically ignored by the Greek Cypriots who resort to an entirely legalistic interpretation of the Cyprus problem. The Turkish Cypriots on the other hand classify the Cyprus problem as one of domination of the Turkish Cypriots by the

¹²³ Reed Coughlan, 'The Cyprus Problem: Perspectives from Both Sides of the Green Line' (1992) 10(1) Ethnic Studies Report 25, 36.

¹²⁴ Diez (n 84) 5.

¹²⁵ Thomas Diez, 'Last Exit to Paradise? The European Union, the Cyprus Conflict and the Problematic "Catalytic Effect"' in Thomas Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002).

¹²⁶ George Christou, 'The European Union, Borders and Conflict Transformation: The Case of Cyprus' (2010) University of Warwick Research Paper 1/2010, 23 <http://wrap.warwick.ac.uk/3220/1/WRAP_Christou_280510-g_christou_cooperation_and_conflict_paper_rr_23_04_09_final.pdf> accessed 12 December 2014.

Greek Cypriot majority. They believe that this amounted to the historical termination of the RoC and thus its island-wide sovereignty and authority. This purely political interpretation ignores the fact that the security system provided by the Turkish army for the Turkish Cypriots triggered a huge violation of the Greek Cypriot human rights. These divergent perspectives have made the Cyprus problem extremely difficult for the outside mediators to handle.

The political arguments put forward by the Turkish Cypriots have always been stronger than their legal arguments, whilst the Greek Cypriot legal arguments have been stronger than their political arguments. Thus, an objective approach requires the acceptance that central to the Cyprus issue is a complicated intertwinement of legal and political matters. Overall, the Cyprus problem is made up of legal issues (which include; property rights, human rights violations and the fate of missing persons) and political issues (which include; security matters, the right of self-determination and territorial adjustments). The dilemma of the Union following the accession of the RoC was that if it followed the law it could not efficiently address the political factors of the Cyprus problem. If it tried successfully to deal with the political aspects of the Cyprus problem, it conflicted with the law.

It is difficult to argue that the EU is a neutral place given the Greek and Greek Cypriot membership and ‘the entanglement of British imperial history and military present.’¹²⁷ Therefore, this thesis will insist that it is highly unlikely that the Union will be able to transform the identities within the island ‘towards a less conflictual co-existence...’¹²⁸ Albeit there are those who classify themselves as being simply Cypriots, there will always be a rigid division between the Greek and Turkish Cypriots; for that reason, the Union should acknowledge and appreciate this separation and help it flourish by pushing for the recognition of the TRNC. Arguably, the recognition and the maintenance of the status quo is the most ideal solution to the Cyprus problem.¹²⁹ The second best option is the creation of a new Cypriot partnership State which is made up of two component States on the basis of political equality.

¹²⁷ Diez (n 84) 5.

¹²⁸ Ibid 2.

¹²⁹ The reason for this will be explained in detail in the following chapters.

Even though there is a large group in northern Cyprus which categorises Turkey as an occupier on the island and believes that the Turkish Cypriot identity is being threatened by the mainlanders, only a very few would contend that the Turkish Cypriots still exist as a community in Cyprus thanks to Turkey's efforts in 1974.¹³⁰ The EU needs to take such identity matters seriously. If it chooses to further ignore them, then its efforts to promote a solution will be pointless. In hindsight, the 1960 RoC Constitution and other peace operations, such as those in the Middle East and in Northern Ireland, have collapsed due to the lack of acknowledgement of identities that are embedded in the conflicts.¹³¹

1.3. A Brief Literature Review & Research Questions

The Cyprus problem isn't easy and writing about it is equally as hard, especially since every comment is analysed for bias. Given the disagreement between the two narratives, it is impossible for any view articulated on the issue to be considered as objective by both sides in the conflict.

It is a distinctive and extremely challenging problem for the EU given the involvement of three Member States and a candidate Member State. Not only has the Cyprus problem cast a shadow over the Union's conflict transformation abilities and its objective of securing stability in the eastern Mediterranean, but it has also had unconstructive consequences for internal EU governance across a vast spectrum of matters.¹³²

The existing literature on the EU and conflict resolution tends to insist that the Union's intervention and the consequences which flow from this depend on the nature of the border in dispute. It can therefore strongly be contested that the Cyprus problem is definitely a European problem which is 'hurting the European Union'.¹³³ The reason it is hurting the Union is because the strategies that are being adopted by the direct and indirect parties to the conflict and their interpretations of the EU's normative projections, have a negative impact upon the way that the Union aims to

¹³⁰ Diez (n 84) 5.

¹³¹ Ibid.

¹³² Christou (n 126) 3.

¹³³ Ibid 2.

address the problem. Ergo, border disputes can only be eradicated by the conflicting parties.¹³⁴

Indeed, the EU's attractiveness can at times suffice as to resolve a conflict; this is the tactic currently being employed for Serbia and Kosovo by the Union. Most academics believe that the EU's role in conflict resolution is to use enlargement or Europeanisation as a tool to induce peace.¹³⁵ Thus, the Union's success as a third party mediator solely depends on its use of conditionality, benchmarking and integration strategies.¹³⁶ The very knowledgeable academic, Nathalie Tocci, further argues that conflict resolution can occur via passive enforcement of rules that come from the Union. She contends that this is not the same as using conditionality as it is not rewards or punishments that transform behaviour, but in fact an 'in-built system of incentives and legally based rule-bound cooperation.'¹³⁷ As mentioned earlier on, others, such as Diez, have concentrated on the direct and indirect effects of the actions of the Union on border conflicts.¹³⁸ Although these ideas all provide highly valuable insight into the strengths and weaknesses of the EU as a conflict mediator and framework in conflict situations, they only seem to provide a non-dynamic and linear analysis of the Union's effectiveness with regards to conflict transformation. The current literature does not adequately address the reality of how the EU is dealing with the Cyprus conflict and as rightfully argued by Bahar Rumelili, the 'interactive dimension of conflict resolution, particularly the question of how the EU can simultaneously influence the insider and outsider states to promote conciliatory policies on both sides.'¹³⁹

The *telos* of this particularly challenging research is to map the application of EU law in an area where there are two competing claims of authority and determine how the EU can actually help resolve the Cyprus problem. In other words, the aim of this research is to highlight the two different sets of challenges that are present in the Cyprus problem namely, the legal and political issues, and underline the importance

¹³⁴ Ibid 3.

¹³⁵ George Christou, *The EU and Enlargement: The Case of Cyprus* (Palgrave Macmillan 2004). See also Coppieters et al (n 78).

¹³⁶ Tocci (n 72). See also Coppieters et al (n 78).

¹³⁷ Christou (n 126) 4.

¹³⁸ Christopher Hill, 'The EU's Capacity for Conflict Prevention' (2001) 6 *European Foreign Affairs Review* 315. See also Diez et al (n 76).

¹³⁹ Bahar Rumelili, 'Transforming Conflicts on EU Borders' (2007) 45(1) *Journal of Common Market Studies* 105, 109.

of applying the law in a contextualised manner in order not to render the right of self-determination of the Turkish Cypriot community non-existent. The indirect questions this thesis will tackle are: ‘what problems has the accession of a troublesome island caused the EU?’, ‘why is it that the powerful legal order of the EU continuously fails to tame this tiny island?’ and ‘does the EU take into consideration the right of political self-determination of the Turkish Cypriot community in its legal dealings with this unique Member State?’

From a strictly legal perspective, the Greek Cypriot position is undefeatable since all of their demands have been in line with demands of the law and specifically EU law. The political, meta-legal arguments put forward by the Turkish Cypriots, especially since 2004, have been indisputable. As a result, the EU has incorporated the structure of the Cyprus problem as it tends to side with the Greek Cypriot legal argumentation and identifies with the Turkish Cypriot political argumentation. The legal arguments are being taken on board by the Union; however, the political arguments (although unwillingly) are being ignored. By recognising the RoC as the sole legitimate entity on the island the EU is obeying the rule of law; nevertheless, by doing this, the Union has clashed with its stance on the political aspect of the Cyprus issue. By supporting the legality of the RoC the EU is simply strengthening the very State structure that it also believes needs to be invalidated in order for the Cyprus problem to come to an end.

It could be that the international code of politics and law demands the EU to side with the Greek Cypriot position, but now the judicial aim of doing justice has become correspondingly lopsided. The idea that binds this thesis together is that the EU does not take into consideration the political implications of its legal decisions on the Turkish Cypriot community. It is the unmanageability of the Cyprus problem and the numerous legal and political issues arising from it that make any contribution on the interrelationship of the problem and the EU legal order rather exigent. If judicialisation without juristocracy and uncontextualised application of the law continues to be the strategy adopted by the EU in Cyprus, then the Cyprus problem will become even more tangled. By approaching the Cyprus problem in purely legal ways, the EU is classifying the Turkish Cypriots as Cypriots of the RoC and not of the TRNC-which they have been since 1983. Without a doubt, the framework of the problem needs to be adopted as the framework of the solution; since the Cyprus

problem is predominantly about freedom and identity, the outside players need to focus on ways to promote the right of self-determination of the two Cypriot parties. If the EU continues to impose on the parties a power-sharing solution in Cyprus, it will simply be relaying the field for another conflict.

As can be interpreted from the main research question, this thesis focuses on the legal issues that surface from the liaison of Cyprus' post-1974 status quo and the RoC's EU membership. In order to analyse the legal issues which are linked with the pre and post-accession situation, this thesis will be evaluating the provisions of the relevant EU legislative instruments and EU law, the case law of the European Court of Human Rights (ECtHR) and a few other national and international courts. Thus, this research project requires a multidisciplinary approach. Furthermore, it is impossible to write about the legal aspects of the Cyprus issue without recognising the historical and political background.

1.4. Structure of The Thesis

This thesis is divided into eight chapters, all of which aim to answer the underlying question; 'can the EU promote peace in Cyprus?'

Chapter 2 is entitled '**The Democratic Theory of Political Self-Determination & The Turkish Cypriot Community**'. This chapter is annexed to the introduction chapter as it outlines the theoretical framework of the thesis. It argues that the Union needs to adopt Harry Beran's democratic theory of political self-determination whilst dealing with border conflicts. This theory uses democratic principles to verify the rightfulness of the political boundaries and the unity of the State that tends to be taken for granted- such as the TRNC. If the EU accommodates this theory in its dealings with Cyprus then it can untie the Cypriot Gordian Knot.

Chapter 3 is entitled '**The RoC's Membership Application...The EU's First Short-Sightedness?**' It analyses the debate surrounding the illegality claim of the RoC's Community application and comes to the conclusion that the depoliticised interpretation of Article 50 of the 1960 Constitution and Article 1(2) of the Treaty of Guarantee render the application lawful. Subsequently, the Commission's vague *avis* for this application is examined and compared to its most recent opinions in order to illuminate the change in the Union's approach to applicant States with ongoing

political problems. This chapter also visits the unprecedented East German accession into the Community with the aim of understanding the *avis* for the RoC.

Chapter 4 entitled '**The Beginning of the Awkward Relationship: Pre-Accession Policy for Cyprus and the Enlargement of the EU**' deals with why, how and under what conditions Cyprus could join the Union. It starts by discussing the reason why the preliminary route for Cyprus' membership journey changed in 1994. Subsequently, it examines the reason behind EU enlargement, the criteria for enlargement and the dimensions of enlargement. It also touches upon the rational choice theory and states that the enlargement process is habitually exploited by Member States in order to gain leverage in bilateral polemics with candidate or applicant States. What is heartbreaking is that EU membership could have resolved the differences between the two conflicting Cypriot parties in the long-run, but unfortunately the candidacy of the island pushed the two conflicting parties further away from one another than before.

Chapter 5 entitled '**The Accession & The EU's Capability to Accommodate a Future Cyprus Solution**' analyses the suspension of the *acquis* in northern Cyprus as dictated by Protocol No 10 Act of Accession 2003.¹⁴⁰ Comparative history indicates that derogations in Accession Treaties are commonly found; however, the case of Cyprus is by all means unique. The chapter also discusses how far-reaching derogations from the *acquis* are allowed to be; it concludes that as long as the founding principles of the Union are not touched by these derogations and that they are needed by the requesting State, they can exist. This implies that the Union is capable of tailoring for 'special cases'. This unprecedented accession has highly limited the conflict transformation power of the Union; it has prevented the EU from becoming the principal *locus* and actor in a possible future proposal to the Cyprus problem. The chapter concludes by discussing the feasibility of northern Cyprus' secession and continued EU membership.

Chapter 6, '**The Infamous *Orams*¹⁴¹ Ruling**' predominantly aims to criticise the ECJ by claiming that the Court's literal interpretation in this sensitive case was

¹⁴⁰ Protocol 10 on Cyprus, Act of Accession 2003 [2003] OJ L236/955 (Protocol 10).

¹⁴¹ Case C-420/07 *Apostolides v Orams* [2010] 1 All ER (Comm) 950; Case C-420/07 *Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571.

politically loaded, despite the fact that it habitually interprets Regulation 44/2001¹⁴² in a factual manner; consequently, the ECJ's attitude has endangered the EU's conflict resolution abilities in Cyprus. It will demonstrate how a depoliticised interpretation of EU law *vis-à-vis* Cyprus has deepened the division on the island; therefore, the argument put forward is that the ECJ should not be blind to the ongoing political conflict in Cyprus whilst rendering its judgments, if the EU is to uphold a conflict management position in this conflict.

Chapter 7 is entitled '**Turkish Cypriots-The Ghosts of Europe No Longer: A Human Rights Approach**'. The case law of the ECtHR re-confirms that northern Cyprus is a unique case within the EU legal order. The decisions of international courts are habitually portrayed as rendering one party to the Cyprus conflict triumphant against the other; the chapter predominantly deals with the ECtHR ruling *Demopoulos and Others v Turkey*.¹⁴³ Moreover, it argues that even though the territorial character of the suspension of EU law allows, in principle, the rights attached to EU citizenship that are not correlated to the territory as such, to be enjoyed by the Turkish Cypriot residents in the north, there are limits for the exercise of these rights. This chapter reinforces the increasing worth of supra-national, quasi-constitutional regimes in dealing with international political controversial issues. Nevertheless, a solution to the property issue and the human rights violations north of the 'Green Line' in Cyprus is hidden in a solution to the Cyprus problem and not in case-by-case European rulings. Overall, the chapter argues that the ECtHR actually acknowledges the ontology of the Cyprus problem and follows a 'law in context' approach.

Chapter 8, 'The Long Road of Shattered Dreams and Broken Promises' argues that the EU's negative impact on the Cyprus problem dramatically amplified after the RoC's accession as the promise made by the European General Affairs Council on 26 April 2004, stating that the EU was ready to reward the Turkish Cypriot community by lifting their international isolation, for playing a constructive role

¹⁴² Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012/1 (Regulation 44/2001 or Regulation); Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1 (Regulation 1215/2012).

¹⁴³ *Demopoulos v Turkey* (2010) 50 EHRR SE14 ECtHR.

towards the goal of reaching a settlement in Cyprus by voting in favour of the Annan Plan, was not kept. The chapter also highlights the political, moral and legal weaknesses of the policy adopted by the EU *vis-à-vis* Cyprus and underlines the problems of ‘secret diplomacy’. It then asserts that the Union will be fixing the imbalance it has caused on the island by keeping its promise of direct Turkish Cypriot trade with the Member States. Alternatively, if these promises are not fulfilled, then there is no hope for a settlement in Cyprus. It concludes by arguing that the Turkish Cypriots should try repairing their own wounds by striving for the recognition of the TRNC.

Chapter 9, ‘Lessons from the Cyprus Experience’, contends that hopes and efforts for a settlement based on federalism/consociationalism seem to be vanishing in Cyprus. This may be the last chance to marry the two sides; alternatively, in the coming years, there will be support for a negotiated separation process. The main objective of this conclusive chapter is to highlight how important it is for the EU to handle the Cyprus issue as an ‘extra ordinary agenda’ item and to collaborate with the outside players whilst doing so as ‘peace via membership’ within its frontiers philosophy has not worked for the case of Cyprus. When dealing with a conflict as such, it is important to acknowledge the interrelationship of the inter-communal elements and their connection with the external powers, which irrefutably changes over time. The chapter will commence by discussing how the consociational theory has been a vital part of Cyprus’ and Northern Ireland’s ‘meta- conflict’; hence, ‘the intellectual conflict about the nature of the conflict and the appropriate prescriptions to tackle it.’¹⁴⁴ It will then proceed by arguing that the Union needs to apply realism to this modern conflict. It is crucial that the Union remains firm in reality and not only in theory to its ethos and conditionality requirements. If the Union fails to utilise its carrot of integration efficiently, it will suffer in the long-run as once the carrot has been consumed, it is extremely difficult to exercise influence over troubled Member States, such as Cyprus. The overall argument is that the EU is limited by bounded rationality and deficient information in its dealings with the Cyprus problem as a literal and uncontextualised interpretation of EU law has been

¹⁴⁴ John McGarry and Brendan O’Leary, ‘Consociational Theory, Northern Ireland’s Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland’ (2006) 41(1) *Government and Opposition: An International Journal of Comparative Politics* 43, 44.

maintained throughout the EU's dealings with Cyprus, hence, pre-accession¹⁴⁵ and post-accession. The chapter will conclude by arguing that the only way forward is the recognised secession of the Turkish Cypriot community.

1.5. Original Contribution to Knowledge & Methodology

This thesis will be providing an original observation in an unoriginal way; it will be discussing how the uncontextualised interpretation of legal matters pertaining to the Cyprus problem have deepened the division on the island and thus rendered partition a new solution. The argument is that the EU's strategy has simply de-humanised the wider Cypriot public as it is dealing with the Cyprus problem in a vacuum.

New elements are constantly being added to the already enigmatic Cyprus problem. Since I am of Turkish Cypriot origin, the Cyprus problem is close to my heart and I simply wanted to provide an alternative perspective to the legal and political arguments that already exist on this topic. It goes without saying that this conflict has been attacked by many academics, lawyers and politicians over the years; even though the political and the legal do not exist in watertight compartments, for the purpose of addressing the Cyprus problem efficiently, the individual effects of these two disciplines need to be taken into consideration. Conflict resolution involves both 'cognitive' (the analysis of the conflict) and 'behavioural' (the practice of problem solving) factors.¹⁴⁶ Thus, the EU needs to understand what the Cyprus problem is actually about, in its full contextual complexity, prior to choosing the appropriate behavioural response. The well-known social philosopher Stuart Hampshire has eloquently concluded that even though we will never really agree about what the content of widespread justice is 'because there never will be such a harmony, either in the soul or in the city,' we may be able to understand that 'fairness in procedures for resolving conflicts is the fundamental kind of fairness, and that it is acknowledged as a value in most cultures, places, and times: fairness in procedure is an invariable value, a constant in human nature.'¹⁴⁷

¹⁴⁵ Albeit there is a nexus between the pre-accession policy adopted for the RoC and EU politics, the EU legal order did not play a polluted role during this process.

¹⁴⁶ Carrie Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (Georgetown University Law Center, Scholarship @ Georgetown Law, 2004) <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1587&context=facpub>> accessed 11 July 2015.

¹⁴⁷ Stuart Hampshire, *Justice is Conflict* (Princeton 2000) 4.

The methodology used addresses the legal complexities of a conflict that has been highly judicialised without being blind to its political nature. A legally ‘autistic’ contribution on the link between the EU legal order and the Cyprus problem would have been pointless since the legal issues have come about as a result of the historical and political aspects of this conflict. Therefore, in every chapter, this research tries to put the relevant legal issues concerning the Cyprus anomaly and the partial application of the *acquis* into its political and historical context and prove that the legislative devices of the EU have not been altered by the persevering realities of the Cyprus problem. Thus, the thesis consists of a critique of the EU approach on sensitive issues arising from the conflict, such as the political and economic isolation of the Turkish Cypriot EU citizens and the positions of the conflicting parties in relation to the future settlement of the problem. The research therefore portrays an overall picture of the partial application of the EU law north of the ‘Green Line’ and the compatibility of a possible future settlement plan which takes into consideration the democratic right of self-determination of the Turkish Cypriot community with the EU legal order. The only way left for the EU to help resolve the Cyprus problem is to aim to broker a deal between the two Cypriot communities which will permit the recognition of the TRNC or at least the ‘Taiwanisation’ of northern Cyprus.

The thesis will be illuminating a theoretical approach which both conceptually and functionally provides a more coherent means of explaining why the EU is failing as a conflict mediator in Cyprus. Although Europeanisation scholars have touched upon matters close to the Cyprus conflict¹⁴⁸ or the relevance of the EU to the RoC which represents the government that has monopolised EU accession¹⁴⁹ and from which the entity attempts secession, their overt domestic scene and how it is impacted by the EU remains under-researched. Europeanisation scholars do not tend to focus on countries or communities with limited external projection. This is a gap that this thesis addresses. Despite the Europeanisation of the Turkish Cypriot community, they are habitually disregarded because of the EU’s interpretation of its current legal framework. Since the self-declared TRNC is not recognised and EU law is suspended in northern Cyprus, the Turkish-Cypriots represent an idiomatic partner of Brussels but the relations between the two resemble the experience of EU

¹⁴⁸ See Coppieters et al (n 78); Diez (n 125) and Tocci (n 72).

¹⁴⁹ See Kevin Featherstone, ‘Cyprus and the Onset of Europeanization: Strategic Usage, Structural Transformation and Institutional Adaptation’ (2000) 5(2) *South European Society and Politics* 141.

enlargement: the EU's relevance to the community has been based on the prospects for EU accession (via reunification) and assistance towards preparation for potential EU integration through financial and technical aid.

It is necessary to not only evaluate the decisions taken by the EU institutions *vis-à-vis* Cyprus, but to also analyse the reasons behind the adoption of such decisions. In order to do so, primary source material has been relied on derived directly from the EU's official documents; verbatim records, judgments, Advocate General (AG) opinions, regulations, official speeches, implementation reports, Member State comments and other official records directly attributable to the EU and its institutions are invaluable to the research as they offer the most accurate accounts of proceedings and developments.¹⁵⁰ With the aim of understanding the epistemology surrounding the research area, secondary resources were used to develop the conceptual and theoretical framework of this thesis. Moreover, competing theories from academic literature on the Cyprus problem and the EU were analysed in order to gain a greater understanding of the problems that exist in the EU's approach towards the Turkish Cypriot community. This research examines, from a legal and political point of view, issues that have surfaced since the publication of the great works of Tocci,¹⁵¹ Diez,¹⁵² Ker-Lindsay¹⁵³ and Skoutaris.¹⁵⁴

Content analysis is a systematic way of classifying information; it helps generate descriptive data based on the ideological framework of the information in a semiological fashion.¹⁵⁵ This research would not vastly benefit from interviews, questionnaires and other quantitative research methods; the goal of this thesis is not to statistically measure views or quantify results but rather to use the selection of events to gain an understanding of the underlying process of decision making in the EU *vis-à-vis* Cyprus. Nonetheless, this does not mean that it will not be incorporating the

¹⁵⁰ The primary data for the research also consists of written EU and UN documentation, such as Protocol 10, cases and letters from the presidents of the RoC and TRNC addressed to the UN dating back to 1974.

¹⁵¹ Tocci (n 72).

¹⁵² Thomas Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002).

¹⁵³ James Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus* (Palgrave Macmillan 2005).

¹⁵⁴ Nikos Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Hart Publishing 2011).

¹⁵⁵ Limor Peer and Mary Nesbitt, 'Content Analysis Methodology' (Readership Institute, July 2004) <http://www.readership.org/new_readers/data/content_analysis_methodology.pdf> accessed 14 December 2014.

valuable information acquired from conferences and informal discussions that have been conducted with Turkish Cypriot government officials.¹⁵⁶ Although the research would have been fortified if information was also collected from the Greek Cypriot officials, as mentioned earlier, the focus of this project is predominantly on the under-researched effects of the EU on the Turkish Cypriot community and the TRNC.

I am aware that my methodological approach has led me to a biased standpoint, but, there is no universal truth in the Cyprus conflict. Everything we hear or read is an opinion, not a fact; everything we see is a perspective, not the truth. We all prize the truth, but all truth is personal, comparative and relative.

I had two principal goals whilst undertaking this research. Primarily, I wanted to describe the special status quo of northern Cyprus within the EU legal order. Even though there are other territorial/geographical exceptions to the application of EU law, northern Cyprus is a distinctive case. The working hypothesis for this part of the research has been that, however objectionable it is for the political life of the Union, the EU legal order has the capacity to accommodate the status quo in Cyprus if the law is contextualised. Unfortunately, the Court of Justice tends to react negatively to such an approach and insists on maintaining the proper functioning of the EU regime. The EU simply needs to adopt more measures to ensure that the Turkish Cypriot community is genuinely part of the EU family or accept the fact that the RoC can no longer represent the entire island in the EU. This research contributes to the discussion on the role of the EU in contested States. In sum, it aspires to a comparative relevance: the Turkish Cypriot case becomes a blueprint for the examination of the Europeanisation of other contested States.

The second aim of this research has been to highlight the fact that the Union membership of the RoC has proven that the well-known parameters of a future settlement plan, based on the principles of bi-zonality, bi-communality and political equality of the two Cypriot communities, are insufficient. The working hypothesis for this section of the research has been that since the EU is capable of accommodating the status quo, it would be ridiculous to prevent the right of self-

¹⁵⁶ A face to face interview brings with it flexibility, and it will accord with the interviewee's own perspective rather than my own. Unfortunately, unstructured interviews suffer from categorisation; they require the imposition of second-order constructs. See Steinar Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (Sage Publications 1996) 13.

determination/secession of the Turkish Cypriot community. The EU has stipulated in the 5th Recital of Protocol No 10 on Cyprus that it is prepared to accommodate the terms of a settlement so long as they are in line with the founding principles of the Union; hence, even if there will be problems between the chosen solution and the EU legal system, the EU is willing to accept the derogations from the *acquis* that such a solution could demand. The accommodation of a solution that would require derogations from EU law is compatible with Protocol No 10 and with the fact that according to Article 6 TEU, the EU is founded on the ‘principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’.

The Member States are the ‘Masters of the Treaties’ and therefore they can find tailor-made solutions which will accommodate an international political dispute that has countless consequences within the EU legal order. Nevertheless, the EU’s flexibility in cases as such does not mean that it will always allow States with border or political conflicts to simply join the family without resolving their domestic issues first. The case of Cyprus has taught the EU a serious lesson; although the current legal regime of the Union is somewhat coping with the case of Cyprus, the only way for it to stop dehumanising the Turkish Cypriots and to provide for a solution to all the pending issues of the Gordian knot is if the Cyprus problem is resolved via democratic means. This research has simply reconfirmed that the EU can build a bridge over troubled waters, so long as it adopts a ‘law in context’ approach and enacts policies that give those with a limited external projection a voice; yet, the EU cannot resolve all problems. Even though the Union can offer its Member States political stability, the solution of international political problems needs the willingness and commitment of the predominant actors involved.

Whether or not it is possible for the TRNC to be internationally recognised is not within the ambit of this research as this issue is extremely complex and involves deep-rooted politics between Russia and Turkey. By all means, this thesis does not intend to ‘resolve’ the Cyprus problem, nor will it explore the island’s turbulent history in thorough detail; it merely highlights the wrongdoings of the EU and suggests alternative political and legal routes for it to take on this bumpy journey.

1.6. A Short Summary

Krasner argues that robust States only cooperate if it means that they will preserve power; hence ‘cooperation after hegemony’.¹⁵⁷ This logic reflects the position of the Greek Cypriot community in relation to the current affairs in Cyprus; the EU is being irrational by ignoring the moral compass of the sufferance imposed upon the Turkish Cypriot community since the accession of the RoC.¹⁵⁸ Keohane claims that an international *fora* follows a certain ideology because it is in the best interest for all;¹⁵⁹ nevertheless, rational choice institutionalists stipulate that the *fora*’s ideology is constrained by limited information, insufficient knowledge and institutional tension.¹⁶⁰

It should be noted that the EU will not always be a prolific conflict resolver. Coppieters insinuated that because certain domestic opportunity frameworks of societies in conflict determine the efficiency of conditionality, the potential failure cannot be attributed to the EU.¹⁶¹ However, this does not negate the fact that if the EU gives way to inconsistencies, lacks lucidity and loyalty whilst setting qualitative criteria, this will cause a sense of enigma among actors party to the conflict. The Union could behave partially and demand conditionality to the disadvantage of the breakaway entity in order to avoid the impasse attributed to the increase of micro-states even though the Union is a follower of a *common state* model.¹⁶²

This thesis will explore a way that relevant actors can better ‘understand’ the Turkish Cypriot claim to authority in Cyprus and subsequently be more reactive to their needs.¹⁶³ The framework of the EU must encourage the ‘reconceptualisation of

¹⁵⁷ Joseph M Ellis, ‘Neoliberal Institutionalism: A Summary and Critique’ (*Political Science Resource Blog*, 17 March 2006) <<http://polisciprof.blogspot.com/2006/03/short-review-of-neoliberal.html>> accessed 14 December 2014.

¹⁵⁸ This will be further explained in the following chapters.

¹⁵⁹ They ‘adjust their behavior to the anticipated preferences of others, through a process of policy coordination.’ Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 51.

¹⁶⁰ Kenneth A Shepsle, ‘Studying Institutions: Some Lessons from the Rational Choice Approach’ (1989) 1 *Journal of Theoretical Politics* 131,138-139.

¹⁶¹ Coppieters et al (n 78) 41.

¹⁶² *Ibid* 36-55.

See also Lucie Tunkrova and Pavel Saradin, *The Politics of EU Accession: Turkish Challenges and Central European Experiences* (Routledge 2010).

¹⁶³ I would refer to myself as a pro-partitionist seeing as polarity does not simply represent the segregation of territory; it also obliterates security dilemmas. Horowitz remarked that ‘separating the antagonists—partition—is an option increasingly recommended for consideration where groups are territorially concentrated.’

Donald Horowitz, *Ethnic Groups in Conflict* (2nd edn, University of California Press 2000) 589.

territorial borders to trigger a “postmodernisation” of ethno-national secessionist conflicts.’¹⁶⁴ The EU-either intentionally or unintentionally- failed to utilise its framework during Cyprus’ pre-accession period in a way which could have manipulated discourses on both sides of the island to a greater degree; so what does the future hold for this distressed island and its people, in the EU? Given the political and historical causes of the legal anomalies that have come about as a result of the accession of a divided island into the Union, a legally ‘autistic’, seemingly depoliticised and extremely technical approach of the EU towards this problem is irrational.

¹⁶⁴ Kaymak (n 58) 4.

2. The Democratic Theory of Political Self-Determination & The Turkish Cypriot Community

Secession-the withdrawal from an existing, recognised State and its government- is a bid for independence. It's a term that is highly problematic and at most times considered to have a negative connotation. With secession, you either stand on one side of the fence or the other. The most important questions with regards to secession are: 'why and on what grounds is secession from an existing nation-state justifiable? And 'on what grounds are the existing power and authority justified to force secessionist movement to remain within the realm?''¹ Numerous cases of national struggle for independence and unification of sovereign countries have taken place throughout modern history; for instance, the Belgian independence (1830-1839) and the German and Italian unification (1870s) are popular European examples.² More recent examples of secessionist movements include those that have emerged from the collapse of the communist world. Thus, secession and self-determination are fundamental issues that need to be discussed in terms of political theory.

Political theorists tend to address the tensions between ethnos (the social community) and demos (the political community) within a State; the clash is due to the different roles a citizen will assume within each of these two categories. 'In political theory, this distinction is important because it points to the universal principles of liberal democracy, on the one hand, and the particular claims of socio-cultural communities within the political community, or nation-state, on the other.'³ This problematic relationship has been offered several solutions, including the option of federalism and consociationalism and constitutional safeguards. These solutions, despite being workable, ignore the right of secession and whether it could be possible and justifiable in a given scenario. Evidently, there is no correct answer to this ongoing issue; there are simply options and throughout this thesis it will be

¹Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) VIII.

² Ibid.

³ Ibid X.

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argued that the Turkish Cypriot community has the moral and political right to secede from the RoC according to Harry Beran's democratic theory of political self-determination for a new world order. So, how does one decide whether it is right or wrong for a secession to take place? What events will make secession acceptable and expectable? Ethnic cleansing and genocide? the suspension of human rights? or simply the political desire of a community?

Beran's theory is 'formulated as a theory of moral right of political self-determination and secession that is consistent with democratic principles.'⁴ Beran believes that a comprehensive normative theory of political borders needs to provide a theoretical resolution for the peaceful settlement of all border disputes; 'a theory of rightful secession can fully be plausible only as part of a comprehensive normative theory of borders.'⁵ The two imperative theories of morally rightful political borders are the nationalist and democratic theory of self-determination. The nationalist theory suggests that the right of political self-determination belongs to a nation.⁶ This thesis will be focusing on the latter option which states that democratically self-defined territorial groups possess the right to political unity- so long as it is voluntary. It is hard to argue that the democratic theory of self-determination has a lot of admirers and not many have made an attempt to elucidate its true colours as a theory for determining political boundaries. Nonetheless, the theory is about human rights; it is about the freedom of the normal adult to personal self-determination and classifies the State⁷ as a servant to individual citizens.⁸

This theory will use democratic principles to verify the rightfulness of the political boundaries and the unity of the State that tends to be taken for granted- such as the TRNC. A group has the right to freely determine its political status; the right of self-determination is definitely not a claim right; it is a liberty right as argued by Beran. Thus, other entities and organisations are obliged to respect this right although they are not obliged to help and nurture the exercise of this right. *Ipsa facto*, the EU is not

⁴ Harry Beran , 'A Democratic Theory of Political Self-Determination for a New World Order' in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) 33.

⁵ Ibid.

⁶Michael R Tomz, 'The Morality of Secession' (MPhil Thesis, University of Oxford Faculty of Social Studies 1994) 44.

⁷ A State in this context is a sovereign political entity such as the U.K., France, Germany. It can also refer to those that are also member to a confederation such as the EU.

⁸ Beran (n 4) 34.

obliged to lend the TRNC a helping hand. There are a number of ways in which this right may be exercised; the group may decide to remain part of the State they are already part of; it can decide to slightly detach itself from the existing State, such as form a federation/confederation; or it can completely secede and even join another State. The two options which will occupy a position in this thesis are the concepts of secession and loose relationship with the existing State.

The central argument throughout this thesis is that the TRNC should be recognised internationally; hence, the secession of northern Cyprus should be permitted. As mentioned earlier, secession is a voluntary withdrawal of a substantial part of a State's people from the existing State and its government. These people leave with their territory and the remainder of the territory stays within the authority of the existing State. Partition can be distinguished from secession; the former takes place when an existing State dissolves in to two or more novel States. The case of Cyprus can fall within both categories; however, this thesis will classify the situation on the island as secession.⁹ Unfortunately, it tends to be rare for such territorial changes to come about in a peaceful manner; most examples of secession are triggered by violence, as in the case of Cyprus.

2.1. The Right of Secession

Secession is a highly neglected concept in the real world and in the world of literature. Not much has been written in political theory supporting the idea of secession. The liberal political theory is one perspective which formulates an answer to the question of whether secession is possible or not and under what conditions. A liberal normative right to secede; what does this mean? In other words, the right to not only leave the existing State but to also to leave it with territory. The liberal perspective can be divided into two; the first is less permissive of secession, whilst the second is more permissive.

The first branch argues that the right to secede is quite restrictive since the seceding community would be taking a section of the rump State's territory- which requires a robust justification since it is a huge sacrifice; hence, the aim of cultural preservation and self-determination of people are not enough to justify such a move. This branch of the liberal perspective contends that there is a moral duty to maintain existing

⁹ Ibid 35.

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States despite the fact that the right to secede does exist.¹⁰ This right should only ever be utilised if moral wrongs were inflicted upon the separatists; thus, this is what is called ‘remedial secession’. Allen Buchanan’s theory identifies the wrongs that give way to secession; these include ‘unjust conquest, exploitation, the threat of extermination and the threat of cultural extinction.’¹¹ It should be noted that the Turkish Cypriot community would be eligible for secession (as a result of the atrocities they suffered from 1963-1974 on the island) if Buchanan’s criteria was set as the litmus test for such a right. Not only does the Turkish Cypriot community satisfy the criteria of the less permissive liberal view regarding secession, but also the criteria of the more permissive view.

In the more permissive view, there is a right of secession and even a right of unilateral secession. So, a group of people, who believe that they are a distinct community with their own culture and traditions and are extensively prominent in a separate region of a State, can justifiably secede from a nation-State in a democratic manner. Buchanan believes that ‘the liberal state is the agent of the people’; so, albeit ‘the right to territory is vested in the state’, the liberal democratic theory argues that the State is not the right-holder.¹² As it stands, ‘all rights the state holds, including the right to the state’s territory, must be derived from the people whose agent it is.’¹³ Overall, if a considerable part of a State’s inhabitants want to detach themselves from the agency of the existing State, then they can end the agency connection and remove themselves from the State with their territory.

Basically, the right to secession should be treated in the same way as no-fault divorce. This means that ‘if the parties want to split, then they have the right to do so, provided this does not inflict certain disadvantages (not *all* disadvantages) on the other party.’¹⁴ Therefore, the wrongs suffered by separatists do no matter; the right of secession is founded on the right of free political association. Indeed, this sounds rather straightforward in theory, yet, it will not be this simple in reality. Is the more liberal perspective too permissive?

¹⁰ A supporter of this view is Allen Buchanan.

¹¹ Lehning (n 1) 2.

¹² Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991) 108-9.

¹³ Beran (n 4) 36.

¹⁴ Lehning (n 1) 3.

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Beran's normative theory of political borders aims to provide a theoretical solution for the peaceful resolution of territorial border disputes.¹⁵ The best arguments in favour of secession are those which are linked to the desire of groups to protect their national identity and to govern themselves. Understandably, it could be disputed that the existence of cultural differences may be a good enough reason to demand separate political association, but it is not a good enough reason to demand a new State. Linda Bishai rather robustly argues that the liberal theory does not succeed in portraying secession as a moral right or even as a practical solution for intrastate conflicts. She argues that secession is simply a temporary solution to problems of political consent and

its fatal flaw is not that it shatters the sanctity of the territorial state but that it perpetuates a framework in which territorial sovereignty is seen as the only means of protecting disaffected groups. It simply recreates the original problems inherent in state structure, and the use of the concepts of sovereignty and national identity as given-one of the inadequacies of liberal theory-prevents us from seeing another solution to intrastate conflict.¹⁶

Bishai argues that identities are likely to change and individuals can identify with a number of different identities simultaneously or consecutively. Therefore, the protection of collective and individual rights will only be possible through the adoption of a solution which is flexible enough to accommodate such interrelated and changeable identity possibilities; meaning, the solution should not be based on territory.¹⁷ This argument points in the direction of multination federalism; hence, States which welcome national diversity. Will this be a good enough solution? Dowding has quite interestingly pointed out that it is isolation which sustains culture and not political separateness/federalism.¹⁸

Will Kymlicka argues against federal systems; he believes that they are 'inherently unstable'.¹⁹ Although I do not personally agree with his reasoning, it is rather fascinating; he claims that federalism's components respect ethno-cultural differences and allow shared rule to take place and as a result, this encourages

¹⁵ Ibid.

¹⁶ Ibid 5.

¹⁷ Linda Bishai, 'Altered States: Secession and the Problems of Liberal Theory' in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) 102.

¹⁸ Keith Dowding, 'Secession and Isolation' in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) 72.

¹⁹ Lehning (n 1) 5.

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national minorities to seek secession. The freedom of self-governance given to these national minorities strengthens their national identities and political confidence. The more the federal system lodges national minorities, the more it will make them believe that they are different and separate peoples with natural rights of self-government, whose membership in the larger State is 'conditional and revocable.'²⁰ Thus, Kymlicka believes that even if restrictive autonomy is granted, federalism is too liberal. For instance, on the one hand, if limited autonomy is granted to the national minorities, then the nationalist leaders will be fuelled with ambition to strive for their own nation-State; on the other hand, if a lot of freedom is granted, then it will trigger the idea that the minority is better off being completely independent. So, while multinational federalism allows national minorities to govern themselves without having to secede, it simultaneously makes secession more attractive and attainable.²¹ My belief is that it is the very lack of autonomy and the existence of suppression that triggers the desire for secession.

The Turkish Cypriots and the Greek Cypriots were living together in Cyprus since 1571, following the Ottoman conquest of the island and it was only from 1960 onwards (the 1960 Constitution of Cyprus was based on two-sided federalism) that the Turkish Cypriots were being oppressed. This oppression gradually led to the massacre of the Turkish Cypriots, which in turn triggered the Turkish intervention in 1974. It was the fact that the Turkish Cypriots were unwanted by their Greek Cypriot counterparts that encouraged the idea of secession.

Paul Gilbert contends that national secession depends on the existence of a *real* community and not an imagined one. His argument is founded on 'civic nationalism'; thus, a nation is a group of people who obtain their communal character from shared political institutions. This means that a nation may be a group already organised into a State or similar polity, like the Turkish Cypriots were in 1960, or they may share a common desire to be organised in such a way. 'Civic nationalism may seem to be best founded on a communitarian basis, that is to say, on the basis of the right to independent statehood of a community created by political

²⁰ Will Kymlicka, 'Is Federalism a Viable Alternative to Secession' in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) 111.

²¹ Ibid.

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institutions.²² Gilbert's criterion is that the secessionist group needs to be a community that is suitable for statehood and 'not already part of a wider such community that is the primary focus of communal attachment.'²³ Therefore, only if there is such a community can there be a claim to secede; this means that the belief that such a community exists, or the wish that there were such a community, does not suffice as to fulfil this criterion. The Zurich Agreement of 1959 between Turkey and Greece established a bi-communal constitutional framework for Cyprus which recognised the equality of the two communities on the island in numerous matters and a large degree of political and cultural distinctiveness.²⁴ For instance, the President of the Republic in 1960 was a Greek Cypriot, whilst the Vice-President was a Turkish Cypriot and the latter had the right to veto in order to ensure political equality was in effect. Ergo, the Turkish Cypriot community even satisfies the communitarian criteria for secession.

2.2. The Democratic Right of Self-Determination & Secession

Since individuals have the right to free association, which includes the right to establish territorial communities on territory they legally occupy, they have the right of habitation. A territorial community is a social group that has a common habitat, is made up of many families and is able to maintain itself as an entity. The members of this group should have a sense of belonging, they should feel like they are one and unique from other communities. They can be small social groups, such as villages, or large ones such as nations. This definition of a territorial community does not necessarily flawlessly depict the very meaning of the concept of community; this concept is not a matter of either/or and thus it is not easy to identify which groups actually classify as communities.²⁵ Nonetheless, this abovementioned definition best suits the needs of this research.

What does self-determination require? The practical answer to this would be: a community which is capable of becoming an independent political entity. It must be noted that in order to be entitled to a right, there needs to be a degree of exercisability. Thus, an independent political entity should be able to govern itself,

²²Lehning (n 1) 7.

²³ Ibid.

²⁴CH Dodd, *The Political, Social and Economic Development of Northern Cyprus* (Eothen Press 1993)

²⁵ Beran (n 4) 37.

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Community*

economically maintain itself and potentially defend itself in a war. It goes without saying that the Turkish Cypriot community fulfils all three of these categories as they have been independently functioning since 1983 (with the help of Turkey).

The idea that in order for a community to have the right to self-determination it needs to be able to sustain itself economically is debatable. A community should be able to meet the basic prerequisites of its people if it is going to be a viable independent political entity; what does this mean exactly? And how can this be tested? The test cannot be that the community can support its present population even if it had to be economically self-sufficient. This test is far-fetched as international trade and investment gives communities the opportunity to develop much larger populations than they could possibly support if they were to solely rely on their own resources. Furthermore, the test cannot be that the community can self-sufficiently support *some* of its population as this renders the test insignificant; surely, if a community has some territory and a water resource then it can support some of its community self-sufficiently. Similarly, no State can support its ever-growing community solely with its own resources; communities grow as a result of international trade, investments and membership to organisations such as the EU. According to Beran, it is unrealistic to

suggest the test be that the community can meet at least the basic needs of its present population with the kind of foreign trade and investment it already has. This is implausible, since a number of already independent states, whose right of self-determination can hardly be challenged, fail to meet this test.²⁶

The sole economic viability test that is the most plausible is: a community is economically viable if it can meet at least the basic prerequisites of its population or has a reasonable possibility of achieving this with suitable economic development help from other States. Hence, the test aims to identify whether the community will require external help indefinitely and if so, then the community's right of self-determination is at issue. In most cases, it is hard to fail this test and even if a community which seeks political independence does happen to fail this test, it may be saved by the fact that international justice may demand the benefits of the utilisation of natural resources be shared in a more just manner between the

²⁶ Ibid 38.

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resource-rich and the resource poor-State.²⁷ In Cyprus, there have been recent hydrocarbon findings off the south shores of the island, and as it stands the benefits of these gas reserves need to be equally distributed between the Greek and Turkish Cypriots. Furthermore, at present, Turkey is the primary provider for the TRNC (it is known as Turkey's offspring) and will continue to be until the new State is comfortably trading with the rest of the world. Thus, it is safe to say that the Turkish Cypriot community fulfil the economic criteria of the right of self-determination.

The condition that a community needs to be able to successfully defend itself in combat to qualify for the right of self-determination seems to be a very strange prerequisite in this day and age. Arguably, even the greatest powers cannot successfully defend themselves in a war today, especially if the war is dependent on nuclear missiles. Even if the war is not a nuclear war, existing smaller States will still struggle to defend themselves against larger States without external help. Statehood and the right of self-determination should definitely not depend on such a negative condition; if anything, the condition should be that the new State will not engage in violent attacks on other States and it should help work towards a world free of war.²⁸

Axiomatically, not all the members of the so-called community will be pro-secession. The changing of political borders is a serious issue that needs to be solved democratically. For instance, during the breakup of former Yugoslavia, the majority in Croatia were in favour of secession from Yugoslavia; nevertheless, the inhabitants of the area of Krajina in Croatia, which is mostly made up of Serbs, were predominantly opposed to the idea of secession. As a result, voluntary association can only be determined via the majority principle; hence, a referendum needs to be orchestrated by the community that wishes to secede within their specified territory in order ascertain whether a separation should take place or not. If the referendum results indicate that the majority of the community wishes to change their territory's political status then the community is free to exercise their right to self-determination by seceding. Those who do not wish to secede within this community can also apply the majority principle to decide how to proceed; i.e. they could remain within the State which others wish to secede, or they could even become independent too. The

²⁷ Ibid.

²⁸ Ibid 39.

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majority principle will always terminate a political dispute in a democratic way; 'it maximises the number of individuals who live in a mutually desired political association, an ideal implicit in the right of freedom of association'.²⁹

Overall, the democratic theory of self-determination can be summarised as follows:

1. Adults have the right of self-determination;
2. Territorial communities have the right of habitation so long as they have acquired their territory rightfully;
3. A group, which is a territorial community or community of communities, has the right of political self-determination so long as it is capable of economically and politically maintaining itself as an independent entity. (This right is derived from the two initial rights mentioned above.)
4. If a territorial community is made up of smaller territorial communities then its right of self-determination is derived from the right of the smaller communities as a result of the voluntary association principle. Ergo, 'the right of a smaller community always overrides the right of the larger community of which it is part, if there is a conflict of wishes regarding political boundaries.'³⁰
5. The majority principle needs to be utilised in order for a community to determine its political status. In most cases, a referendum needs to take place unless the demands of the community are so clear that a vote is rendered unnecessary.
6. No-fault secession is possible. The exercise of the right of self-determination requires the fair division of the assets and debts of the existing State.

In sum, the reason this theory is called the democratic theory of political self-determination is because it is based on the right of personal self-determination and requires the majority principle to resolve territorial/political polemics.³¹ Furthermore, it is a theory of rightful political borders of populated regions and not unoccupied locations. The overall aim of the theory is to *peacefully* resolve border disputes, which in turn means that this theory does not deal with situations that require justifiable emergency secession; for instance, if people are being slaughtered or there is a genocide taking place in the existing State, a referendum to determine rightful borders does not need to be held in order for them to secede and furthermore in a situation as such, the just division of the assets of the State need not take place.

²⁹ David Gauthier, 'Breaking Up: An essay on Secession' (1994) 24 Canadian Journal of Philosophy 357, 360.

³⁰ Beran (n 4) 40.

³¹ Ibid.

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Without a doubt, the right of self-determination can be overridden by other human rights, and it may be that the exercise of this right is immoral, unjust or even impracticable.³² Interestingly, Beran has even argued that it is sometimes acceptable to permit political independence to those groups which do not possess the right of self-determination.³³ Throughout this thesis it will be argued that Turkish Cypriots in Cyprus do possess this right and this should be acknowledged by the outside players.

Obviously, secession is not the answer to every social conflict and by all means I do not intend to argue that it will ultimately and effectively solve the Cyprus problem. Other options include federalism, consociationalism and minority rights.³⁴ These alternate options tend to be applicable only when a rather small minority is scattered within a State, which in turn makes it near enough impossible for them to secede; so not like in Cyprus where the island is ethnically divided by the Green Line separating the Greeks and the Turks. In some instances, even if the minority does occupy a territory, it may not wish to secede and as a result the best solution would be for a confederation to be set up or the establishment of minority rights.

In 2004, the Annan Plan referendum results indicated that the Turkish Cypriots living in the north of Cyprus desired a confederation/federation on the island, whereas the majority on the island-the Greek Cypriots- did not wish to reunite with the Turkish Cypriots. Thus, the situation in Cyprus is rather difficult to assess and it is going to be even harder to try and fit the Turkish Cypriots into a category within this theory unless another referendum is held either on the entire island or in the north in order to ascertain whether or not the Turkish Cypriots would like to secede or officially rejoin the RoC. Nevertheless, this thesis will presume that the best option for the resolution of the Cyprus conflict is the official recognition of the already established TRNC; this is because the Greek Cypriots are reluctant to welcome back the Turkish Cypriot authorities to their constitutionally assigned posts and the needs of the Turkish Cypriot community will be better addressed if the TRNC is internationally recognised than if they were to return back to an already failed marriage-the 1960 RoC.

³² Gauthier (n 29).

³³ Beran (n 4) 41.

³⁴ J McGarry & B O'Leary, *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts* (Routledge 1993) Chapter 1.

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Albeit the international *fora* believes that the best solution for the Cyprus problem is power-sharing, the reality is that power-sharing would only work on the island if there are almost equally numerous communities living on the land. Power-sharing in 1960 Cyprus led to the oppression and ethnic-cleansing of the Turkish Cypriot community. A federation tends to work well when there are numerous divergent communities, i.e. such as in Germany, and thus the communities can make the most of local autonomy and be part of a larger political and economic entity.

These abovementioned options for deeply divided States are by all means democratic and also allow communities to exercise their right of self-determination. ‘Democracy is a political system which respects the rights of individuals and communities of individuals, and such respect may require limiting majority rule by minority rights, power-sharing and federation in order to avoid the tyranny of the majority.’³⁵ Personally, I believe that secession is the safest option for those who are being suppressed within a State, so long as it is a workable option.

In sum, the democratic theory of self-determination and secession differs from other theories of secession in the sense that the right of secession in the democratic theory of self-determination is far more liberal as mentioned earlier. Other secessionist theorists, such as O.S. Kamanu (1974), Anthony H. Birch (1984) and Buchanan (1991), believe that the moral thing to do is to maintain an existing State, even though they do acknowledge the right of remedial secession.³⁶ Unfortunately, the abovementioned secessionist theorists do not really go into depth about the ‘compatibility of such a highly qualified right of secession with the fundamental principles of democracy.’³⁷ This is where Beran differs; the right of secession is not based on the wrongs endured by separatists but on the right of free political association and therefore his argument is based on no-fault secession.³⁸ So, this in turn means that Turkish Cypriots do not need to justify their desire to secede as they automatically possess the right of self-determination by being a community and are solely exercising their right of free association.

³⁵ Beran (n 4) 41.

³⁶ See Allen Buchanan, ‘The International Institutional Dimension of Secession’ in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005)

³⁷ Beran (n 4) 42.

³⁸ Ibid.

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Evidently, secession comes with a great price and it is a huge risk to take; in fact, secession could be classified as being an inconvenience at large. Nonetheless, those who wish to secede tend to have a very robust reason for wanting to take this step. In the case of Cyprus, the issues which have caused the island to separate into two ethnically divided territories have not been eradicated by negotiations which are still ongoing; this consequently proves that sometimes the most peaceful option is separation, despite the disruption this may cause.

The democratic theory of self-determination, unlike the libertarian theories of secession initiated by Ludwig Von Mises³⁹, aims to be well-matched with strong States ‘with a duty of aid to fellow citizens in need, and with principles of international distributive justice which libertarians reject.’⁴⁰ *Ipsa facto*, this gives the EU and the UN an important role to play in the Cyprus problem and this will be discussed throughout the chapters of this thesis.

Existing States can respond to both internal and external challenges to their territorial integrity with force, and this is supported by international law. However, the democratic theory of self-determination claims that only external threat to a State’s territorial integrity should be dealt with force by the State. Internal challenges to the State’s integrity should be permitted according to this theory of secession.⁴¹ It could be argued that this is not necessarily a black or white issue; some internal attacks to an existing State could be extremely nasty and deserve a forceful response, such as the Kurdistan Workers’ Party (PKK) terrorist attacks that are constantly occurring in Turkey. Since 1984 this terrorist group has been waging a violent struggle against the Turkish State for cultural and political rights and self-determination for the Kurds in Turkey. The original ideology of the PKK led by terrorist Abdullah Ocalan was to establish an independent Marxist-Leninist State in Turkey which was to be known as Kurdistan. However, they have adopted a new political platform of democratic confederalism which is heavily influenced by the libertarian socialist philosophy of

³⁹ Ludwig von Mises, *Nation State and Economy: Contributions to the Politics and History of our Time* (New York University Press 1983) 34.

⁴⁰ Beran (n 4) 42.

⁴¹ *Ibid.*

communalism.⁴² The strategy adopted by this terrorist group has been brutal, with hundreds of civilian deaths and thousands of soldiers killed across the country over the years as result of suicide bombers and Kurdish guerrilla attacks.⁴³ The situation in Cyprus however, is completely different. The Turkish Cypriots have never been violent against the Greek Cypriot majority on the island; they were always the victims of fierce attacks and the targets of elimination. In fact, the Turkish Cypriots never once instigated internal force for the purpose of self-determination throughout the history of the island; the 1983 act of self-determination came as a result of the 1974 intervention on the island and the events which followed.

2.3. The Theoretical Context –Political Self-Determination

Despite how simple and unambiguous the right of self-determination sounds in the abovementioned section, the reality is different. It is imperative to differentiate between ideal world theory and real world theory of politics. According to the former theory, the communities of the globe all tend to have a general consensus with regards to the moral principles of the right of self-determination and secession. ‘It is important that agreement on morality, and compliance with it, is assumed only for the part of morality directly relevant to self –determination. For this means that ideal world theory is not as remote from reality as it would be if it assumed universal agreement on, and compliance with, all moral principles.’⁴⁴ The importance of distinguishing between these two theories will be elucidated once the objections to the democratic right of self-determination theory are explained below. The point to note is that there are objections to the theory which only apply to it in a ‘real world’, whilst others only apply to it in an ‘ideal world’.

As mentioned above, in an ‘ideal world’ the communities of the world behave in a way which is in line with the agreed morality principles regarding self-determination; this is not the case in the ‘real world’. In real world theory, it could be argued that either the States are left with no other option but to act in an immoral

⁴² Yvo Fitzherbert, ‘A New Kind of Freedom Born in Terror’ *Open Democracy* (26 August 2014) <<https://www.opendemocracy.net/arab-awakening/yvo-buxton/new-kind-of-freedom-born-in-terror>> accessed 24 May 2016.

⁴³ Constanze Letsch & Nadia Khomami, ‘Turkey Terror Attack: Mourning After Scored Killed in Ankara Blasts’ *The Guardian* (11 October 2015) <<http://www.theguardian.com/world/2015/oct/10/turkey-suicide-bomb-killed-in-ankara>> accessed 22 May 2016.

⁴⁴ Beran (n 4) 43.

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way; or States can act in a moral way but they also have to take into consideration that there are disagreements among States as to what morality necessitates and that States habitually act from self-interest rather than morality.⁴⁵

The end of World War II brought with it numerous cases of declarations of independence. The augmentation in the number of independent States can be correlated to the fact that the colonies of the Western Powers gained independence. Furthermore, the collapse of the Soviet Union and Yugoslavia, the partition of Czechoslovakia and the creation of Bangladesh via secession also increased the number of new States. Today, there are many countries which contain separatist movements; for instance in Europe, Albania, Spain, Belgium, Bulgaria, Bosnia Herzegovina, Denmark, France and Italy are just a few examples where such movements are active. Paradoxically, whilst independence movements are increasing, so are integration movements. Sovereign States today are seeking political and economic integration. The EU is by far the most powerful example of this claim. 'There are theoretical reasons to think that both trends are in accordance with the needs of contemporary humanity.'⁴⁶

Robert Dahl's theory in 1970 regarding dispersing sovereign State power to local and international government, argues that by devolving power to local governments, a more robust sense of local community is established and that it is more beneficial to make political decisions at the lowest level of political organisation which has the authority to make them.⁴⁷ At the same time, a more powerful international government reduces the possibility of war, helps with sustainable development, protects the environment, universalises laws and augments international justice, manages international business and controls natural resources.⁴⁸ Dahl's 'Chinese boxes model' of political organisation perfectly sets out the most desirable levels of government; world, continental, State, provincial and local.⁴⁹ So, in an ideal world, the whole of humanity would belong to one set of nested boxes; however, the reality is far from this, as the criterion of rightful borders will clash with the criterion of good borders.

⁴⁵ Beran (n 4) 43.

⁴⁶ Ibid 44.

⁴⁷ Robert A Dahl, *After The Revolution?* (Yale University Press 1972)

⁴⁸ Beran (n 4) 44.

⁴⁹ Dahl (n 47).

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(T)he number of levels of government need not be equal throughout the world; the borders among communities may be determined by different considerations in different parts of the world; a state in one continent may wish to belong to the continental government of a neighbouring continent; and there is no guarantee that all communities will agree to belong to one world-wide system of nested boxes.⁵⁰

In reality, the structure of nested boxes tends to be created according to certain principles and facts such as; the principle of subsidiarity, the principle of economy-it should not be expected of people to spend a huge amount of time on making political decisions and taking part in political activities-, natural geography, cultural homogeneity and inclusiveness, accessibility of resources and externalities.⁵¹ Nevertheless, two things are a must in order for the communities of the world to be able to comfortably exercise their right of self-determination; 1) a strong international legal system and court is a necessity in today's world, such as the one belonging to the EU; 2) stronger international peace-keeping forces. The 'Chinese boxes model' of political organisation is meant to be compatible with the idea that the number of genuine nation-States will most probably increase within the next century and thus self-determination will continue to be the most imperative type of political organisation, despite the fact that there is currently an augmenting interest in transferring State powers to international organisations.⁵²

According to ideal world theory, communities abide by moral prerequisites relevant to rightful political borders, which mean that they respect the right of self-determination, the rights of minorities and the demands of international justice. Nevertheless;

ideal world theory need not assume that people always choose the best possible borders. Nor need it assume that the whole of humanity agrees to be part of one all-embracing political system of nested boxes. This is so because choosing borders other than the best, and choosing not to be a member of an all-embracing political system, need not be morally wrong.⁵³

⁵⁰ Beran (n 4) 45.

⁵¹ Ibid.

⁵² Ibid 46.

⁵³ Beran (n 4) 46.

2.4. Objections to the Theory of Democratic Right of Self-Determination

There are criticisms which are directed at the democratic theory of self-determination even in its ideal world state. The first criticism is that the democratic theory of self-determination ‘combines incoherently principles that belong to different stages in the historical development of the functions of political boundaries.’⁵⁴ This right of self-determination should solely be part of a world which is made of nothing but ‘genuinely sovereign states.’ In this kind of world, rightful political borders can be determined by the criterion of the right of self-determination; however, if humanity is governed by the ‘Chinese boxes model’ and thus is made up of various levels of government (without fully sovereign entities), then rightful political boundaries should be determined by the majority principle without resorting to the right of self-determination.⁵⁵ So, since Cyprus belongs in Europe and is part of the EU, Cypriots are governed by a number of levels of government and therefore the borders in Cyprus should be determined by the majority principle.

This criticism can be dismissed. Firstly, prior to holding a referendum in order to ascertain whether or not a territory will be changing its political borders, it has to be determined who is entitled to partake in the voting. Beran exemplified the Northern Ireland conflict in this context; both sides of the Northern Ireland conflict believed that a solution to the conflict could only be achieved via democratic means, such as by a referendum. On the one hand, Sinn Fein, the political wing of the Irish Republican Army, argued that all of the citizens of Ireland should be given a vote; on the other hand, the British Government and the Unionists of Northern Ireland believed that solely the citizens of Northern Ireland should have a vote as the outcome would predominantly concern them. According to the democratic theory of self-determination, the fact that individual communities possess the right of self-determination provides a theoretical explanation for supporting the idea that only the inhabitants of Northern Ireland should be given a vote.⁵⁶ This consequently translates into the idea that a referendum needs to be held in Northern Cyprus with regards to secession in place of a referendum on both sides of the island in order to ascertain whether or not the island should reunite.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid 47.

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The second objection to the critique concerning the theory is that it simply assumes that the whole of humanity accepts one set of ‘Chinese boxes’ and that the only decisions which require making concern where the internal divisions within the largest box should be located. The counterargument to this assumption is that if human beings have the right to determine their political relationships, then groups of individuals can easily decide not to be part of a single global system of ‘Chinese boxes’.⁵⁷ For instance, the Swiss are not part of the EU or the EEA and do not have the desire to join; Turkey, as a Muslim-majority State, may wish to leave the UN or NATO which are organisations predominantly dominated by Christian-majority States. Thus, the argument here is that even though in an ideal world it would be best for the whole of humanity to belong to one system of nested political boxes, the truth is that individual territorial communities can decide whether they would like to be part of this nest or not; *ipso facto*, the system is built by individuals who have the right to not be part of a single global structure.

Michael Walzer has argued that in order for political communities to have the right of self-determination, they need to have rallied their own people and

made some headway in the ‘arduous struggle’ for freedom. The mere appeal to the principle of self-determination isn’t enough; evidence must be provided that a community actually exists whose members are committed to independence and ready and able to determine the conditions of their own existence.⁵⁸

Beran does not believe that a strenuous struggle is a prerequisite to prove that a community exists; a community’s right of self-determination should not be tested via its ability to prove its commitment to independence.⁵⁹ I do not completely agree with Beran’s assertion; without determination, persistence and will-power, secession should not take place as it is a right which is accompanied by consequences and responsibilities. Nevertheless, Walzer argues that evidence needs to be provided in order to prove that a community exists; Beran rebuts this by stating that:

It is not true by definition that a group of people who have a common habitat and wish to secede from their existing political entity are a distinct

⁵⁷ Ibid.

⁵⁸ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Revised, Basic Books 2006) 93.

⁵⁹ Beran (n 4) 48.

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community; however one could take it as evidence that is often sufficient, in practice, to regard the group as being a community.⁶⁰

Beran's rebuttal is strong; since there is a right of association, and if the group satisfies the majority of the criteria required in order to be classified as a community, then the group should be labelled as a community.

The second criticism regarding the democratic right of self-determination is directed at the removal of territory from the existing State territory. When a community chooses to secede, it will be taking it with its land which is possibly militarily, historically or economically crucial to the rump State. Albeit in the ideal world theory's serene world militarily essential territories are non-existent, the real world is unfortunately not as peaceful and this could alter the right of self-determination. For instance, if the separatist community takes with it a proportion of territory which is essential for the defence of the rump State contra invasion, then the rump State could try and strike an agreement with the new State in order to assume joint control over the said territory; nonetheless, if the separatists reject this request and the rump State faces a genuine threat of attack, then the rump State's right to peaceful existence can countermand the separatists' right of self-determination.⁶¹

In an ideal world, historically and economically imperative territories can be lost as a result of secession; nevertheless, this isn't necessarily a deterrent for secession since States are *obliged* to respect the sentiments of other States. Even in the real world this isn't a good enough reason to rule out the right of secession of a community. Indeed, border transgressions are difficult and at times impossible. 'The simple fact is forgotten when it comes to monuments or sites, the study of which at all levels necessitates the transgression of physical, conceptual, temporal and cultural boundaries. This is empathetically so in the case of Cyprus...'⁶² 'The funerary shrine of Umm Haram, a holy woman of Islam, at the Mosque of Hala Sultan Tekke near Larnaca'⁶³ in the Southern part of Cyprus, is the most important Islamic pilgrimage site on the entire island. In northern Cyprus, situated on the north-eastern point of the

⁶⁰ Ibid.

⁶¹ Beran (n 4) 49.

⁶² Nassos Papalexandrou, 'Hala Sultan Tekke, Cyprus: An Elusive Landscape of Sacredness in a Liminal Context' (Academia.edu) <https://www.academia.edu/7137386/Hala_Sultan_Tekke_Cyprus_An_Elusive_Landscape_of_Sacredness_in_a_Liminal_Context> accessed 22 May 2016, 252.

⁶³ Ibid. Abstract.

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island in Karpaz, stands the sacred Apostolos Andreas Monastery; the monastery is dedicated to Saint Andrew and it is a crucial site for the Cypriot Orthodox Church.⁶⁴ Both of these sites are considered as being holy and important by the two communities on the island and as a result since 2004-the opening of the borders on the island-, the Turkish Cypriots have been welcomed by the Greek Cypriots to visit the Mosque, whilst the Greek Cypriots have been welcomed by the Turkish Cypriots to visit the Monastery. Thus, cross-cultural sharing is possible in independent States, meaning that such issues should not prevent the exercise of the right of self-determination.

The existence of natural resources tends to make a territory essential to the economy of a State. The issue regarding natural resources and secession is near enough solvable in the same way as the abovementioned issue of historically and economically important territories; just division of the assets of the rump State tends to be the answer to the problem. For instance, the theory of international distributive justice asks resource-rich States to share the benefits of exploiting their natural resources with resource poor-States; as a result, if the resource rich region is taken away by the separatists, then they will be obliged to distribute the benefits of exploiting such resources with the rump State. This will definitely be the case if the distributive justice theory supports the idea that existing States have complete sovereignty over their natural resources and therefore justice will require the new State to share the benefits with the rump State in a fair manner. Well, in the ideal world, agreements as such will be formulated and carried out with the assistance/monitoring of international organisations that both the rump and new State have joined-i.e. the EU.⁶⁵

Axiomatically, the real world is different; the reality is that new States-which have taken the only natural resources of the rump State- could decline to share the profits or breach an agreement demanding such sharing. As a result, a moral argument for resisting secession could arise. This is due to the fact that States are considered to have absolute sovereignty over their natural resources and this sovereignty is

⁶⁴ Whatson-Northcyprus, 'Apostolos Andreas Monastery, Karpaz, North Cyprus' <<http://www.whatson-northcyprus.com/interest/dipkarpaz/andreas.htm>> accessed 23 May 2016

⁶⁵ Beran (n 4) 49.

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exercised on behalf of all of the members of the State.⁶⁶ So how does this situation apply to Cyprus? The hydrocarbon findings off the south coast of Cyprus in 2011 are challenging the current parameters of the Cyprus problem alongside those of regional politics. The *de facto* Greek Cypriot RoC has decided to commence exploiting the offshore reserves; any exploitation is being sincerely challenged by the Turkish Cypriot authorities and Turkey.⁶⁷

This is yet another regional matter related to the unresolved Cyprus problem that has placed the EU in a rather uncomfortable politico-legal situation; the issue pertaining to the right to explore and exploit the hydrocarbon findings around the island. The Union argues that according to EU *acquis*, which is in line with international law, the RoC ‘has full rights to energy exploration within its offshore domain of jurisdiction’⁶⁸ and that sub-national entities of a Member State do not possess the legal instruments to investigate gas reserves. If this interpretation of the law were to be implemented, then the Greek Cypriot community would guarantee monopoly access to the hydrocarbon findings. The Greek Cypriot administration has also claimed that according to the legal requirement, the Turkish Cypriots will be left outside of any agreements concerning the gas reserves if the Turkish troops continue to stay on the island and if the Turkish Cypriots do not join the RoC by placing themselves under its legal regime.⁶⁹ Automatically, this portrays the image that the EU is not in favour of the theory of international distributive justice or the democratic right of self-determination theory- whether it is in its ideal world theory form or in its real world theory form. The correct approach for the EU to take in a situation as such is to encourage the just division of the benefits of exploiting these gas reserves in Cyprus since the northern part of the island is resource poor in comparison to the south. Turkey and the Turkish Cypriots, pursuing a purely political argument, claim that since the latter are inhabitants of Cyprus and the co-owners of the island in accordance with the 1960 RoC Constitution, they have equal

⁶⁶ Ibid 50.

⁶⁷ Hubert Faustmann, ‘Hydrocarbon Findings off the Coast of Cyprus: Showdown in the Eastern Mediterranean or a Chance for Local and Regional Reconciliation?’ (Academia.edu) <https://www.academia.edu/17600796/Hydrocarbon_Findings_off_the_Coast_of_Cyprus_Showdown_in_the_Eastern_Mediterranean_or_a_Chance_for_Local_and_Regional_Reconciliation> accessed 21 May 2016.

⁶⁸ Ibid.

⁶⁹ Ibid.

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rights to the natural resources of Cyprus; even though the Turkish Cypriots have chosen to secede (although unsuccessfully), they are still entitled to the benefits of these reserves. In the eyes of the Turkish side, the political argument resonates stronger when reference is made to the fact that it was the Greek side which rejected the Annan Plan in 2004 and not the Turkish side. Paradoxically, the Turkish Cypriot authorities and even Turkey have suggested that the RoC can keep the benefits of the reserves and exploit the reserves as they wish if the TRNC is given recognition.⁷⁰

Unfortunately, the EU has caused a perilous acceleration of pugnacious rhetoric and has triggered Turkey to move its warships in the environs of the gas reserves.⁷¹ Obviously Turkey has taken the issue too far.

From an EU perspective, this entire episode presented an unprecedented oxymoron. Rather than moving in the direction of conciliatory cooperation and solidarity, as the process of European integration intends, one saw an EU Member State and an acceding state clash around polarised legal and political approaches to the issue of energy exploration.⁷²

This un-European behaviour- triggered by the quarrel between the EU's and the Greek Cypriot side's legal argument versus the Turkish and Turkish Cypriot side's political argument- has been paused for the time being; consequently, this has also paralysed the exploitation and exploration of the gas reserves on the island. As the EU has classified energy security matters as one of its priorities-especially since the Ukraine crisis,⁷³ which makes the transfer of energy resources from the eastern Mediterranean to Europe more desirable, given the current high dependency on Russian gas- there is still space for EU involvement in the Cyprus conflict. The development of the Southern Corridor and new projects in Turkey and Cyprus could make the region into a key hub for European energy markets. Nonetheless, without a settlement between the two conflicting parties on the island, polarised legal and political perspectives originating from the structure of the Cyprus problem will

⁷⁰ Harry Anastasiou, 'Cyprus as the EU Anomaly' [2009] 23(2) Global Society 129

⁷¹ Anshel Pfeffer, 'Turkey to deploy warships over gas dispute with Cyprus' *Haaretz* (Israel, 25 September 2011) <<http://www.haaretz.com/news/diplomacy-defense/turkey-to-deploy-warships-over-gas-dispute-with-cyprus-1.386659>> accessed 21 May 2016.

⁷² Anastasiou (n 70) 143.

⁷³ Commenced in 2013.

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continue to arise and the EU will *ad infinitum* fail to repair this anomaly through its legal structure.⁷⁴

Returning back to the criticisms of the theory of democratic right of self-determination; the third argument has been that this theory will give way to the creation of too many new States which will in turn make it difficult to govern mankind in a uniform manner. For instance, a UN with thousands of members could ‘multiply by scores the number of states that could not effectively control their own affairs and would make international policy formation even more difficult than it is now.’⁷⁵ Indeed, this theory will allow minorities in States to potentially form their own States; moreover, it is often assumed that other peoples which are not best characterised as being nations as they are culturally too varied, will also gain the chance to establish their own States.⁷⁶

These two critiques of the theory can easily be revoked. The augmentation in new States can be controlled by two factors according to Beran; 1) the democratic right of self-determination is only available to communities which will be able to function as independent States and thus, this is a form of limitation; 2) even if a community meets the requirements demanded by this right, it may choose to remain as a member of a greater political group and simply opt for something similar to a loose confederation with the State or provincial status within a State or even separate local status within a province.⁷⁷ The reason for this is axiomatic; the economic benefits that come with remaining part of an already stable and established State are much greater than those which come with joining a newly established State. At the same time, by remaining loosely attached to the existing State, the community would obtain the right to control its own internal affairs in some shape or form and it would gain more recognition as a community in the international field.⁷⁸

If the democratic theory of self-determination was utilised in the early 1990s in the Former Yugoslavia, then some of the borders of the republics of the Former Yugoslavia would have been redrawn; for instance, numerous Serbian communities

⁷⁴ Anastasiou (n 70) 143.

⁷⁵ Beran (n 4) 50.

⁷⁶ For instance the Bougainvillians of Papua New Guinea.

⁷⁷ The choice would ultimately depend on the size of the community in question.

⁷⁸ Beran (n 4) 50.

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in Bosnia Herzegovina and Croatia would have probably joined Serbia, whereas some Croatian communities in Serbia and Bosnia Herzegovina would most likely have joined Croatia. So the idea that this theory would lead to the increase in new States is true; nevertheless, these new States did come about even without this theory being utilised. If the theory was taken on board then there would have been ‘a rump state of Yugoslavia and independent states of Slovenia, Croatia, Macedonia and Bosnia Herzegovina, but with borders considerably changed by peaceful means, to reflect the wishes of those living in these lands.’⁷⁹

Undoubtedly, the EU would have probably preferred to have had the Former Yugoslavia as one Member State instead of seven separate Member States;⁸⁰ however, it could be argued that it would be harder for the EU to manage one Member State with drastic internal problems than individual smaller States which are peaceful. The same could be argued with regards to Cyprus; it would be a simpler task for the EU-in relation to the uniform application of *acquis* and the elimination of the possibility of future aggression on the island- if Cyprus is accepted as two divided States.

Evidently, if Cyprus reunites, then the economically troubled island will breathe. The RoC has miraculously come back from the brink of economic disaster; nevertheless, even though the south of the island has erased its deficit, the RoC’s economy will only rocket if reunification takes place. A recent study by the Cyprus Centre of the Peace Research Institute Oslo (PRIO), predicts massive financial benefits for Cyprus if the island reunifies; for instance, in the first five years, the gross domestic product (GDP) will increase by just under €5 billion and by €10bn within twenty years. The GDP per capita will also increase drastically- ‘Cypriots will see their income increase by about €1,700 in the first five years alone.’⁸¹

Albeit reunification would up a huge dynamic market in Cyprus, the question is, does this fact override the right of self-determination of communities? The answer is not black or white; different theories of morality have different answers for this

⁷⁹ Ibid 51.

⁸⁰ Seven States: Bosnia Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia and Slovenia.

⁸¹ Helena Smith, ‘Time for Cyprus’s Reunification Has Come-But Erdogan Holds the Key’ *The Guardian* (Nicosia, 30 October 2015) <<http://www.theguardian.com/world/2015/oct/30/cyprus-reunification-erdogan-economic-gains-settlement-election-turkey>> accessed 20 May 2016.

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question. But, my argument is that the right to better living standards is a liberty right which does not override the right of self-determination if the standard of living is not ridiculously poor. Walzer has quite rightly argued that certain human rights may be overridden by consequences (if they amount to imminent disaster.)⁸² If for instance, the moving of a community or the prevention of secession of a community is necessary to lessen starvation in the State or to decrease life threatening pollution, then this would be acceptable; right to life and health is a greater right than the one of self-determination. Thus, since the living standards of the Greek Cypriots have now improved, the right of secession of the Turkish Cypriot community still exists.

It has been argued that it is simply ‘a recipe for war’ to ascribe the right of self-determination and secession to every community.⁸³ David Miller calls this the ‘Balkan objection’.⁸⁴ This objection however does not distinguish between the morally justified and the morally unjustified rejection of the exercise of the right of self-determination and secession. It does not make sense to reject the right of secession simply because the rump State will unjustifiably deny its occurrence with the use of force. First and foremost, it is crucial to determine whether or not a right of secession/self-determination exists for a community prior to deciding under which conditions its exercise can be justifiably denied by others. For instance, according to the democratic right of self-determination the Slovenes had the right of secession from Yugoslavia, even if they could predict that such secession would crumble Yugoslavia. This meant that the rump State’s attempt to stop the secession by force would have been unjustified. However, Beran does claim that if the Slovene’s were aware that their secession and the disintegration of Yugoslavia would trigger a horrific war in Europe then they should have postponed their secession.⁸⁵

Another objection to the right of self-determination and secession is that the right could potentially be used as a threat by the community against the rump State in order to obtain ‘unfair benefits’. Obviously, this is not moral; however, it should be

⁸² Walzer (n 58) See Chapter 16.

⁸³ Beran (n 4) 54.

⁸⁴ David Miller, ‘In Defence of Nationality’ (1993) 10 *Journal of Applied Philosophy* 3, 12.

⁸⁵ Beran (n 4) 54.

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noted that the very existence of this right is actually enough to deter the rump State from treating the community unjustly.⁸⁶

Unfortunately, the Turkish Cypriot community have simply been denied the right of secession. The international forum believes that the best solution to the Cyprus problem is either the establishment of a federation or perhaps a confederation. So, according to the outside players, the Turkish Cypriot community can exercise their right of self-determination- so long as it does not exceed the demand for a confederation.

If the 'real world' remotely resembled the 'ideal world', then the limitations on the exercise of a democratically based right of self-determination would be a lot less. The collapse of communism and the end of the Cold War temporarily bridged the gap between the 'real world' and the 'ideal world'. Today, even though secession is not encouraged, it is somewhat accepted and tolerated; for instance, after years of strife and violence in Kosovo the world intervened in 1999 and thereby removed Belgrade's governance over Kosovo and placed it under UN interim administration until 2008- when Kosovo declared its independence. Kosovo's fate reflects both the 'ideal world' and 'real world' with regards to the right of self-determination. The fact that five EU Member States-Greece, Cyprus, Romania, Slovakia and Spain-refuse to recognise Kosovo as a sovereign State proves that the 'real world' and the 'ideal world' are still far from becoming one. Nonetheless, the democratic theory of self-determination is definitely not utopian.⁸⁷

2.5. A Liberal World?

Overall, according to Beran, if the 'Chinese box model' of political organisation and a democratically based right of self-determination are universally accepted then a new world order would eventually be formed. The number of States would augment or the political divisions within States would increase; the number of nation States would increase by redrawing borders in order to make them closer to national divisions; more States would establish political and economic bonds across State

⁸⁶ Ibid 55.

⁸⁷ Ulrike Lunacek, 'Parliament Rapporteur: All EU Countries Should Recognise Kosovo' (*EurActiv.com*, 20 December 2011) <<http://www.euractiv.com/section/global-europe/interview/parliament-rapporteur-all-eu-countries-should-recognise-kosovo/>> accessed 22 May 2016.

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borders within continental areas; and finally, the importance and the use of international courts would increase in order to settle disputes.⁸⁸ The question that needs answering is: does the world have an innate aversion of secession? Has the right of self-determination become too much to accept? As it stands, the international *fora* believes that the right to independent statehood will not include a right to secede from a State which already upholds the principles of equality and individual moral autonomy; thus, the reunification of Cyprus is believed to be the solution which will enable these principles to be carried out without having to resort to permanent secession. Secession still has a negative connotation; it is a ‘refusal to acknowledge the legitimacy of the state’s claim to authority. It is a bid for independence from the state through the appropriation of the state’s territory.’⁸⁹

What needs to be accepted is that if ‘we’ claim to live in a liberal world, then the two features of liberalism must not be ignored; its distinctive ‘moral ontology’⁹⁰ and a dedication to its firm thesis of moral egalitarianism-‘where all individuals are of equal moral worth and thus possess equal rights and entitlements’.⁹¹ *Ipsa facto*, if the individual has the power to choose its political status, then each individual ‘enjoys moral dominion regarding themselves such that only their *consent* is sufficient to determine membership of any association, including political associations such as the state.’⁹² Therefore, the only legal political divisions are those which have been chosen by the majority of the people and reflect their decisions.⁹³ In sum, this means that if a group opts to secede, the prevention of this would go against the idea that all associations are voluntary.⁹⁴

According to Kant, liberalism is based upon the prioritisation of principles such as equality and individual freedom, and these two principles are prerequisites for a good quality life. A person should be able to live his or her life in line with his or her own beliefs; furthermore, a person should be able to question these beliefs and if

⁸⁸ Beran (n 4) 55.

⁸⁹ Matthew J Webb, ‘Is There A Liberal Right To Secede From A Liberal State?’ (2006) 10(4) TRAMES 371

<<http://www.kirj.ee/public/trames/trames-2006-4-5.pdf>> accessed 22 May 2016.

⁹⁰ Brian Barry, ‘Nationalism Versus Liberalism’ (1996) 2(3) Nations and Nationality 423, 432.

⁹¹ Webb (n 89) 372.

⁹² *Ibid* 373.

⁹³ Harry Beran, ‘A Liberal Theory of Secession’ (1984) 32 Political Studies 21, 26.

⁹⁴ *Ibid* 24-25.

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they seem to be undeserving of adherence, readjust them after having thoroughly researched other adoptable options.⁹⁵ Consequently, these principles give rise to certain individual rights-i.e. freedom of association- which overrule conflicting considerations.⁹⁶ So, the imperative point to note is that under Beran's construction of liberalism, individuals are the authors of their own lives and they are free to make their own life-plans.

Webb argues that if the State is able to enhance the ability of individuals to live their lives according to their own beliefs via the enforcement of these abovementioned individual rights, 'why, from a liberal point of view, should it matter *who* governs us or *what* state we live in, so long as that state is a liberal one?'⁹⁷ Ergo, if a State is liberal, then no community would have a just reason to want to secede, other than social injustice, which will not occur in a liberal State.⁹⁸ He makes a valid point; however, with regards to Cyprus, the so-called liberal 1960 RoC is proof that this argument does not work in practice and therefore, it makes no sense to re-try an already failed marriage on the island where liberalism was nothing but an ideology.

It is understandable that a group should only be allowed to secede if, and only if, they live in an illiberal State; but what if the State that claims to be liberal and appears to be liberal from the outside is in fact illiberal in the eyes of those individuals who wish to secede? This is when Beran's democratic theory of self-determination becomes applicable; he argues in favour of a right to secede from liberal States. What matters is not the character of the State from which the community wishes to secede, but that a majority of the said group want secession. Indeed, it cannot be denied that an individual's ability to live a good life is to a certain extent dependent upon the laws and policies of the State within which they live. However, it is evident that a State will not be able to fully satisfy all of the competing demands of all of the different communities which form its citizenry; for this reason, if a community feels utterly dissatisfied with what the State provides,

⁹⁵ Will Kymlicka, *Multicultural Citizenship* (Clarendon Press 1995) 80-81.

⁹⁶ Dowding (n 18).

⁹⁷ Webb (n 89) 376.

⁹⁸ Dowding (n 18) 71-72.

then the best option is for that community to go its own way or join a State which offers the sustenance and understanding it desires.⁹⁹

Lehning claims that there is a resurgence of secessionist movements. 'In Europe, for instance, they highlight the question of further European unification and may even enhance the formation of a genuine European Union.'¹⁰⁰ The EU needs to legally and politically respond to the secessionist renaissance, especially since there are secessionist movements within the borders of the current Union. Therefore, it would be an utter mistake for the EU to dismiss the idea and ignore its demand as it will harm the future of a united Europe. There is a revival of nationalism and more and more communities within Europe and the Union are seeking sovereign status and challenging their State's idea of what its boundaries are.¹⁰¹

2.6. The International Dimension of Secession

Secessionist attempts tend to have consequences which spill across international borders. Therefore, international responses are crucial to such matters. The question in this case is: how should EU law and institutions react to the Turkish Cypriot secession? Unfortunately, as will be seen throughout the chapters of this thesis, the accounts of the right of secession offered by political theory and more specifically the democratic theory of self-determination are not being taken into consideration by the EU legal system. In order for the EU to be more effective and morally aware, it needs to build upon and contribute to such theories.

Simultaneously, the political theories regarding secession also lack an international institutional dimension according to Buchanan.¹⁰² He claims that most of these theories do not really mention the practical restraints that affect the right to secede (such as property loss or other human rights issues) given that what these theories suggest would result in being an international legal right. Although I believe that a group has a right to secede irrespective of any question of international institutional morality or of any consideration of international legal institutions, this fact does not provide a guide for institutional legal reform. Albeit the democratic theory of self-determination does help the EU and the other international organisations formulate a

⁹⁹ Webb (n 89) 378.

¹⁰⁰ Lehning (n 1) 1.

¹⁰¹ Ibid.

¹⁰² Buchanan (n 36).

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response to secession, unfortunately, it does not take into consideration the international context of secession and consequently how international institutions should react to certain legal issues concerning secession; Beran argues in favour of secession in a vacuum. Thus, the EU needs to fill in the loopholes of this theory (with regards to Cyprus) by moulding the general principles provided by Beran.

Throughout this thesis I will be highlighting the fact that the EU is unresponsive to the right of secession of the Turkish Cypriot community because it has been internationally accepted that the solution to the Cyprus problem can only be reunification. As a result, the EU is struggling with the case of Cyprus. I believe that the Turkish Cypriots should be recognised as having a right to secede as a matter of international institutional morality; this recognition would consequently eradicate many legal and political problems the EU is dealing with in relation to Cyprus, such as the property issue and the trade issue.

2.7. What Kind of Union is the EU?

Why do I believe that the democratic theory of self-determination is applicable to the case of Cyprus and the EU? Because the Union claims to be a democratic organisation and therefore the legal and political decisions it makes in relation to the Cyprus problem should be in line with democratic principles. A future settlement in Cyprus should be in line with the principles in which the Union is founded; the Union is founded on the principle of democracy.

Democracy as an idea and practice originates from Ancient Greece. The idea has been accompanied by many definitions since its birth. The definition habitually correlated to Cleon is the one which is common to us today; ‘rule of the people, by the people, for the people’.¹⁰³

It is definitely not an easy task to evaluate the democratic legitimacy of the EU since the meaning of democracy is ever-evolving; there is no set benchmark to measure the Union’s democratic legitimacy against.¹⁰⁴ Furthermore, how do you measure the level of democracy of a supranational organisation which is made up of many

¹⁰³A philosophy and practice of liberal democracy, which highly resembled the principle of representation, materialised from the 18th century onwards.

Vaughne Miller&Jon Lunn, ‘The European Union: A Democratic Institution?’ (2014) House of Commons Library Research Paper 14/25.

¹⁰⁴ Ibid.

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sovereign States? The 2009 German Federal Constitutional Court ruled on the compatibility of the Treaty of Lisbon (2009) with the German Constitution and here it stated that: ‘With the present status of integration, the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to the level of legitimisation of a democracy constituted as a state.’¹⁰⁵

Brigid Laffan has argued that political theorists mainly concentrate on democracy and legitimacy in the traditional nation-State and not on political systems in non-States, such as supranational organisations. As a result, ‘the EU is a challenge to how we conceptualize democracy, authority and legitimacy in contemporary politics.’¹⁰⁶

The Lisbon Treaty arguably improved the democratic legitimacy of the Union. The Treaty on European Union and the Treaty on the Functioning of the European Union form the constitutional foundation of the Union. These Treaties set out the institutional framework for the way the EU functions; provide a set of principles by which it will act; identify provisions on where the powers and competences lie; and provide rules on how to modify such things. It is important to note that the EU does not have competences by right and no competence-competence and this principle is protected by the Court of Justice of the EU.¹⁰⁷ Nevertheless, the judicial activism of the Court cannot be ignored. The Court has been very open with promoting the interests of the Union and EU integration throughout the years; even to the point of

¹⁰⁵ Federal Constitutional Court Press office, Press release No 72/2009 (30 June 2009) ‘re. Judgment of 30 June 2009 on Act Approving the Treaty of Lisbon compatible with the Basic Law’ <<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-072.html>> accessed 23 May 2016.

¹⁰⁶ Brigid Laffan, ‘Democracy and the European Union’ in Laura Cram, Desmond Dinan & Neill Nugent (eds), *Developments in the European Union* (Palgrave Macmillan 1999)

With regards to structure and functioning, the Union is definitely not like the inter-governmental UN, and it is also not a federal entity like the United States. According to Joseph Weiler, the Union has ‘chartered its own brand of constitutional federalism.’ Basically, the structure of the Union is a compromise of rival and complementary systems. Thus, just like there are different definitions and models of democracy—such as representative, associational and direct—there are different models, principles and systems competing within the EU. See Joseph H H Weiler, ‘Chapter 2, Federalism Without Constitutionalism: Europe’s Sonderweg’ in Kalypso Nicolaidis & Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001)

¹⁰⁷ See Case C-376/98 Germany v Parliament and Council (tobacco advertising) [2000] ECR I- 8419. Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/0001 Article 5(2): ‘... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to obtain the objectives set out therein. Competences not conferred upon the Union in the Treaties shall remain with the Member States.’

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dismissing the interests of the Member States. An example would be the establishment of the doctrine of ‘direct effect’ by the ECJ.¹⁰⁸ Thus, how democratic actually is the Union?

Without a doubt, the Union’s Treaties aim to establish a democratic basis for the organisation; for instance, Article 10 TEU demands that EU action is based on ‘representative democracy’.¹⁰⁹ This Article basically confirms that the heads of State and government in the European Council and government ministers in the Council have a democratic responsibility towards their citizens and their national governments. ‘The Treaties thereby link democratic legitimacy at EU level to accountability and legitimacy at national level: democratic legitimacy is not just a matter of EU governance but also of domestic governance.’¹¹⁰ Article 10(3) provides that every citizen will have the right to participate in the democratic life of the EU.¹¹¹ National parliaments can take part in the decision-making process of the Union as a result of the mechanisms set out in the EU Treaties. Two legally binding Protocols annexed to the EU Treaties- the Subsidiarity Protocol¹¹² and the Protocol on the Role of National Parliaments- make it possible for national parliaments to examine Union documentation and decline Commission proposals.¹¹³

¹⁰⁸ This doctrine is the foundation of the legal relationship between the Union and the Member States. Miller & Lunn (n 103) 15.

¹⁰⁹ Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/0001 Article 10:
1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11 TEU includes certain provisions which complement the representative system and Article 12 TEU stipulates how the national parliaments help the proper functioning of the Union.

¹¹⁰ Miller & Lunn (n 103) 15.

¹¹¹ Thus, for the first time in the history of the Union, the right to directly participate and influence the decision-making process has been established by means of the ‘citizens’ initiative’ thanks to the Lisbon Treaty.

¹¹² Protocol No 2 on the application of the Principles of Subsidiarity and Proportionality. The principle set out in Article 5(3) TEU, whereby the EU should act only if action at EU level would be more effective than at national level. Article 5(3) TEU national parliaments ‘ensure compliance with the principle of subsidiarity in accordance with the procedure provides for in the Protocol’. Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/0001.

¹¹³ Protocol No 1 on the role of National Parliaments in the European Union obliges the institutions of the Union to send all documents to national parliaments and wait until they have been properly examined by these parliaments before adopting the legislation. Article 9 of this Protocol also states

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Moreover, the Preamble to the EU's Charter of Fundamental Rights proclaims that the Union is 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.' Without a doubt, the EU's focus is on the rights, duties and freedoms of its citizens. The fact that the Copenhagen Criteria requires the candidate States to have stable institutions, guarantee democracy, uphold human rights and rule of law and respect for and protect minorities, proves that democracy is highly valued by the Union and that Beran's theory has a place in the supranational organisation's system.

Obviously, there is no straight answer as to whether or not the Lisbon Treaty *actually* made the EU affairs more democratically legitimate. It should be noted however that the infamous term 'democratic deficit' is not extinct.¹¹⁴ A democratic deficit exists if the institutions of the Union do not satisfy the prerequisites of general principles of democracy, such as, transparency and accountability. As mentioned above, the Court of Justice and the EU Treaties are working to ensure that a representative democratic system is running throughout the EU affairs.¹¹⁵ But, although the power of the European Parliament has increased since the signing of the Lisbon Treaty, it is still weak in comparison to the Commission and the Council; the EU is rather distant from voters; and the policies adopted by the Union are not supported by the majority of the EU citizens. Yet, as Paul Craig has stipulated, since the Member States are all democratic States, and democratic parliaments have agreed to the membership of such an organisation, citizens of these States have indirectly

that the European Parliament and national parliaments 'shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union'. The second recital of this Protocol recalls that Member States wish: 'to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts as well as on other matters which may be of particular interest to them'. Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/0001.

¹¹⁴ EU definition: 'The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is so complex'.

EUR-LEX Glossary of Summaries 'Democratic Deficit' <http://eur-lex.europa.eu/summary/glossary/democratic_deficit.html> accessed 23 May 2016.

¹¹⁵ The Treaties 'provide a clear and equitable legal and constitutional basis for power, accountability and legitimacy, one that was negotiated and agreed by the leaders of all EU Member States and endorsed by their parliaments and/or electorates.' Miller & Lunn (n 103) 17.

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consented to a transfer of some sovereign powers which is ‘characteristic of any collective action.’¹¹⁶ Hence, the EU is nonetheless a democratic organisation.

Beran’s argument is that the rightful unity of a State has to be based on the willingness of its ‘normal adults’ to be part of one State; the EU is also based on democratic willingness insofar as there is now a right to withdraw. According to Article 50 TEU, the Member State will notify the European Council of its desire to leave and once it has obtained the consent of the European Parliament, the Council will have to conclude an agreement on behalf of the EU with the withdrawing State.¹¹⁷ This option has made the Union more democratic-even though no Member State has yet withdrawn.¹¹⁸

The Union has never actually had to deal with the breakup of any Member State; the Scottish Government held a referendum on the independence of Scotland from the U.K. on 18 September 2014, but the majority voted to stay united. Unfortunately, the EU still does not have a common consensus with regards to handling such a scenario; there are no clear agreements or Treaties which solve this dilemma. The questions that remain unanswered are: would the new State remain in the EU or would it have to reapply in order to join the club or would both the rump State and the new State be considered as completely new States which need to reapply for membership? With regards to the Scottish situation, there was a common belief that the remainder of the U.K would be the same and therefore its membership would continue. Furthermore, it was believed that Scotland would be regarded as a novel State which would require negotiations on the terms of its membership if it wanted to join the EU.¹¹⁹ According to Blair Jenkins, who led the ‘Yes’ campaign in Scotland, since Scotland would continue to obey all of the EU principles set out in

¹¹⁶ Paul Craig, ‘The ECJ, National Courts and the Supremacy of Community Law’ in Roberto Miccù & Ingolf Pernice (eds), *The European Constitution in the Making* (Baden-Baden 2004)

¹¹⁷ Article 50 Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/0001.

¹¹⁸ The U.K. will hold a referendum on 23 June 2016 to decide whether it should remain as a Member State or withdraw. Before the Treaty of Lisbon, there were no provisions in the Treaties which outlined the ability of a Member State to voluntarily withdraw from the Union. So, pre-Lisbon, the concept of withdrawal was difficult. See United Nations, Vienna Convention on the Law of Treaties (23 May 1969) Treaty Series 1155 331.

¹¹⁹ James Crawford & Alan Boyle, ‘Annex A Opinion: Referendum on the Independence of Scotland –International Law Aspects’ (Scotland analysis: Devolution and the Implications of Scottish Independence 2013)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf> accessed 25 May 2016.

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Article 2 TEU, and since there are no provisions to exclude a Member State in the current EU agreements, Scotland would continue to be a Member State upon secession.¹²⁰ On the other side, the ‘No’ campaign led by Alistair Darling, argued that the independence of Scotland would have also placed Scotland outside of the Union as a new State.¹²¹ Jose Manuel Barroso¹²² stipulated that it would be rather difficult, if not unattainable, for an independent Scotland to join the Union as not all Member States would approve such a decision-especially Spain which has its own fears regarding the principle of secession.¹²³ The reality is, if Scotland ever declares its independence then it will have to go through a lengthy process of negotiations and ratifications if it wants to become a Member State. The point to note is that the Union should take into consideration the possibility of internal secession and should prepare itself to handle such matters in a democratic and uniform manner.

All of these abovementioned arguments indicate that the EU should support Beran’s democratic theory of political self-determination for a new world order as it prides itself on its democratic legitimacy. If the EU claims to be a democratic organisation, then it should not be supporting the idea that secession should only occur if moral wrongs have been suffered by the separatists. If the EU wants to ensure an ever-closer Union it cannot reject secessionist claims by using ‘moral wrongs’ as a benchmark, it cannot drive communities away and it can definitely not unduly rake over the past. Even though the Union is siding with the political arguments put forward by the Turkish Cypriot community with regards to the events that took place on the island pre-1974 and the situation on the island since the Annan Plan referendum, it is continuing to act against them in the legal field and is consequently rendering invidious judgments. The EU tends to avoid invidious judgments between Member States in order to prevent tension and bias-for instance, it avoids the topic of

¹²⁰ *BBC News*, ‘Scottish Independence: Blair Jenkins answers your questions’ (Scotland, 18 January 2013) <<http://www.bbc.co.uk/news/uk-scotland-21088109>> accessed 25 May 2016.

¹²¹ Noscotland.net, ‘“Better Together” - Alistair Darling delivers the John P Mackintosh lecture’ (9 November 2012) <<https://noscotland.net/2012/11/09/alistair-darling-delivers-the-2012-jp-mackintosh-lecture/>> accessed 25 May 2016.

¹²² 11th President of the European Commission serving from 2004-2014.

¹²³ Spanish Prime Minister Mariano Rajoy, said in November 2013 that after a vote for independence, Scotland ‘will be left outside the EU’, Simon Johnson, ‘Spanish PM: Independent Scotland would be kicked out of the EU’ *The Telegraph* (London, 27 November 2013) <<http://www.telegraph.co.uk/news/politics/10479461/Spanish-PM-Independent-Scotland-would-be-out-of-the-EU.html>> accessed 25 May 2016.

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Nazis and fascists-; yet, it also needs to maintain equilibrium between Member States and candidate States and even third States if it wants to uphold a democratic and just status. So, by rendering judgments such as the infamous *Orams* ruling, the EU is taking sides in the Cyprus conflict which pre-dates its involvement with the island. Even if the decisions of the EU institutions satisfied the Turkish Cypriots, the EU would still be unduly raking over the past and this time damaging its relations with the Greek and Greek Cypriots. Thus, ‘moral wrongs suffered’ cannot be the threshold for secession as this would clash with the very *raison d’etre* of the EU. The Union needs to employ Beran’s theory of no-fault secession if it wants to promote peace in Europe. The EU simply needs to acknowledge this theory and this in turn will untie the Cypriot Gordian knot. There needs to be an acceptance of ‘here-and-now’.

Beran’s theory is one of rightful borders and not of good borders; it is intended to serve for the peaceful resolution of border disputes via democratic means. It should be underlined that his theory is not intended to imply that people who are being slaughtered by others in their State cannot justifiably secede (perhaps with the help of powerful allies) without a referendum and just division of assets; hence, his theory, as mentioned before, needs supplementing with a theory of justifiable emergency secession. Overall, I believe that secession should be an option if and only if, the new State is going to be able to survive, treat its citizens in a just manner, be liberal and democratic and honour its international duties.¹²⁴ The TRNC is capable of fulfilling these requirements; it just needs to be given a chance.

¹²⁴ Simon Caney, ‘National self-determination and National Secession: Individualist and Communitarian Approaches’ in Percy B Lehning (ed), *Theories of Secession* (Routledge 2005) 155.

3. The RoC's Membership Application...*The EU's First Short-Sightedness?*

Humorist George Mikes once said that 'the Cypriots know that they cannot become a world power, but they have succeeded in becoming a world nuisance, which is almost as good.'¹ A new chapter to the Cypriot political saga -whose end is neither known nor seems likely to be 'happily ever after' if it carries on in the same direction-was added when the EC accepted the RoC's unilateral application for accession and subsequently labelled her as a candidate Member State without necessitating a political solution to the Cyprus problem. Automatically, the EU became a party to the conflict when it should have remained outside as a mediator. Unfortunately, since then, the Cyprus problem has become a nuisance for the political and the legal life of the Union and it seems as though the strategies adopted to handle the issues arising from this unprecedented case are not that pragmatic. The vision of the EU is rather restricted when dealing with political conflicts that take place inside its borders and membership itself is definitely not a universal remedy; the Union cannot create a utopia.² Nonetheless, the EU is predominantly a mechanism that encourages 'piecemeal social engineering' as argued by Popper;³ thus, the bloc should have utilised its membership reward tactfully contra Cyprus. The aim of this chapter is to reveal the way in which the Community handled the RoC's application, which was the first official move made by the Greek Cypriot authorities to pass over the Cyprus problem to the 'almighty' Union.

It has been fiercely contested for years that Cyprus was not eligible to join the EU or even apply for membership according to Article 50 of the 1960 Constitution⁴ and Article 1(2) of the Treaty of Guarantee.⁵ In the late 90s Cyprus' application ignited a

¹ Nikos Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Hart Publishing 2011) 54.

² Skoutaris (n 1) 205.

³ K Popper, *The Open Society and its Enemies (Volumes 1 and 2)*(Princeton University Press 1971).

⁴ The Constitution of the Republic of Cyprus, 16 August 1960 (entry into force) <www.kypros.org/Constitution/English> accessed 11 July 2015.

⁵ Treaty of Guarantee (signed at Nicosia on 16 August 1960) (The Republic of Cyprus, and Greece, Turkey and the United Kingdom of Great Britain and Northern Ireland) <www.kypros.org/Constitution/English/appendix_b.html> accessed 11 July 2015.

very interesting legal debate. It is therefore crucial to look at the argument surrounding the illegality of the application claim which surfaced as a result of Turkey's wrath.⁶ This chapter will subsequently examine the ambiguously worded opinion of the Commission and elucidate the reason why the Commission handled the application in the way that it did. It will also briefly examine the most recent opinions of the Commission in order to highlight the change in the EU's stance towards volatile countries. Finally, the forgotten accession of East Germany will be looked at for the purpose of explaining why the EU's approach *vis-à-vis* Cyprus' application was not in actual fact irresponsible.

3.1. The Facts

Prior to the application of Cyprus to join the EU family, the Union's relationship with the '*pearl of the Mediterranean*' was predominantly economic. Thus, Brussels maintained its distance from the chaotic political situation on the island for a while. In the end, these economic ties were solely between the Community and the Greek Cypriot led RoC.⁷ It was in 1962, one year after the U.K. application to join the EC, that Cyprus asked the Community for an Association Agreement; Cyprus was worried about the loss of its commonwealth preferences with the U.K.⁸ As a result of the French veto to the U.K. entry, Cyprus withdrew its request, only to renew it in 1972 when the U.K. membership was guaranteed.⁹ On 19 December 1972 a two-stage agreement was sealed and entered into force on 1 June 1973.¹⁰ It provided for the bilateral legal basis of the liaison between Cyprus and the EEC/EU insofar as it dealt with dispute resolution, trade and accompanying provisions of services, persons and capital and other common provisions. This Association Agreement predominantly regulated trade and the two five year phases of liberalisation would eventually lead to a customs union. On the first phase, tariffs on a range of goods were to be reduced. This phase was prolonged a numerous times due to the Turkish

⁶ The government of the RoC is recognised by the EU and its Member States as the sole legitimate government acting for all Cypriots on the island.

⁷ George Kyris, 'The European Union and Cyprus: The Awkward Partnership' (*EurActiv.com*, 2 April 2013) <<http://www.euractiv.com/euro-finance/european-union-cyprus-awkward-pa-analysis-518835>> accessed 8 July 2015.

⁸ Frank Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006).

⁹ Jean Francois Drevet, *Chypre en Europe* (L'Harmattan 2000) 246.

¹⁰ Council Regulation (EEC) 1246/73 of 14 May 1973 on the conclusion of an agreement establishing an association between the European Economic Community and the Republic of Cyprus [1973] OJ 1973, L 133/2.

intervention in 1974.¹¹ In 1980 the Association Council, which was set up with the Agreement and decides by unanimity, commenced the negotiations for the conditions and procedures of the second phase as from 1982.¹² The second phase was finally agreed upon with the Additional Protocol of 19 October 1987,¹³ which meant that EC competition rules were to apply to the association. This however, was no longer satisfying for the Greek Cypriot administration.

On 4 July 1990, acting with the support of two of the Guarantor States, U.K. and Greece,¹⁴ President George Vassiliou of the RoC, formally applied for EC membership on behalf of the entire island. This application was warmly welcomed by the Community as the timing was perfect; with the end of the Cold War the Community was contemplating a major enlargement and Cyprus was definitely regarded as belonging to Europe. This was directly confirmed by the Commission when it issued its formal opinion (*avis*) on 30 June 1993:

Cyprus's geographical position, the deep-lying bonds which, for two thousand years, have located the island at the very fount of European culture and civilization, the intensity of the European influence apparent in the values shared by the people of Cyprus and in the conduct of the cultural, political, economic and social life of its citizens, the wealth of its contacts of every kind with the Community, all these confer on Cyprus, beyond all doubt, its European identity and character and confirm its vocation to belong to the Community.¹⁵

The application for membership was the first step into the abyss; it deepened and darkened the Cyprus problem and the fate of the island's people. It could be contested that the Greek Cypriot government believed that EU membership would protect the Greek Cypriots against potential Turkish military action and it would give them further 'lawfare' weaponry, especially since Turkey also desired to join the Union. Simultaneously, there was hope that the prospect of EU accession would

¹¹ Additional protocol to the Agreement establishing an association between the European Economic Communities and the Republic of Cyprus of 15.09.1977, OJ 1977 L 339; Supplementary Protocol of 11.05.1978, OJ 1978 L172; Transitional Protocol of 21.12.1979 (referred to in the Commission's answer to written questions 535/79, OJ 1980 C 74, 4).

¹² Association Council EC-Cyprus, Decision 1/80 of 24 November 1980.

¹³ EEC Cyprus Association Protocol of 19 October 1987, OJ 1987, L 393, 2.

¹⁴ Greece had become a member of the EU in 1981.

¹⁵ European Commission 'Commission opinion on the application by the Republic of Cyprus for membership' COM (93) 313.

change the negative attitude of the Turkish Cypriot community towards a settlement.¹⁶

3.2. The Application & The Illegality Argument

Mr. President, on behalf of the Government of Cyprus, I have the honour to inform you that Cyprus hereby submits its application to become a member of the European Economic Community, in accordance with the provisions of Article 237 of the Treaty establishing that Community.¹⁷

Indeed, the application was done for economic considerations, but it would be foolish to deny that it was also a political manoeuvre.¹⁸ Although the *de facto* authorities of the TRNC acknowledged that the Turkish Cypriot community would highly benefit from joining the EC, they refused to be voiced by the RoC Government in such an application.¹⁹ The *de facto* authorities of the northern part of the island put forward a strong argument as to why they claimed the application for membership by the RoC was inadmissible. In the memorandum that was presented by the leader of the TRNC, Rauf Raif Denktaş, to the Council of Ministers on 12 July 1990,²⁰ it was alleged that the application was illegal under international law.

It was contended that the 'unilateral' application for accession by the Greek Cypriot side was not legal since the Greek Cypriot authorities did not have any means of control over the land under the Turkish Cypriot administration; subsequently, they could not represent the Turkish Cypriot Community in the international realm. The Turkish Cypriot government insisted that Cyprus' EU membership would not be discussed until the Cypriot problem had been solved.²¹ Since the membership doors remained closed to Turkey which had applied for membership in April 1987,²² this

¹⁶ Kyris (n 7).

¹⁷ Under the Presidency of George Vassiliou, the Foreign Minister of the RoC, Iacovou, addressed this letter to the President of the Council, the Italian Foreign Minister, de Michelis, on 3 July 1990. Hoffmeister (n 8) 85.

¹⁸ According to a poll in April 1991, 76% of Greek Cypriots believed that accession would contribute towards a settlement. Ibid.

¹⁹ European Commission (n 15) 7.

²⁰ UN Security Council, UN Doc A/44/966-S/21398<http://repository.un.org/bitstream/handle/11176/57203/A_44_966-EN.pdf?sequence=3&isAllowed=y> accessed 11 July 2015.

²¹ J Redmond, *The Next Mediterranean Enlargement of the European Community: Turkey, Cyprus and Malta?* (Dartmouth 1993)54.

²² The Commission had responded negatively to Turkey's application on 18 December 1989 with the reasoning that: 'The examination of the political aspects of the accession of Turkey would be incomplete if it did not consider the negative effects of the dispute between Turkey and one Member State of the Community, and also the situation in Cyprus...At issue are the unity, independence, sovereignty and territorial integrity of Cyprus, in accordance with the relevant resolutions of the

application was seen as a security threat by the Turkish Cypriots as it provided the Greek Cypriots with a back-door to *Enosis*. The memorandum underlined the characteristics of the 1960 Cypriot Constitution, which were based on equality, bi-communality and the joint venture of two communities within the government.²³ Correspondingly, both communities were obliged to agree before Cyprus could join the EC and this was not the case as the Turkish side only agreed for the island to apply for membership if they were to be equally included.²⁴ On the request of Turkey, Professor Mendelson published a legal opinion on the matter in June/July 1997.²⁵ Soon after, on the request of the RoC, Professor Crawford, Hafner and Pellet rebutted this opinion in their opinion.²⁶

3.2.A. Article 50 of the 1960 Constitution

Mendelson in his opinion highlighted the intention of Article 50(1)(a) of the RoC Constitution.²⁷ This provision was an institutional safeguard for the Turkish Cypriots to be exercised by the Vice President. It provided the President and the Vice-President of Cyprus²⁸ with the power to veto decisions regarding membership to an international organisation unless Greece and Turkey²⁹ were both parties to it.³⁰ Theoretically, since only Greece was party to the then Community, both communities had to provide their assent for Cyprus to apply and subsequently

United Nations.' European Commission, 'Commission opinion on Turkey's request for accession to the Community'. COM SEC (89) 2290 final s9.

²³ Deniz Sonalp, 'Cyprus Conflict: Noncompliance with the 1960 Constitution and Treaties, Political Disagreements' (MA thesis, University of Maastricht Faculty of Arts and Social Sciences 2009) 25.

²⁴ Alternatively, under the Annan Plan they did not consent to the Republic of Cyprus joining the EU on its own.

Olga Demetriou, 'EU and the Cyprus Conflict, Review of the Literature' (2004) EU Border Conflicts Studies Working Paper Series 5/2004, 6<<http://www.birmingham.ac.uk/Documents/college-social-sciences/government-society/polsis/research/eu-border-conflict/wp05-eu-and-the-cyprus-conflict.pdf>> accessed 29 November 2014.

²⁵ MH Mendelson, 'The Application of the "Republic of Cyprus" to Join the European Union', Opinion of June 6 1997, UN Doc A/52/481, S/1997805.

²⁶ J Crawford, G Hafner and A Pellet, 'Opinion: Republic of Cyprus: Eligibility for European Union Membership, Opinion of 14 October 1997' in A Markides (ed), *Cyprus and EU Membership: Important Legal Documents* (PIO 2002).

²⁷ '1. The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning - (a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate.' HM Mendelson, *Why Cyprus Entry into the European Union would be Illegal: Legal Opinion* (Meto Print Ltd 2001) 10.

²⁸ The President of Cyprus in 1960 was a Greek Cypriot and the Vice-President was a Turkish Cypriot. Ibid.

²⁹ Two out three of Cyprus' guarantors.

³⁰ A Nachmani, *Turkey: Facing a New Millennium: Coping with Intertwined Conflicts* (Manchester University Press 2003) 181.

accede. As a result of the destruction of relations between the communities in 1963/64, the Turkish Vice-President had to resign. Subsequently, the RoC continued to operate without the Turkish Cypriot representatives in government. The requirement of Vice-Presidential assent is unnecessary according to the international *fora*.³¹ Pellet believes that the reason for this is because 'the international community continues to recognise that the Government of Cyprus has the normal capacity to represent Cyprus and to conduct its foreign affairs'.³² Conversely, Mendelson posed the argument that Article 50 was one of the 'unamendable Basic Articles of the Constitution'³³ and that even the Greek Cypriot authorities have avoided formal amendments to the Constitution. However, the counterargument is that there is no legal rule according to which a Constitution must be formally adapted if a provision has become temporarily obsolete.³⁴ Mendelson, as the counsel for the Turkish Cypriot community, also argued that Article 50 provided a veto power to the Turkish Cypriot community and not to the Vice President *ad personam*;³⁵ and the 1990 memorandum clearly indicated that the TRNC was against the membership. Nonetheless, it could be said that this argument breaches the principle of *dolo petit*,³⁶ meaning that the Turkish Cypriot community cannot insist on a veto right which was provided by a Constitution from which they have withdrawn fifty years ago.³⁷

3.2.B. Article 1(2) Treaty of Guarantee

According to the 1960 Treaty of Guarantee all three Guarantors of Cyprus³⁸ guaranteed the state of affairs established by the Basic Articles of the Constitution. Therefore, the issue at hand is not simply a matter of constitutional law but one secured by international law.³⁹ Mendelson further asserted that the potential membership of Cyprus violated Article 1(2)⁴⁰ of the Treaty of Guarantee:

³¹ Mendelson(n 27) 26.

³² Crawford et al (n 26) 31.

³³ Mendelson(n 27) iii.

³⁴ Hoffmeister (n 8) 94.

³⁵ (To the person.)

³⁶ (Good faith.)

³⁷ Hoffmeister (n 8) 94.

³⁸ United Kingdom, Greece and Turkey.

³⁹ Mendelson(n 27) iii.

⁴⁰ Article 1(2): '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'.

The Republic of Cyprus... undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. With this intent it prohibits all activity likely to promote directly or indirectly either union or partition of the Island.⁴¹

According to Article 31(1) of the Vienna Convention, 'this provision will 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.'⁴² Article 31(1) seems to infer that a literal interpretation will be awarded to Article 1(2) of the Treaty of Guarantee in the sense that its only purpose is to prevent *Enosis* and *Taksim*.⁴³

Firstly, Mendelson contested that the expression '*political or economic union*' in Article 1(2) directly refers to the EU as it is unarguably an economic organisation as well as a political union; secondarily, he insisted that the term '*participate*' in a union and not '*create*' a union clearly indicated that this Article referred to 'something less than a full merger.'⁴⁴ The most disputed point put forward by Mendelson has been his analysis of the phrase '*with any other State whatsoever*.' Some believed that this expression only referred to the union of Cyprus with *one* other State and in particular with either Turkey or Greece, since this was the initial objective of the Treaty;⁴⁵ yet, if that was the sole aim the phrase '*with any State whatsoever*' would have been replaced with '*Greece or Turkey*';⁴⁶ concomitantly the union with any other State was banned. The Treaty, according to Mendelson, prevented accession to the EC as it amounted to fifteen disallowed unions with any Member State of the EU.

Crawford, Hefner and Pellet then rebutted this opinion by simply highlighting the initial objective of the Article; which was the prevention of Cyprus' union with any

As well as Article 2(2): 'Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting directly or indirectly, either union of Cyprus with any other state or partition of the island.' Mendelson(n 27) 5.

⁴¹ Ibid 4.

⁴² Hoffmeister (n 8).

⁴³ *Taksim* (Turkish for 'division') was the objective of Turkish Cypriots who supported a partition of the island of Cyprus into Turkish and Greek portions.

⁴⁴ The phrase 'likely to promote, directly or indirectly' re-emphasised that any kind of activity which will lead to joining either type of union is condemned. This was further authenticated with the phrase 'in whole or in part', which makes it clear that even partial union was prohibited.

Mendelson(n 27) 7.

⁴⁵ Hence, to prevent *Enosis* or *Taksim* as known to the Cypriots.

T Bahcheli, 'The Lure of Economic Prosperity versus Ethno-Nationalism: Turkish Cypriots, the European Union Option, and the Resolution of Ethnic Conflict in Cyprus' in M Keating and J McGarry, *Minority Nationalism and the Changing International Order, Vol 1* (OUP 2001) 213.

⁴⁶ Mendelson(n 27) 7.

one country and the prohibition of the island's partition, especially since the Zurich Agreement was established in 1959 as a result of both Greece and Turkey giving up their maximum positions.⁴⁷ Crawford argued that since the singular 'state' was used in the abovementioned Article, it did not refer to the EU;⁴⁸ 'What is prohibited by Article 1(2) is union with another state, not cooperation with a group of states in establishing a supranational organisation of a political and/or economic character.'⁴⁹ But this argument is not too convincing since legal drafting in English classifies 'any state whatsoever' as plural unless it is declared otherwise.⁵⁰ Opposing this, Bahcheli argued that the Treaty of Guarantee did not address the EU since it is a 'sui generis organism'; *ipso facto* not just a random collection of States.⁵¹ So, even if the Article did forbid a union with other States, the EU is made up of independent States.

Nonetheless, even under the narrow meaning of the Article, the membership of Cyprus, specifically without Turkish partaking in the EU, would indirectly encourage the closer political or economical unification with Greece.⁵² Thus, if Turkey and Greece were both members of the international organisation that Cyprus was to join or if both Cypriot communities agreed to the accession, then the membership of Cyprus to the international organisation would not be outlawed.⁵³ Unsurprisingly, this has also been classified as a weak argument as the prohibition to join an international organisation that Greece and Turkey are not members is set out in Article 50 of the Constitution and not in the Treaty of Guarantee. The two instruments have different purposes; the Treaty of Guarantee deals with the international duties of Cyprus whilst the Constitution structures the internal decision-making process. That's why; 'a distinction between a "political or economic union with any State" on the one hand (Treaty of Guarantee), and "international organisations and pacts of alliance" on the other hand (Article 50 Constitution) was

⁴⁷ Hoffmeister (n 8) 5.

⁴⁸ Mendelson (n 27) 8.

⁴⁹ Crawford et al (n 26) 18.

⁵⁰ UK Interpretation Act 1978 s6 'In any Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.'

⁵¹ This ideology was also adopted by the EU.

Demetriou (n 24) 7; Bahcheli (n 45) 213.

⁵² Mendelson (n 27) ii.

⁵³ Mendelson First Opinion (n 25) s 108.

made.⁵⁴ So, Article 50 cannot be utilised to interpret the Treaty; the right of the Turkish Cypriot Vice President to veto an application for membership if Greece and Turkey are not members at the same time, is not an international duty of the State.

Mendelson interestingly referred⁵⁵ to the advisory opinion⁵⁶ of the Permanent International Court of Justice of 1931; the Austrian State Treaty 1955⁵⁷ outlawed a union between Austria and Germany in a similar way to the 1960 Treaty which implicitly tried to prohibit *Enosis* and *Taksim*. Thus, the proposed Austro-German customs union would alienate Austria's economic independence and create an indirect union between Vienna and Berlin.⁵⁸ What Mendelson had supposedly demeaned was the repercussions of Article 4 of the Austrian State Treaty to Austria's EU accession. The objective of Article 4 was to prevent *Anschluss*,⁵⁹ and it necessitated Austria to not 'enter into political or economic union with Germany in any form whatever.' Evidently, historical and contextual correlations can be drawn between Article 4 and I Treaty of Guarantee;⁶⁰ however, Austria joined the EU without amending the relevant Article and this is a strong argument for the Hellenic community to use as it set a significant precedent for the compatibility of Cyprus' accession with the Treaty of Guarantee.⁶¹ The Turkic counterattack was also robust; in the Austrian situation all the parties to the Treaty provided their consent to Austria's EU membership;⁶² 'If states all agree... to waive a breach of the Treaty that is fine. But this is not the case here because one of the parties to the Cypriot Treaty, Turkey, does not agree.'⁶³

The general argument was that the founding principles of the RoC, namely; territorial integrity, independence and security, would not be undermined by the

⁵⁴ Hoffmeister (n 8) 92; Crawford et al (26) 6.

⁵⁵ Mendelson (n 27) 36.

⁵⁶ *Austro-German Customs Regime* (1931) PCIJ SerA/B, no 41, 37.

⁵⁷ Signed in 1955.

⁵⁸ Nachmani(n 30) 181.

⁵⁹ German annexation refers to the 1938 annexation of Austria into Greater Germany by the Nazi regime.

⁶⁰ Especially because the compatibility of Austria's accession with Article 4 was heavily discussed following her application in 1989 to join the EEC.

⁶¹ C Tomuschat, 'The Accession of Cyprus to the European Union' in P Haberle, M Morlok & V Skouris (eds), *Festschrift für D Tsatsos* (Nomos 2003) 681.

⁶² Including Russia, which insisted in 1955 on avoiding a repetition of *Anschluss*.

Nachmani (n 30) 181.

⁶³ *Ibid.*

island's accession to the EU; Article 6(3) of the EU Treaty certifies this.⁶⁴ Surely the point that requires recognition is that both instruments are trying to prohibit the possible rapprochement of Cyprus with either Greece or Turkey, and it goes without saying that albeit Cyprus is joining a family of many, Greece will acquire a privileged position in Cyprus. The counterargument to this is that even though there is a customs union between Member States,⁶⁵ 'economic policy still lies in the hands of Member States and is only co-ordinated in the EU framework (Art. 99 et seq. EC)';⁶⁶ thus, Greece will not dominate their decision-making and there will be no economic subordination of Cyprus to Greece through EU policy. But what about the political domination of Greece over the island via the EU legal and voting system?

The interpretations of Articles I and II of the Treaty of Guarantee are supported by the subsequent practice of the parties to the Treaty. Thus, neither the U.K. nor Turkey objected on that ground when Cyprus entered into a customs union with the EEC in 1972.⁶⁷ Furthermore, all of the fifteen Member States also agreed in 1995 to commence the accession negotiations with Cyprus. The UN Security Council also overtly agreed with the decision,⁶⁸ whilst simultaneously confirming that a solution to the Cyprus problem cannot involve the union of the island with any other country. As a result, the U.K. rejected Mendelson's argument 'citing the unambiguous wording of Article 1 (2)' and the actions and statements of the Commission, the Security Council and the other Member States.⁶⁹ So, the outcome was that the Treaty only outlawed the union of Cyprus with one other country and not its accession to an international organisation.

⁶⁴ '[The] Union respects the national identity of its Member States, whose systems of government are based on democratic principles.'

See J Crawford, G Hafner and A Pellet, 'Further Opinion: The Eligibility of the Republic for European Union Membership, Opinion of 14 October 1997' in A Markides (ed), *Cyprus and EU Membership: Important Legal Documents* (PIO 2002)s 5(e).

⁶⁵ Art 25 et seq.

Consolidated Version of the Treaty Establishing the European Community [2002]OJ C 325, 33-184.

⁶⁶ Hoffmeister (n 8) 92.

⁶⁷ Turkey's concerns at possible discrimination against Turkish Cypriots were addressed by Article 5 of the Association Agreement of 19 December 1972. Furthermore, the situation of Cyprus under the Association Agreement and its Protocols was subsequently addressed by the European Court of Justice in 1994 in terms which cast no doubt upon the legality of the situation so far as the EU is concerned.

⁶⁸ UNSC Resolution 1062 (28 June 1996) S/RES/1062, s 13; UNSC Resolution 1092 (23 December 1996) S/RES/1092, s 17; UNSC Resolution 1117 (26 June 1997) S/RES/1117, s 14.

⁶⁹ Hoffmeister (n 8) 93.

Did the RoC have the authority to represent both communities in the international realm and apply for membership in the name of both communities? The answer to that question was a depoliticised yes. The UN Security Council Resolution 186 (1964) has been the main reason that the power of representation of the RoC Government has never been challenged by the international *fora*; they have always classified it as the sole effective government of the island. Consequently, the European Commission and the ECtHR have asserted that any Greek Cypriot government has *locus standi*⁷⁰ as the government of Cyprus.⁷¹ Furthermore, straight after the TRNC declaration of independence, the Council agreed⁷² that the island could only ever be represented by the RoC, and the European Parliament also reaffirmed this position.⁷³ Besides, Article 46 of the Vienna Convention on the Law of Treaties stipulates that 'internal irregularities do not in principle affect the power which a government enjoys to enter into binding commitments with other States.'⁷⁴ Thusly, the application of Cyprus' EC membership was not classified as being unlawful. Yet, it could be argued that this was due to the fact that a literal interpretation of the laws surrounding the issue was adopted, as from both Article 50 of the Constitution and the Treaty of Guarantee it can be drawn that Greece and the U.K. were under a moral obligation to veto the accession of the RoC into the Union until all three of the Guarantors had provided their consent.⁷⁵

⁷⁰ (Standing.)

⁷¹ See *Cyprus v Turkey* (2001) 35 EHRR 731.

⁷² By the Declarations of 16 and 17 November 1983, the European Parliament, the Commission and the Foreign Ministers of the Member States, within the framework of the European Political Co-operation, rejected the Turkish Cypriot declaration of independence. See EC Bulletin 11-1983, points 2.2.34, 2.4.1 and 2.4.2; and [1983] OJ C 342/52.

⁷³ European Parliament resolution on Cyprus' application for membership of the European Union and the state of negotiations of 4 October 2000 <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2000-0429>> accessed; European Parliament resolution on Cyprus' application for membership of the European Union and the state of negotiations of 5 September 2001 <http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=010905&LANGUE=EN&TPV=PROV&SDOCTA=18&TXTLST=1&Type_Doc=FIRST&POS=1> accessed 5 June 2015.

⁷⁴ Skoutaris (n 1) 37.

⁷⁵ Mendelson (n 27) iv.

Article II

Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution. Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.

To sum up, the EC, following the logic of its established position, believed that neither Article 50 nor the Treaty of Guarantee could obstruct the RoC's application or membership; subsequently, the Community commenced procedures laid down by the Treaties in order to analyse this admissible application.⁷⁶

3.3. The *Avis*: A Sudden Change...

On 12 September 1990, after long discussions, the Committee of Permanent Representatives proposed to the Council to forward the application to the Commission in order for the accession procedure to be set in motion. Initially and rightfully, the Commission decided not to act upon the application as it was believed that the Commission's fact-finding missions on the island would have been damaging to the UN efforts of finding a solution to the Cyprus problem. Moreover, according to the 1991 'it-is urgent-to-wait' formula, accession negotiations should not commence prior to the conclusion of the Maastricht Treaty at the end of that year. Therefore, the enlargement group that was established in September 1991 did not deal with the Cypriot application and solely handled the Austrian and Swedish applications. Matutes, the External Relations Commissioner, told the Foreign Minister of the RoC, Iacovou, in March 1992, that the status quo in Cyprus prevented the application of the Four Freedoms and that it was not possible for only one community on the island to represent Cyprus in the European institutions. This automatically indicated the necessity of a settlement to the Cyprus problem prior to accession.⁷⁷ Unfortunately, the Greek Cypriot response to this was rather harsh; Iacovou stipulated that the Commission should desist from getting involved in the internal political affairs of the island and that this could only be dealt with by the Council of Ministers. He further argued that the Commission should simply limit its opinion to social and economic factors and contended that a Greek veto will be exercised over the northern enlargement if Cyprus' application was not acted upon. This attitude was not well received in Brussels and by the Member States.⁷⁸

⁷⁶ Sonalp (n 23) 26; European Commission (n 19)8.

⁷⁷ Hoffmeister (n 8) 86.

⁷⁸ At the Lisbon Summit of 26-27 June 1992, they stated that 'the relations [with Cyprus] will be developed and strengthened on the basis of the Association Agreements and the application for membership and by intensifying the political dialogue', European Council - Presidency Conclusions (Lisbon, 26 and 27 June 1992), SN 3321/1/92. Brussels: Council of the European Communities, June 1992.

It was late 1992, after Boutros Ghali's (the UN Secretary-General), set of ideas were ineffective in Cyprus, that the Commission commenced the preparation for its opinion. The opinion that came on 30 June 1993⁷⁹ did not object that the RoC Government had applied for membership of the entire island. It was worded in such a way as to imply that the Cypriot desire for membership would trigger the reunification of the island, open the way to full restoration of human rights and fundamental freedoms across Cyprus, increase security and prosperity and most importantly, initiate the advancement of pluralist democracy.⁸⁰ The opinion confirmed that it was satisfied with the level of democracy and human rights in Cyprus despite the fact that the officials in northern Cyprus highlighted certain restrictions and constraints in their activities, especially in relation to their access to the media.⁸¹

The two officials sent from Brussels to the south of the island acknowledged the disparities between the two sides in the economic field.⁸² It was further agreed that the north would benefit from the accession via financial assistance for its infrastructure and the opening of markets once a settlement was reached on the island.⁸³ The Commission recognised the lack of efficiently functioning institutions on the island due to the division and affirmed that this needed to change in order for the accession to take place; it also acknowledged that the only way for this to be resolved is via a final settlement.⁸⁴ In view of this, it stated that the decision-making process of the executive and the legislature needed to be in line with the decision-making and discussion apparatus of the EU in order for the Cypriot authorities to adopt and implement the *acquis communautaire* across both sides of the island.⁸⁵ Hence, the Commission utilised the substratum of *acquis communautaire* in order to justify the importance of finding a solution prior to accession. This alone would have been a robust outline of conditionality on the RoC, TRNC and Turkey. Controversially, the Commission then proclaimed that if there were to be a political agreement 'the prospect of the progressive re-establishment of fundamental liberties would help overcome the inevitable practical difficulties which would arise during

⁷⁹ European Commission (n 15).

⁸⁰ Ibid para 45.

⁸¹ Ibid para 17.

⁸² Ibid para 28 et seq.

⁸³ Ibid paras 37-38.

⁸⁴ Ibid para 21.

⁸⁵ Ibid.

the transition period in regard to the adoption of the relevant Community legislation.⁸⁶ This insinuated that a political agreement may not be concluded and that the inevitable difficulties would have to be overcome in an alternative way. Lastly, the Commission highlighted that even before an impending settlement, it will utilise all the instruments that exist under the Association Agreement in order to aid the economic, political and social transformation of the island so that it could speed up her integration process with the EC.⁸⁷ The EC's unfathomable positive outlook on Cyprus' application made it seem as though no obstacle could stop the troublesome island from acceding.

However, the Community took an unexpected, yet, logical turn and declared through the Commission's first opinion that an optimistic signal would only be sent to the authorities of the RoC confirming that the island was suitable for membership, once 'the prospect of a settlement' was surer.⁸⁸

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.⁸⁹

Although the ambiguous word '*surer*' was used by the Commission, the process with Cyprus that would eventually lead to accession, was not guaranteed until the endeavours of the UN Secretary-General resulted in an equitable settlement to the Cyprus conflict dealing with the interests of each community on the island.⁹⁰ The Commission's conclusion was that it considered Cyprus to be eligible for membership as the integration of Cyprus into the Community would imply a balanced, peaceful, lasting settlement to the Cyprus problem;⁹¹ yet, this would all depend on the *prospect* of significant progress of the UN talks. If these talks were to

⁸⁶ Ibid para 46.

⁸⁷ Ibid para 49.

⁸⁸ Ibid para 48.

⁸⁹ Ibid para 10.

⁹⁰ Ibid.

⁹¹ Ibid para 47.

fail, then the situation would be up for reassessment.⁹² So the question was: how *sure* did the *prospect* of a settlement have to be?

Nevertheless, this stern stance adopted by the Community was influenced by the newly established Copenhagen criteria⁹³ for EU accession which states that, the acceding Member State needs to have stable institutions, respect democracy and law and also have good relations with its neighbours; thence, a divided Cyprus in which the recognised government breaches its own constitution, does not exercise control over one third of the island, does not represent a quarter of the population, and is in an explicit quarrel with a neighbour-Turkey, cannot become an EU Member State.⁹⁴ In this respect, it is difficult to understand how the Community found the RoC's application admissible since these problems were put forward in the arguments relating to the Guarantor Treaty and the 1960 Constitution of Cyprus.

Oddly enough, the Commission then insisted that Cyprus' geographical location and deep rooted connections have positioned her at the heart of European culture.⁹⁵ As a result, Cyprus is too valuable and too Europeanised to completely push aside; therefore, the Commission cunningly stipulated that the requirement of a political solution to the problem prior to accession would 'serve only to reinforce this vocation and strengthen the ties which link Cyprus to Europe.'⁹⁶ Paradoxically, the

⁹² Ibid para 48.

⁹³ Any country seeking membership of the European Union must conform to the conditions set out by Article 49 and the principles laid down in Article 2 of the Treaty on European Union. The relevant criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. To join the EU, a new Member State must meet three criteria: political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; acceptance of the Community acquis: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. Accession Criteria (Copenhagen criteria): European Council in Copenhagen 21-22 June, Conclusions of the Presidency SN 180/1/93 REV 1 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf> accessed 11 July 2015.

⁹⁴ Nathalie Tocci, 'The Missed Opportunity to Promote Reunification in Cyprus' (The Cyprus Conflict: Looking Ahead Conference, Cyprus Policy Center, Eastern Mediterranean University, Famagusta, 2007) <<http://www.cypruspolicycenter.org/dosyalar/nathalie.doc>> 92 accessed 18 June 2015.

⁹⁵ According to the data collected by the Commission for the technical preparation of the Opinion, the amount of European influence visible in the political, cultural, economic and social lives of the Cypriots and the richness of the island's contacts with the Community, bestow on Cyprus a Europeanised character and guarantee its vocation to belong to the European family. European Commission (n 15) para 44.

⁹⁶ Ibid para 45.

vague word '*surer*' utilised by the Commission with regards to the prospect of a settlement in Cyprus prior to accession, rather overtly identified the EU's true intentions in relation to the island's future and the Copenhagen criteria in general; it indicated that the criteria is simply used as a skeleton protocol rather than a robust structure by the EU and that the rules can be bent if the results are to benefit the Union in the long-run. The EU did not want to rule out the possibility of gaining a family member, such as Cyprus, merely due to the lack of a political agreement within the island, despite the fact that this would go against the Union's very own values.

The bloc somehow believed that the Cypriot authorities would feel obliged to abide by these values out of respect for the Community and subsequently they would find a way to commence inter-communal talks and eventually enact an internal agreement. But the Community also envisaged the possibility of incivility coming from these authorities; *ipso facto* the failure of inter-communal talks to produce a settlement in the near future. Consequently, the Commission stipulated that in such a case, the state of affairs had to be re-examined in relation to the positions espoused by each side of the island and that the issue of accession would have to be reconsidered by the Union in 1995 January.⁹⁷ In other words, the Community was insinuating that there existed the probability of an accession without a solution of the Cyprus problem and that everything would depend on the circumstances and the needs of the Union at that point in time. Thus, both the Commission's opinion and the dismissal of the illegality of the application claim, was politically driven by Community interests.

If accession without a settlement was undesirable, then why did the Commission start to work on Cyprus? Despite the chaotic situation on the island, the Commission could not resist the idea of immediately commencing talks with the government of the RoC once the Council had provided its blessing. The Commission insisted that the talks would help the Cypriot authorities familiarise themselves with the components of the *acquis* so that they could efficiently plan their negotiating position and provide a possibility for an examination of the need for technical cooperation they require to transpose Community law and policies that are needed

⁹⁷ Ibid para 51.

for the island's integration; moreover, the talks would prepare the way in due course for the north of Cyprus to catch up economically with the south.⁹⁸

Overall, the opinion was full of contradictions; half of it was overtly insisting that a settlement was the predominant prerequisite for accession, whilst the other half was covertly planning an accession without a settlement. Although in general this analysis of the Commission's first opinion on Cyprus seems to imply that an accession seemed possible, depending on the circumstances, if an inter-communal agreement was not reached on the island, the conclusion was in actual fact rather different. The opinion foresaw the possibility of a failure of reunification yet, it continued to include the north of the island in its assessment; for instance, the Commission stated that: '...the accession of Cyprus would involve a further language (Turkish) which would require some 200 translators and interpreters...'⁹⁹ Therefore, according to this *avis*, the EU was a monolithic actor which had a dependable tactic to catalyse a settlement for the island via accession.

The Community had many reasons to desire the reunification of Cyprus prior to accession; predominantly, it would have promoted stability in the Eastern Mediterranean, which is crucial because of its propinquity to the Union¹⁰⁰ and because of its proximity to the chaotic Middle East. Secondly, a settlement in Cyprus would have heartened peace between current EU candidate Turkey and EU Member State Greece.¹⁰¹ Former French President Chirac contended that 'Cyprus has a vocation to join the EU. But the EU does not have a vocation to take in a piece of Cyprus and to take in problems which are not its own.'¹⁰² According to some, the conflict was merely a domestic matter between the Greek and Turkish Cypriots and thus only required the sporadic intervention of the Union. Most Member States feared that by interfering, they would jeopardise their bond with 'geostrategic

⁹⁸ Ibid.

⁹⁹ Ibid para 28.

¹⁰⁰ Especially after the accession of Greece in 1981.

¹⁰¹ Greece is the Member State which is most closely linked to the problem as a result of the prominence of Cyprus in Greek and Turkish relations.

Tocci (n 94) 53.

¹⁰² In the European Union conference which took place in London on 12 March 1998.

M Hellicar, 'Denktash Rejects EU Offer as "Trap"' (*Hellenic Resources Network*, 1998) <<http://www.hri.org/news/cyprus/cmnews/1998/98-03-14.cmnews.html#02>> accessed 20 June 2015.

Turkey.’¹⁰³ Furthermore, the Treaties lacked provisions which dictated how the Community should behave in situations where the land of an applicant was divided since this was contrary to the ideology of Europeanisation.¹⁰⁴ Thus, it naturally made more sense for the resolution of the Cyprus conflict to have been a conditionality requirement for its accession negotiations to commence. The Commission’s opinion was supported by the Council, whose President at the time, Uffe Ellemann-Jensen,¹⁰⁵ proclaimed that he had no ‘doubt that someday in the future, when the unfortunate division has ended, Cyprus...will be a member of the Community’¹⁰⁶

3.4. The Reward & The Comparison

Arguably, the postmodern polity of the EU would be challenged as soon as it becomes a party to the conflict instead of remaining as an outside mediator; such a move would disturb the decision-making processes within the EU. An appropriate comparison here would be between the case of Cyprus and Northern Ireland. Prior to the European Parliament’s adoption of the Haagerup Report in 1984, the Northern Irish conflict was considered to be the U.K.’s domestic issue. Once the European Parliament interfered, the Community was accused with interfering in matters it had nothing to do with whatsoever; in fact, a Member of the European Parliament, who was also the leader of the Democratic Unionist Party, Ian Paisley, was the main criticiser of the EC.¹⁰⁷ In the long run, the EU managed to postmodernise the Northern Ireland conflict in an indirect manner and the conflict did not have an effect on the decision-making process of the Union. Even though Cyprus’ EU journey is very different to that of Northern Ireland, in the sense that there is an increased volume of Europeanisation today and the internal affairs of membership candidates now concern the Union as result of the Copenhagen criteria, the Cypriot conflict should be bracketed within the EU. Thus, the Union’s influence should be indirect and the conflict should not be a direct issue of the Union.¹⁰⁸

¹⁰³ Tocci (n 94) 55.

¹⁰⁴ Stephanie LauthéShaelou, ‘Back to Reality: The Implications of EU Membership in the Constitutional Legal Order of Cyprus’ in Adam Lazowski.(ed),*The Application of EU Law in the New Member States* (TMC Asser Press 2010) 40.

¹⁰⁵ Denmark’s foreign minister.

¹⁰⁶ J Redmond, ‘Cyprus and Malta: Still the Mediterranean Orphans?’ In J Redmond (ed),*Prospective Europeans: New Members for the European Union* (Harvester Wheatsheaf 1995).

¹⁰⁷ Thomas Diez, ‘Cyprus and the European Union: An Opening’ in Thomas Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002) 205.

¹⁰⁸ Ibid.

Membership conditionality, the EU's inferred theory in use, is undoubtedly the most influential and successful conflict resolution mechanism in existence.¹⁰⁹ The Union's multi-level framework of governance could increase the prospects for settlement by altering the meaning of the disputed subjects in conflict circumstances, such as, identity, borders, sovereignty and security; this can only happen when the conflict countries have a realistic vision of EU accession.¹¹⁰ Tocci identified three predominant determinants of EU effectiveness, namely; 'the value of benefits, the credibility of obligations and the political management of contractual relation.'¹¹¹ The value of the EU's incentives is evidently superior to what other international actors have on offer and therefore the prospects of conflict resolution are increased; 'Value/cost is determined by the objective nature of the benefit/punishment on offer.'¹¹² Accordingly, only if the gains relative to the costs are considerably higher, can the EU effectively control third country conflicts.¹¹³ When membership is the reward, the EU's manipulative power on a conflict is more effective in comparison to situations where relations are founded on financial assistance or partnership;¹¹⁴ accordingly, this begs the question of whether or not the Union can successfully influence third countries in a state of conflict that it does not plan to offer membership. Hence, the corollary of this is that, the Commission intentionally drafted its first opinion in a way as to imply that membership would definitely be given to Cyprus as long as there was evidence that some effort had been made to solve the conflict. The Commission believed that if it had offered any other reward to Cyprus or was completely negative, the Cypriot authorities would have withdrawn their application and the EU would have lost out on the chance to resolve the Cypriot problem. Moreover, the Commission solely stipulated that they would reconsider Cyprus' position in 1995 if the problem remained unresolved in order to avoid losing the island's interest and assure her that her efforts would be rewarded regardless, since the time lag between demanded conditions and the delivery of the reward could

¹⁰⁹ Dennis J D Sandole, *Peacebuilding* (Polity Press 2010) 95.

¹¹⁰ N Tocci, 'The EU in Conflict Resolution' in S Wolff and C Yakinthou (eds), *Conflict Resolution: Theories and Practice* (Routledge 2011).

¹¹¹ N Tocci, 'EU Incentives for Promoting Peace' (*Conciliation Resources*, 2008) <<http://www.c-r.org/accord-article/eu-incentives-promoting-peace>> accessed 22 June 2015.

¹¹² Tocci(n 110).

¹¹³ Tocci (n 111).

¹¹⁴ Tocci(n 110).

cause the authorities within the conflict zone to delay policies until the delivery of the reward is closer.¹¹⁵

Unfortunately, the EU's credibility is highly hindered once the parties in conflict countries realise that the Union itself fails to respect a condition demanded of it, such as its very own Copenhagen criteria or the condition of reunification prior to accession.¹¹⁶ The wording of the first opinion failed to maintain a serious tone and in fact 'potentially' unintentionally delivered the carrot before the fulfilment of the obligations by stating that the situation would be reconsidered in 1995. Tocci claims that the value of the reward is absorbed by the party who receives it if it is delivered in the short-term 'based on an understanding that the respect of its accompanying obligations will follow suit.'¹¹⁷ This is because the conflict party is encouraged to avoid respecting the obligations once the EU demonstrates that it is reluctant to take away the carrot.

Surprisingly, some scholars, inter alia, Professor Oberling,¹¹⁸ still contest that the application made by the RoC was in actual fact a strategy to use membership negotiations as a catalyst for triggering a solution to the Cyprus problem;¹¹⁹ 'membership of the EU, in fact, constitutes their last opportunity to exert international pressure upon the Turks and Turkish Cypriots to bend to their will.'¹²⁰ If this was the case, then the EU's enigmatic wording of the opinion was all a strategy drafted to scare the Turkish Cypriots by stipulating that the Greek side of the island would eventually accede without them if a settlement was not signed. This theory could not have been more wrong.¹²¹ The RoC made no secret of its strategy to accede without the Turkish side of the island in order to be provided with a

¹¹⁵ Tocci (n 111).

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ From Hunter College, New York.

¹¹⁹ Redmond (n 106) 135.

¹²⁰ S Sonyel, 'The European Union and the Cyprus Imbroglia' (1998) *Journal of International Affairs* 3(2) <<http://sam.gov.tr/wp-content/uploads/2012/02/SalahiSonyel.pdf>> accessed 22 June 2015.

¹²¹ L Friis 'Looming Shadows: The European Union's Eastern Enlargement and Cyprus' in T Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002)24.

'protective arm in respect of its relations with Turkey',¹²² and the EU's ineffective conflict resolution policy for Cyprus aided this strategy.

Originally, an *avis* was a political document as enlargement was envisaged as a procedure aimed at making it possible for third States to become contracting parties to the founding treaties of the EU. Today, enlargement is conceived as a comprehensive policy whereby the institutions of the Union and the Member States are actively getting involved with the applicants' preparation for joining the Union.¹²³ As a result of the increasing 'enlargement fatigue', which came about after the EU's expansion to Central and Eastern Europe, significant adjustments have been made to the enlargement procedure. The EU's enlargement strategy of 2006 has given Member States the power to unilaterally impose new conditions for accession.¹²⁴ The Commission now only prepares and gives its *avis* once it has been requested to do so by the Council and this move can be blocked by a Member State's decision.¹²⁵ So the Council no longer automatically passes on the application to the Commission; instead, it has to '[decide] to implement the procedure' of Article 49 TEU.¹²⁶ Moreover, the Council has also set conditions for its transmission of the application to the Commission; for instance, the request for an *avis* on Serbia's application was delayed awaiting the Advisory Opinion of the International Court of Justice on Kosovo's declaration of independence.¹²⁷ As a result, the process is no longer purely political; it is more of a legal journey. The positive aspect of this change is that this vigorous procedure prevents applicants with internal political disputes from knocking on the Union's door.

In 2009, the Council transmitted the membership applications of Montenegro and Albania to the Commission and an opinion was thus prepared. In December 2010, Montenegro was granted candidate status as it had no major issues with its

¹²² N Nugent, 'EU Enlargement and the Cyprus Problem' (2000) 38(1) *Journal of Common Market Studies* 136.

¹²³ C Hillion, 'EU Enlargement' in PP Craig and G De Burca (eds) *The Evolution of EU Law* (OUP 2011) 187.

¹²⁴ *Ibid* 200.

¹²⁵ For instance, Albania's application was withheld due to Germany.

Ibid 206.

¹²⁶ *Ibid*.

¹²⁷ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion) General List No 141 [2008] ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&p3=4>> accessed 20 June 2015.

neighbours; in fact it has been playing a conciliatory role, 'representing a factor of stability for the region since its independence in 2006'.¹²⁸ The process was not as smooth for Albania due to a political crisis that could have a serious negative impact on the European integration process. The EU has made it quite clear that it wants to abstain from getting involved in such an internal matter; 'it is the responsibility of the Albanian Government together with the opposition to find a solution.'¹²⁹ Therefore, in 2009 when Albania submitted its application, Germany stated that it would wait for the approval of the *Bundestag*¹³⁰ prior to asking the Commission to formulate its *avis*. Accordingly, a 'critical opinion' was put forward by the Commission which conditioned any future step on the European integration process to the fulfilment of the Copenhagen political criteria by Albania.¹³¹ Nonetheless, the Commission could have taken a more nuanced approach by linking the granting of candidate status to a solution of the political problem.¹³²

The case of Serbia resembles the case of the RoC, yet the EU's approach has been highly different in these two cases; Serbia's candidature application was sent on 22 December 2009, but at the fore was the Kosovo issue. The International Court of Justice responded to Serbia's request for advice regarding Kosovo's declaration of independence on 22 July 2010; it stated that the declaration is not unlawful according to international law. This non-binding opinion, alongside some complex negotiations with the Union, convinced Serbia to present together with the Union a draft resolution in the UN General Assembly 'that calls for dialogue with Kosovo on all issues that was approved by consensus.'¹³³ The aim of this dialogue would be to achieve progress on the journey to the Union and better the lives of the people

¹²⁸ F Nelli Feroci, 'EU Enlargement Policy: From Success to Fatigue' in F Bindi and I Angelescu (eds) *The Frontiers of Europe: A Transatlantic Problem?* (Brookings Institution Press 2011) 30.

¹²⁹ European Parliament resolution of 8 July 2010 on Albania, para 4 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0282+0+DOC+XML+V0//EN>> accessed 21 June 2015.

¹³⁰ The Bundestag is the constitutional and legislative body in Germany; the national Parliament of Germany.

¹³¹ The Commission considers that negotiations for accession to the European Union should be opened with Albania once the country has achieved the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria requiring the stability of institutions guaranteeing notably democracy and rule of law.

European Commission 'Commission Opinion on Albania's application for membership of the European Union' COM(2010)680 <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/al_opinion_2010_en.pdf> accessed 22 June 2015.

¹³² Nelli Feroci (n 128) 31.

¹³³ *Ibid.*

affected. This positive step taken by Serbia convinced the Council to transmit the application to the Commission for its *avis* on 12 October 2011. The opinion demanded that Serbia needed to work together in finding a solution for Kosovo's regional representation. Serbia's EU integration process heavily depends on inclusive and functional regional cooperation.¹³⁴ The prospect of membership has always been a huge incentive for Serbia's change in attitude; consequently, a solution that would permit Belgrade and Pristina to establish functional and regional cooperation was sought.¹³⁵ Arrangements Regarding Regional Representation and Cooperation were finally adopted on 24 February 2012 and this enabled the Council to grant Serbia candidate status.¹³⁶

These recent opinions of the Commission indicate that this new enlargement procedure will avert the re-occurrence of opinions resembling the one of the RoC. Even if the Union wanted the resolution of the Cyprus problem prior to handling such an application, its highly politicised enlargement process prevented it from legitimising such a demand.

The fact that the Commission's *avis* accepted the RoC's application in the name of the entire island, even though the Greek Cypriot administration cannot represent the Turkish Cypriot community, is not necessarily 'a bad move'. It is imperative to remember the unique case of East Germany in this regard. On 9 November 1989, the fall of the 'Berlin wall' gave rise to an unprecedented issue; East Germany's accession to the EC. A series of meetings later, the European Council President stated that German unification would take place 'in the perspective of European Integration.'¹³⁷ On 17 January 1990, the Commission voiced its stance on the matter; the Commission President, Jacques Delors stated that, 'East Germany [is] a special case...there is a place for East Germany in the Community should it so wish.'¹³⁸ This brave remark was the beginning of the East German accession to the EC. Shortly,

¹³⁴ European Commission, 'Serbia 2010: Progress report accompanying the communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2010-2011' (Commission staff working document) SEC(2010)1330.

¹³⁵ T Papić, 'The Political Aftermath of the ICJ's Kosovo Opinion' in M Milanović and M Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 260.

¹³⁶ European Council Conclusions, Decision of 1 March 2012, EUCO 4/3/12 REV 3, 8 May 2012.

¹³⁷ European Council, Conclusions of the Presidency, Strasbourg 8 and 9 December 1989, European Parliament Activities, Special Edition SN 441/2/89.

¹³⁸ European Parliament, Debates of the European Parliament, Presentation of the Annual Programme of the Commission for 1990, Session of 17 January 1990, 111.

thereafter, a three-stage plan of East Germany's accession was presented by the Commission. According to a parliamentary report, encompassing the work of a Temporary Committee, the three-stage process was to be made up of; an 'interim stage' before unification, in which East Germany would gain the chance to adopt the laws and policies of West Germany; a 'transitional stage' which would take place upon unification and would involve the gradual application of Community *acquis*; this would then be followed by the final 'definitive stage' which would be achieved upon full integration of East Germany to the Community.¹³⁹ Since the Commission had approved this decision, the EC had to ensure that all measures were taken for an easy accession process; subsequently, a select group of committees were appointed the task of assessing the impact of this accession. The conclusion of the impact assessment was unsurprisingly positive and it was agreed that this accession would be highly advantageous; as a result, the Council adopted the Commission's proposal and the three-stage plan was implemented. The ever increasing demand for reunification enabled the 'interim stage' to pass rapidly. The 'transitional stage' was slightly more problematic as it was not realistic to implement the proposed legislative package in time for reunification.¹⁴⁰ Nevertheless, the point to note is that the European Parliament accepted this unprecedented proposal; meaning that it was willing to go to extreme lengths just to guarantee the membership of East Germany.

The dedication of the institutions of the EC to bring together East Germany and the rest of Europe proved that the Union aimed to please the people, despite the drastic

¹³⁹ AJ Donnelly, 'Interim Report drawn up on behalf of the Temporary Committee to consider the impact of the process of German unification on the European Community, on the implications of German unification for the European Community. Part C: Opinions of the other committees', Working Documents 1990, Document A 3-183/90/C, 9 July 1990. [EU European Parliament Document]; R Tarvet, 'The Accession of Scotland to the European Union: Is "Independence in Europe" Achievable?' (Academia.edu) 4 <http://www.academia.edu/9183943/The_Accession_of_Scotland_to_the_European_Union_Is_Independence_in_Europe_achievable> accessed 21 June 2015.

¹⁴⁰ AJ Donnelly, 'Report of the Temporary Committee to consider the impact of the process of German Unification on the European Community on the common positions of the Council on the Community and German unification: 1 Regulation on tariff measures (C3-365/90-1) 2 Decision on ECSC products (assent) (C3-365/90-2) 3 Directive on harmonization of technical rules (C3-365/90-3) 4 Decision on consumer protection (C3-365/90-4) 5 Directive on aid for shipbuilding (C3-365/90-5) 6 Directive on statistics: transport, gas, electricity (C3-365/90-6) 7 Regulation on statistics: labour forces (C3-365/90-7) 8 Regulation on statistics: agriculture (C3-365/90-8) 9 Decision on aid for the steel industry (C3-365/90-9) 10 Directive on plant health (C3-365/90-10) 11 Regulation on fisheries: common policy (C3-365/90-11) 12 Decision on fisheries: Spitzbergen (C3-365/90-12) 13 Regulation on transport: Road, rail and inland waterway (C3-365/90-13) 14 Regulation on transport: Shipping (C3-365/90-14) 15 Regulation on energy (C3-365/90-15) 16 Directive on environment (C3-365/90-16) 17 Regulation on agriculture (C3-365/90-17)'. Session Documents 1990, Document A3 0314/90, 19 November 1990.

economic and political differences that existed between East and West Germany. Albeit everything was achieved within the legal confines of the Treaties, the EC bypassed the usual criteria it used for enlargement in order to lodge this 'special case'. As demanded by Article 31(1) Vienna Convention,¹⁴¹ Delors' interpretation of the Treaties was in favour of the people. Indisputably, East Germany experienced the most extraordinary entry to the Union; it basically joined the family overnight when the German Democratic Republic was unified with West Germany. This case was a controlled experiment for assessing the growth effects of EU membership. The main lesson to be taken from this experiment for other EU accession States and the EU is that, even after favourable institutional and financial conditions, catching up with EU standards may come to a halt below the expected average; there exist differences between the actual East German growth rate and the theoretical growth rate due to the discrepancies in human capital.¹⁴² Indeed, every country will have a different convergence path due to political, cultural and technological barriers; some, such as northern Cyprus, may be closed to direct foreign investment and hence will not have access to the newest technologies. Others may have 'low savings and investment rates because of a weak institutional enforcement of property rights as experienced under a long period of socialist planning.'¹⁴³ Undeniably, such differences will slowly wither away under a common set of Union institutions; yet, in the short to medium run, they will remain across countries with divergent political and economic histories.

Therefore, the EU is now aware that an accession as quick and as drastic as the one of East Germany is not healthy for the Union, as the EU does have an absorption capacity that it cannot exceed;

Various new phenomena indicate that previously known tendencies of expanding western norms to the new Member States and the promising East-West rapprochement, not least in economic terms, have taken a downward turn over the last few years.¹⁴⁴

¹⁴¹ The EU is bound by all aspects of international law and protocol, including adherence to the non-binding Vienna convention.

¹⁴² E Gundlach, 'Growth Effects of EU Membership: The Case of East Germany' (2003) 30(3) *Empirica* 237.

¹⁴³ *Ibid.*

¹⁴⁴ European Commission, '25 Years after the Fall of the Iron Curtain: The State of Integration of East and West in the European Union' <http://ec.europa.eu/research/social-sciences/pdf/policy_reviews/east-west_integration.pdf> accessed 22 June 2015.

The RoC's Membership Application...The EU's First Short-Sightedness?

For this reason, it could be argued that the Union's acceptance of the RoC's application for membership on behalf of Cyprus as a whole, was to prevent the re-occurrence of the East Germany experience. Firstly, it did not want to push away a State which had met the standards for membership just because half of that State was under siege; secondly, it still anticipates a reunification/solution on the island and thus if it simply permitted southern Cyprus to accede alone, it would not only be disregarding the UN Security Council Resolution 186, but it would be creating a situation where it would potentially have to enable yet another accelerated accession upon the conclusion of a settlement. By accepting the application on behalf of Cyprus as a whole, the Union gained the opportunity to gradually prepare the north for membership so that it could imminently accede upon reunification/solution without causing the Union much hassle.

4. The Beginning of the Awkward Relationship: Pre-Accession Policy for Cyprus and the Enlargement of the EU

This chapter will prove that the EU provided very limited incentives to the Greek Cypriots to contribute to a resolution of the Cyprus problem during the pre-accession period of the island. In fact, it is questionable whether or not the EU genuinely wanted the island to reunify prior to accession, as it does not seem like the Union invested any effort to this aim. As a result, Cyprus was welcomed into the Union as a divided island, arguably representing the most legally and politically complex enlargement to date. The objective of this chapter is to shed light on the role of Brussels in the Cyprus problem before the accession of the island took place in 2004.¹ Specific attention is paid to the EU's failure to play a decisive role in the resolution of the Cyprus problem during this period. Since the RoC's application for membership, the idea of EU integration played a counter-productive role in inter-communal reconciliation and this did not change during the pre-accession process; indisputably, the only party to blame for this is the EU. The pre-accession conditionality set for the RoC was the first official move made by the EU to internalise the Cyprus problem.

¹ An analysis of the Annan Plan 2004 will not be within the ambit of this research. Although that the Annan Plan was created foreseeing EU accession, the skeleton of the Plan did not woo the two Cypriot leaders. The rationale behind this was that the EU and UN failed to apprehend or even acknowledge the importance of the ontology of the Cyprus issue and how it interlinks with the Annan Plan. The fate of the Annan Plan was put to test on 24 April 2004 via separate simultaneous referendums held on both sides of the island. The results were highly disappointing, yet anticipated. Turkish Cypriots voted overwhelmingly in favour of the plan (64.9%); whilst 75.8% of the Greek Cypriot voters voted against the plan. As a result, the Annan Plan did not enter into force. Indisputably, the outside powers have now realised that it will be even more difficult to reunite the 'two families alike in dignity' post EU accession.

See K Annan, 'The Annan Plan for Cyprus', official United Nations website of the Secretary-General's comprehensive peace plan for Cyprus: The 'Annan Plan' (2004) <<http://www.hri.org/docs/annan>> accessed 5 July 2015.

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The chapter will commence by discussing the reason why the initial route for Cyprus' membership journey drastically changed in 1994; even though, it must be noted that the genuine reason for this change still remains a mystery. Subsequently, a basic 'game theory' approach will be applied to Cyprus' EU candidacy, which in turn will explain how the Union has pushed the 'Cyprus game' into a 'deadlock'. The chapter would remain incomplete without an analysis of the logic of EU expansion in general, the criteria of enlargement, the manipulative power of inclusion and the dimensions of enlargement beyond the criteria. In general, this chapter will discuss whether or not the pre-accession period for Cyprus was a window of opportunity that the Union refused to acknowledge; did the Union lose out on a chance to catalyse reunification and transform this long-lasting conflict as a result of its strategic choice to detach the Cyprus problem from the RoC's membership journey? On the whole, if the overall gains from enlargement are sufficiently great, then the potential negative consequences of such a decision will be sidestepped by the EU.²

4.1. Facts

In 1994 the so-called 'vigilant' strategy adopted by the EU towards Cyprus was replaced by a strategy where a solution to the Cypriot problem was no longer a prerequisite for accession negotiations to commence.³ The European Council in Corfu, June 1994, changed the route of Cyprus' EU journey; the Union proclaimed that 'the next phase of the enlargement of the Union will involve Cyprus...' ⁴ The European Council's decision was reaffirmed in Essen on 19 December 1994.⁵ The term 'pre-accession' formally appeared for the very first time in the Conclusions of the Essen European Council.⁶ The conditions *sine qua non*⁷ are on the one hand a State's eagerness to become a Member State and on the other the commitment of the EU to embrace that State.⁸ The Council was invited to inspect new reports of Cyprus

² CJ Schneider, *Conflict, Negotiation and European Enlargement* (CUP 2012).

³ N Nugent, 'EU Enlargement and the Cyprus Problem' (2000) 38(1) *Journal of Common Market Studies* 136, 139.

⁴ European Council at Corfu, 24-25 June 1994, Presidency Conclusions.

⁵ European Council Meeting on 9-10 December 1994 in Essen, Presidency Conclusions.

⁶ M Maresceau, 'Pre-accession' in M Cremona (ed), *The Enlargement of the European Union* (OUP 2003) 9.

⁷ (Something that is essential).

⁸ The first initiatives to be developed within the pre-accession strategy were 'Structured Dialogues', the 'Approximation of Laws' and the 'Opening of European Community Programmes and Agencies'. Maresceau (n 6) 12.

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presented by the Commission in 1994 and subsequently, on 6 March 1995, the EU General Affairs Council restated the fittingness of Cyprus for membership. The EU stated that the negotiations will open with Cyprus, six months after the conclusion of the 1996 Intergovernmental Conference. Ironically, there was no reference to the Cyprus problem or as to what would happen if this problem remained unresolved by the time the negotiations were to be finalised.⁹ Correspondingly, a pre-accession strategy was devised in order to prepare the island for its EU accession. This decision provided new impetus to the dealings between the island and the EU and consequently brought the vision of accession closer to realisation.

The pre-accession strategy included the creation of a structured dialogue between the EU and Cyprus and this dialogue encompassed an all inclusive political dialogue which aimed to help the RoC bring into line its legislation, practices and policies with the EU *acquis*. The decision of 1995 also opened the doors of certain 'Community Programmes' for Cyprus, such as; '*Leonardo da Vinci*', '*Socrates*' and '*Youth For Europe*'.¹⁰ In order to evaluate the EU's absorption capacity, the Commission released its Agenda 2000¹¹ in 1997; alongside containing proposals for the potential development of EU policies, this document also thoroughly referred to the situation in Cyprus. The focal point to note is that the Commission basically reiterated its Opinion of 1993 and added that:

...the timetable agreed for accession negotiations to start with Cyprus means that they could start before a political settlement is reached if progress towards a settlement is not made before the *negotiations* are due to begin, they should be opened with the Government of the Republic of Cyprus as the only authority recognized by international law.¹²

4.2. The Change of Path

So, what happened at Corfu that triggered the change of the EU strategy towards Cyprus? The genuine reason for this change in attitude still remains a mystery and an interesting topic for future research. Undoubtedly, the change of strategy could be

⁹ L Friis 'Looming Shadows: The European Union's Eastern Enlargement and Cyprus' in T Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002) 25.

¹⁰ European Commission, '2000 Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries' COM (2000) 700 final, 13 November.

¹¹ 15 July 1997. The Agenda 2000 legislative package resulted from the combined effort of all the institutions of the EU. It was conceived at the Madrid European Council in December 1995.

¹² Commission, 'Agenda 2000, Vol I: For a Stronger and Wider Union' (Communication) COM (97) 2000 final; Commission, 'Agenda 2000, Vol II: The Challenge of Enlargement' (Communication) COM (97) 2000 final.

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owed to Greece's success in juxtaposing the Cypriot situation to the implementation of the customs union with Turkey; hence, Greece blackmailed the EU to open negotiations with Cyprus if they wanted the customs union with Turkey to be put into practice.¹³ Nonetheless, this has never been confirmed and has always been masked by other theories.

Some Member States believed that a pledge to open negotiations with Cyprus would act as a carrot that would push the TRNC to negotiate a settlement on the island. Then, what if the TRNC refused to go to the negotiation table? What if this carrot was not desired enough by the Turkish Cypriots and this strategy was a complete failure? What if the Greek Cypriots did not want to negotiate with the Turkish Cypriots once they obtained the promise of the opening of accession negotiations with the EU?¹⁴ Did the Union think that far ahead?

The EU was simultaneously trying to convince both Turkey and the TRNC that they did not have the power to veto the RoC's accession as the illegality claims put forward for the application of membership were forceless. Therefore, according to the EU, both Turkey and the TRNC only had one option; to come to terms with the unavoidable and try to soak up the benefits that were to flow from the Union.¹⁵ The benefits were first and foremost economic as membership would lift the ban of Turkish Cypriot products from the customs union (which currently have to be exported via Turkey or the 'Green Line'). Secondly, the international non-recognition of the TRNC and the lack of direct flights to the north have hindered the tourist industry immensely; this would cease to be a problem upon reunification.

Beyond these economic benefits, there would be legal benefits; the Turkish Cypriot community would be provided with societal security as minority rights and democracy is part of the *acquis*. Therefore, further atrocities contra the Turkish

¹³ BA Yesilada, 'The Mediterranean Challenge' in J Redmond and GG Rosenthal (eds) *The Expanding European Union: Past, Present and Future* (Lynne Rienner Publishers 1998) 184.

¹⁴ The failure of the Annan Plan is a perfect example as to how the Greek Cypriots rejected a settlement in a referendum.

¹⁵ Nugent (n 3) 139.

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Cypriots would be prevented.¹⁶ In other words, ‘cohabitation without mutual trust and fear appears to be conceivable only in the larger context of the EU.’¹⁷

Hans van den Broek, the enlargement Commissioner of the EU at the time, re-emphasised that: ‘The commitment to start accession negotiations with Cyprus is a serious one and will be kept. There is no question of any other country exercising a veto on the accession of a new member states to the EU.’¹⁸ What the EU had failed to understand was that even if this strategy was adopted in order to push the Turkish Cypriots to negotiate, the TRNC authorities were completely aware that the carrot had transformed into a stick the moment the European Council issued its decision at Corfu; unfortunately, this strategy would simply push the TRNC further into the arms of Turkey and consequently would make the former less inclined to participate with the Greek Cypriots.¹⁹ The Turkish Cypriots felt isolated and bullied as a result of this carrot and stick strategy since the EU overtly threatened to leave the north outside the European family if they did not negotiate or if the negotiations were unsuccessful, whilst permitting the south to accede even if they did not negotiate. Consequently, this encouraged the TRNC to run her ‘protector’ Turkey in 1998 when President Denktaş (TRNC) rejected President Glafcos Clerides’(Roc)²⁰ invitation to the Turkish Cypriots to assign representatives as permanent members of the negotiating team for the accession of the island.²¹ Furthermore, the opening of accession talks in March 1998 gave Denktaş an alleged reason to refuse further inter-communal negotiations and instead to integrate the north of Cyprus even more closely with the Turkish economy.²²

A second theory as to why the outcome of the 1993 opinion was modified in 1994 is ‘path-dependency.’ The consensus-based negotiation system that belonged to the

¹⁶ T Diez ‘Last Exit to Paradise? The European Union, the Cyprus Conflict and the Problematic “Catalytic Effect”’ in T Diez (ed), *The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union* (Manchester University Press 2002) 144.

¹⁷ H Kramer, ‘The Cyprus Problem and European Security’ (1997) 39(3) *Survival* 16, 27.

¹⁸ N Nugent, ‘Cyprus and the European Union: A Particularly Difficult Membership Application’ (1997) 2(3) *Mediterranean Politics* 53, 68.

¹⁹ Z Öniş, ‘Greek-Turkish Relations and the Role of the European Union: Perpetuator of Conflict or Contributor to Peace?’ in C Kollias and G Gunluk-Senesen (eds), *Greece and Turkey in the 21st Century: Conflict or Cooperation?* (Nova Publishers 2003) 13-14.

²⁰ Denktaş and Clerides were close friends since their days as fellow barristers in the 1950s in London.

²¹ E Mortimer, ‘Turkish Cypriot Leader Clung to Idea of Partition’ *Financial Times* (London, 14 January 2012) <<http://www.ft.com/cms/s/0/b3ec8272-3e4e-11e1-ac9b-00144feabdc0.html#axzz2MUDt8nRa>> accessed 7 March 2013.

²² *Ibid.*

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robust fifteen-member team of the EU was the reason why it became near enough impossible for new projects to be initiated and fresh solutions to be introduced. According to Diez, the fifteen-member team was said to be highly conservative and refused to steer away from their ‘*well-reputed*’ decisions. Thence, this was the reason the EU ruled out the possibility of offering a special membership to Cyprus, which should have been the only option considering the situation on the island, and instead stuck to its all-or nothing membership formation. The Member States that supported the widening of the Union proclaimed that an alternative to membership could lead to ‘enlargement on the cheap’, for example ‘blocking CEE membership of the expensive CAP’.²³ Extending equally, the EC had symbolically terminated the division of Europe and therefore anything other than membership would have been inconsistent with the Union’s *raison d’être*.²⁴ The remaining Member States that valued the deepening of the Union were worried that flexible membership would cause the EU institutions to slow down, as countries which would not be partaking in all areas of integration would be let into the Union.²⁵

Understandably, the candidate Member States at the time, including Cyprus, firmly rejected such an idea as they did not want to be sitting in a ‘waiting room’ anticipating membership. As a result, the EU stuck by its conservative ways and did not conjure up a special strategy for Cyprus.²⁶ Nevertheless, this ‘path-dependency’ theory does not directly answer the question as to why the EU decided to allow negotiations to commence with the island even if an internal settlement was not reached; what was the urgency in making Cyprus a member? Surely, by allowing one half of the island in whilst isolating the other half would clash with the very *raison d’être* of the Union; the EU would be further dividing the island as oppose to re-uniting it.

In the meantime, the period after Corfu was dominated not by intense peace talks but by aggressive collisions on the border between the two parties of Cyprus.²⁷ Moreover, in January 1996, Turkey and Greece nearly declared a war on one another over two rocky islets in the Aegean, and had it not have been for the United States of

²³ CAP is the abbreviation for Common Agricultural Policy; Friis (n 9) 25.

²⁴ (Reason of being).

²⁵ Friis (n 9).

²⁶ Ibid 26.

²⁷ These collisions took place in the summer of 1996.

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America (U.S.A.), the situation could have been worse. Unsurprisingly, these negative events highly worried some of the Member States and they started to doubt whether it was right to open accession negotiations with such a troublesome island.²⁸ Paradoxically, these doubts were quickly erased by the ‘threat strategy’. It could be strongly argued that both the ‘carrot strategy’ and the ‘path-dependency strategy’ were more a response to the ‘Greek linkage strategy’²⁹ than a thorough analysis of the Cypriot situation...³⁰ The Greek linkage strategy is Greece’s success in linking the Cypriot candidacy/membership to many factors;

Firstly, Greek approval of the Customs Union in March 1995 became conditional upon the acceptance of South Cyprus or the Republic of Cyprus as a candidate country for the European Union. Secondly, the Greek veto prevented Turkey from capitalizing on financial aid promised as part of the entry to the Customs Union, which effectively stated at the beginning of 1996. Furthermore, Greece effectively exploited its bargaining position within the Union by promising to block the eastern enlargement process, in the case the Republic of Cyprus, claiming to represent the whole of the island, failed to be incorporated into the Union.³¹

To quote the then foreign minister of Greece, Pangalos; ‘If Cyprus is not admitted, then there will be no enlargement of the Community, and if there is no enlargement there will be no end to the negotiations now going on for the revision of the Treaties and the Community will thus enter an unprecedented crisis.’³² The corollary of this is that, international politics will dominate international law.³³ Overall, the EU has made it seem as though it is acceptable to bypass the Copenhagen criteria³⁴ if it means not losing Cyprus, if it is the only way to force the TRNC to negotiate, if it is the only way to make Greece implement the customs union with Turkey, if it is the only way to maintain the conservatism within the EU and if it is the only way to uphold the ‘anti-division of Europe’ ideology. Ironically, the Union will continue to

²⁸ Friis (n 9) 26.

²⁹ Also referred to as the ‘threat strategy’.

³⁰ Friis (n 9) 26.

³¹ Öniş (n 19) 10.

³² Quoted in Nugent (n 18) 72.

³³ N Tocci, ‘The Missed Opportunity to Promote Reunification in Cyprus’ (The Cyprus Conflict: Looking Ahead Conference, Cyprus Policy Center, Eastern Mediterranean University, Famagusta, 2007) 92 <<http://www.cypruspolicycenter.org/dosyalar/nathalie.doc>> accessed 18 June 2015.

³⁴ Any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. Regulation 622/98 upgrades the Copenhagen Criteria from political conditions to legally binding conditions subject to sanctions, Council Regulation (EC) No 622/98 of 16 March 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 L 85/1.

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quote international law in order to legitimise the steps it has taken when it benefits the Union as a whole; for example, the EU habitually proclaims that the government of southern Cyprus is the sole administrator of Cyprus according to international law.³⁵ Thus, how the EU behaves in a given situation will depend on the circumstances, intentions and motives of the Union. Although the EU is perceived as an organisation of value and equality, this image was destroyed as a result of the way it handled Cyprus' membership journey. For instance, albeit the Commission had proposed to commence negotiations, the north of the island had never been thoroughly or even slightly evaluated and all of the information concerning the north was collected from the RoC; thus, realistically, the Commission could have refused to open negotiations with the RoC as it could not be sure if human rights were being adequately obeyed on the northern side of the border.³⁶

President Denktaş quite angrily argued (after the collapse of the peace talks between the two Cypriot parties in Montreux August 1997) that membership 'under the title of the government of Cyprus will strip the Turkish Cypriots of their rights. And the remedy for this is war.'³⁷ This was a clear indication that the carrot strategy did not work. In fact, a month before, the TRNC and Turkey had entered into an association agreement which aimed to achieve integration between the two communities in the economic and financial fields and provided for 'partial integration' in the security, defense and foreign policy fields.³⁸ Nonetheless, Greece ensured that it maintained the pressure on the Member States in the period following the publication of Agenda 2000. The Italian Prime Minister, Dini, contended that 'there are two republics in Cyprus, two entities, two governments. If the EU does not recognise this basic fact, in concluding the negotiations for membership, then you run into problems.'³⁹

³⁵See Commission of the European Communities, 'Commission opinion on the application by the Republic of Cyprus for membership' COM (93) 313 final, 8, Bulletin of the European Communities, Supplement 5/93.

The TRNC has been rendered as 'legally invalid' by the Security Council of the UN, which also demanded the non-recognition of the new republic by other countries, UN Security Council, Resolution 541 (18 November 1983) S/RES/541 and UN Security Council, Resolution 550 (11 May 1984) S/RES/550. See also *Europe Review 2003/2004: The Economic and Business Report*, World of Information Review: Europe Series (Walden Publishing Ltd 2003).

³⁶ Friis (n 9) 26.

³⁷ *Financial Times* (London 11 September 1997), quoted in Friis (n 9) 27.

³⁸ Andreas P Kyriacou, 'A Viable Solution to the Cyprus Problem in the Context of European Union Accession (2000) 12(1) Cyprus Review, 2 <http://www3.udg.edu/fcee/professors/akyriacou/cr%2012_1_2000.pdf> accessed 15 July 2015.

³⁹ Quoted in Nugent (n 18) 73.

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The Luxembourg European Council of December 1997 declared the new enlargement process with the ten applicant countries of Central and Eastern Europe (CEEC) and Cyprus. This enlargement process encompassed an enhanced pre-accession strategy and special pre-accession aid for the candidates.⁴⁰ A specific pre-accession strategy distinct from that for the CEEC's was assembled for Cyprus since the island was far more economically advanced than the other applicants and did not suffer from transition problems. The political dilemma caused by the *de facto* division of the island was not the object of the specific pre-accession strategy suggested for Cyprus.⁴¹ Consequently, the Luxembourg European Council decided to commence accession negotiations with the island⁴² which were opened on 31 March 1998.⁴³

The 1999 European Council in Helsinki sadly confirmed that an agreement was definitely not a prerequisite for Cyprus' official accession⁴⁴ and subsequently an Accession Partnership was adopted for the island on the 13 March 2000.⁴⁵ Incongruously, the European Council in Helsinki tried to hide the fact that the accession of Cyprus was to be automatic by adding that it would primarily have to consider 'all relevant factors'.⁴⁶ The Nice European Council in 2000⁴⁷ articulated its strong support to the efforts of the UN Secretary-General to succeed in drafting a settlement which was in line with the UN Security Council Resolutions, of the Cyprus dilemma.⁴⁸ Ironically, the European Council asked all the parties involved to contribute to the efforts made to this effect.⁴⁹ The reason this call for contribution is ironic is because the EU incapacitated the UN sponsored negotiations as well as having physically separated the two sides of the island even more so than ever.

Political equality was the prime concern of the UN whilst searching for a solution to the Cyprus problem and the negotiations were always founded on the principle of

⁴⁰ Turkey was excluded from candidate country status at Luxembourg. The Luxembourg European Council was highly disappointing for the Turkish community as a whole. European Council in Luxembourg 12-13 December 1997, Presidency Conclusions.

⁴¹ Maresceau (n 6) 37.

⁴² The Council also decided to open accession negotiations with Hungary, Poland, the Czech Republic, Estonia and Slovenia.

⁴³ European Council (n 40).

⁴⁴ European Council in Helsinki 10-11 December 1999, Presidency Conclusions.

⁴⁵ Maresceau (n 6) 31.

⁴⁶ European Council (n 44).

⁴⁷ European Council in Nice, 8 December 2000.

⁴⁸ This process was initiated in 1999. *Ibid.*

⁴⁹ *Ibid.*

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impartiality.⁵⁰ The EU portrayed itself as an organisation that does not classify political equality as a predominant factor in its relations by recognising the southern Cypriot administration as the legitimate government of the RoC and opening accession negotiations with this administration on behalf of the entire island. In reality, the authority of the Greek Cypriot administration is forceless as it obtained its sole power by wrongfully seizing the constitutional authorities of the Turkish Cypriot community, in other words from the co-founder of the RoC. Although the exponents of this argument have not been very vocal, it would be plausible to assert that the lack of impartiality coming from the EU obliterated the efforts and the settled resolutions of the UN and infringed the agreements that were accepted to date by the conflict parties. Additionally, equilibrium of power between the Greek and Turkish Cypriots on the negotiation table was dishonourably slanted. Thus, the reality of the two sides negotiating co-equally *bona fide* under the auspices of the UN, was extirpated by the EU. The inference exhibited here is that one of the negotiators (the Turkish Cypriot side) has been classified by the EU as an illegal nationalist entity aspiring permanent separation from the other side, whilst the other negotiator (the Greek Cypriot side) is labelled as the rightful authority of the whole of Cyprus.⁵¹ This is impartiality at its best.

The European Council in Laeken in December 2001 highlighted that it was adamant to bring the accession negotiations with the applicants to a triumphant conclusion by 2002;⁵² the Council also emphasised that the candidates would be assessed on their own merits ‘in accordance with the principle of differentiation.’⁵³ Implicitly, the EU does not have a harmonious pre-accession strategy for its candidate members and it can be argued that the ‘principle of differentiation’ is just an excuse for the EU to

⁵⁰ E Iseri, ‘A Comparative Assessment of the United Nations and European Union’s Roles in the Resolution of the Cyprus Conflict: The Scale of Partiality-Impartiality’ (2004) 9 *Turkish Review of Balkan Studies*, 125, 141.

⁵¹ A Sözen, ‘The Role of the European Union as a Third Party in Resolution of External Conflict: The Case of the Cyprus Problem’ IACM 15th Annual Conference, Salt Lake City 8-12 June 2002 26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=314822> accessed 6 March 2013.

⁵² European Council in Laeken 14-15 December 2001, Presidency Conclusions.

⁵³ Carlos Ripoll y Martínez de Bedoya (PPE-DE), Written Question P-2071/02 of 8 July 2002, OJC 92 E/132

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:092E:0132:0133:EN:PDF>> accessed 6 March 2015.

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pursue its interests as it sees fit. The Commission's Annual Progress Report⁵⁴ which stipulated that the reforms in Cyprus and progress of the negotiations were maintained, was welcomed by the European Council; moreover, the Danish Presidency in the Brussels European Council of 2002⁵⁵ concluded that the Union endorsed the findings of the Commission that the island fulfilled the political criteria of the EU⁵⁶ and could assume the requirements of membership from the start of 2004.⁵⁷ The laborious course of the accession negotiations was finalised at the Copenhagen European Council in December 2002 and the momentous decision was taken to admit Cyprus⁵⁸ as a member of the EU, as of May 2004. In its significant decision, the Copenhagen European Council stated that:

3. The European Council in Copenhagen in 1993 launched an ambitious process to overcome the legacy of conflict and division in Europe. Today marks an unprecedented and historic milestone in completing this process with the conclusion of accession negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. The Union now looks forward to welcoming these States as members from 1 May 2004. This achievement testifies to the common determination of the peoples of Europe to come together in a Union that has become the driving force for peace, democracy, stability and prosperity on our continent. As fully fledged members of a Union based on solidarity, these States will play a full role in shaping the further development of the European project.⁵⁹

10. In accordance with paragraph 3 above, as the accession negotiations have been completed with Cyprus, Cyprus will be admitted as a new Member State to the European Union. *Nevertheless, the European Council confirms its strong preference for accession to the European Union by a united Cyprus.* In this context it welcomes the commitment of the Greek Cypriots and the Turkish Cypriots to continue to negotiate with the objective of concluding a comprehensive settlement of the Cyprus problem by 28 February 2003 on the basis of the UNSG's [UN Security General] proposals. The European Council believes that those proposals offer a unique opportunity to reach a settlement in the coming weeks and urges the

⁵⁴ Annual Progress Reports are crucial features of the enhanced pre-accession strategy reviewing the candidate's progress towards accession.

⁵⁵ European Council in Brussels 24-25 October 2002, Presidency Conclusions.

⁵⁶ The Commission also highlighted that Cyprus would be able to fulfil the economic criteria as well as all the other obligations which arise from membership.

⁵⁷ Embassy of the Republic of Cyprus in Washington DC, 'Application for Membership: Pre-accession Strategy' <<http://www.cyprusembassy.net/home/index.php?module=page&cid=31>> accessed 5 March 2015.

⁵⁸ Alongside the other nine candidates. Nonetheless, Cyprus was the first state to successfully conclude its accession negotiations within the agreed timeframe.

⁵⁹ European Council in Copenhagen 12-13 December 2002, Presidency Conclusions, Council Document 15917/02 Enlargement, para 3.

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leaders of the Greek Cypriot and Turkish Cypriot communities to seize this opportunity.

11. The Union recalls its willingness to accommodate the terms of a settlement in the Treaty of Accession in line with the principles on which the EU is founded. In case of a settlement, the Council, acting by unanimity on the basis of proposals by the Commission, shall decide upon adaptations of the terms concerning the accession of Cyprus to the EU with regard to the Turkish Cypriot community.

12. The European Council has decided that, in the absence of a settlement, the application of the *acquis* to the northern part of the island shall be suspended, until the Council decides unanimously otherwise, on the basis of a proposal by the Commission.⁶⁰

The European Council claimed that this enlargement would provide the foundation for a Union with a crucial role to play in promoting peace and stability across Europe;⁶¹ nonetheless, the very inclusion of a divided Cyprus in this enlargement utterly defied the concept of the EU being a peace-promoter and in actual fact portrayed the Union as a conflict enhancer. As they say, if you do one hundred things right nobody cares but when you do one thing wrong everybody will remember it forever. This case has set a dangerous precedent for the EU.

On the 16 April 2003, President Papadopoulos of the RoC signed the Treaty of Accession of Cyprus to the EU and sealed ineradicably Cyprus' future course. President Papadopoulos noted that:

Cyprus not only withstood the cataclysmic consequences of occupation,⁶² but today, despite the tremendous difficulties and obstacles posed in her way, has managed, through hard work, perseverance and patience, to attain the target of accession and now aspires to create the conditions that will overturn the facts of occupation and act as a catalyst for the achievement of a peaceful, lasting, viable, functional and just solution of the Cyprus problem for the benefit of all Cypriots and of peace, security and stability in the Eastern Mediterranean.⁶³

If President Papadopoulos was sincere about wanting to terminate the division of the island then he would have found a way to conclude a settlement prior to signing the

⁶⁰ Ibid. Chapter on Cyprus.

⁶¹ Ibid. Enlargement, para 9.

⁶² Referring to the Turkish occupation on the island.

⁶³ Embassy of the Republic of Cyprus in Brussels, 'Cyprus and the EU' <http://www.mfa.gov.cy/mfa/embassies/embassy_brussels.nsf/cyeu_en/cyeu_en> accessed 15 July 2015.

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Accession Treaty.⁶⁴ The reality of it is, the EU membership of the RoC has provided the Greek Cypriots protection against any future Turkish intervention, characterised the Greek Cypriot strategy as legitimate and placed Turkey in an even more uncomfortable position as it is now ‘occupying’ not only a sovereign State but also an EU Member State.⁶⁵ Thence, the point to note here is that the ongoing political conflict on the island was not deemed to be a ‘relevant factor’⁶⁶ when the European Council in Copenhagen requested Cyprus to become a member, neither was it in 2003 when the RoC signed the Accession Treaty and nor was it in 2004 when Cyprus became a Member State.⁶⁷ Negative views of the EU were articulated within a discussion about the accession’s possible harmful effects on the Cyprus conflict and these heightened during and after the Helsinki and Copenhagen Summits.

The advocates of the Communist party in Greece volubly argued that Cyprus’ entry into the EU in the form of its *de facto* division was a catalytic of partition rather than reunification, as it encourages the Union to recognise and welcome the division on the island; thus, the EU indirectly recognises the TRNC.⁶⁸ The Communists of Greece were not the only ones to comment on the same vein and voice this ‘Euro-partition’ argument; the far right also believed that the EU would be congealing the partition by letting in a divided Cyprus.⁶⁹ A factor that both the far left and the far right had not considered was that the TRNC’s illegality was reconfirmed the moment the EU accepted the RoC’s application of membership on behalf of the whole of

⁶⁴ President Papadopoulos was a well known supporter of the ‘European Solution’. Papadopoulos was afraid that with the acceptance of the Annan Plan, the RoC ‘would come to an end with no equitable compensation.’ He tried to convey the idea that it would be far more beneficial for the Greek Cypriots to reject the Plan as they are more likely to reach a ‘good’ solution to the Cyprus problem after joining the EU; by being in the EU, the Greek Cypriots would have achieved the strategic objective to politically protect their interests and the interests of the RoC.

See G Kyris, ‘Europeanisation and “Internalised” Conflicts: The Case of Cyprus’ (GreeSE papers 84, Hellenic Observatory Papers on Greece and Southeast Europe. The London School of Economics and Political Science 2014) <http://eprints.lse.ac.uk/56645/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repositor_y_Content_Kyris%2C%20G_Europeanization%20and%20the%20Turkish-Cypriot%20Political%20Parties_Kyris_Europeanisation_Internalised_conflicts_2014.pdf> accessed 15 July 2015.

⁶⁵ G Christou, ‘The European Union and Cyprus: The Power of Attraction as a Solution to the Cyprus Issue’ (2002) 2 *Journal of Ethnopolitics and Minority Issues in Europe* 1, 8-9.

⁶⁶ As stated in the Helsinki European Council 1999.

⁶⁷ N Tocci *The EU and Conflict Resolution: Promoting Peace in the Backyard* (Routledge 2007) 45.

⁶⁸ T Diez, M Albert and S Stetter, *The European Union and Border Conflicts: The Power of Integration and Association* (CUP 2008) 85.

⁶⁹ *Ibid.*

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Cyprus; therefore, even if the EU was accepting the division on the island, this was not going to benefit the TRNC- which still remains an unrecognised State.

Opponents of the ‘Euro-partition’ argument were very vocal in Cyprus. The nationalists in southern Cyprus saw in the accession of a divided island a guarantee that the Greek Cypriot demands would be met as those demands would become the demands of the Union by way of membership.⁷⁰ *Ipsa facto*, the EU will always have to side with its Member State and demand whatever its member demands from a ‘third party’. Thus, the Turkish Cypriots have considerably lost power on the negotiation table and they will have to accept the terms of a future settlement that will be devised by the Greek Cypriots if they want to fully benefit from the Four Freedoms of the EU.

Although the EU insists that the accession of Cyprus as a divided island would break the Turkish stubbornness and force them to arrive at a solution via the renewed negotiation impetus as membership would make the status quo on the island untenable, the reality is that this strategy would simply strengthen the Greek Cypriot position.⁷¹ Nonetheless, even if the original aim of the Union was truly the former strategy, it somehow transformed into the latter discourse outside of the EU’s will. After the Greek Cypriot elections of 2003, the governmental policy in the country was said to be shaped by this latter discourse; hence, the utilisation of the Union’s framework and institutions by the Greek Cypriots in order to further their interests.⁷² Therefore, some would argue that it is the mechanisms that caused this transformation of discourse to occur ‘that evidence the failure to realise the opportunities for solution offered by the EU’s impact on the conflict’;⁷³ accordingly, the Greek Cypriots failed to utilise the Union’s force on the conflict because they put into domestic practice this strategy. In other words, the altering views on the EU ‘show the conditions upon which the pathways of impact operate.’⁷⁴

The argument is that the EU and conflict transformation became an oxymoron in the case of Cyprus as a result of the Hellenic nationalist rhetoric. In the carrot catalyst description, the EU is constructed as an actor standing outside the conflict as a

⁷⁰ Diez et al (2008) 86.

⁷¹ Diez (n 16) 144.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

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mediator. The conflictual nature of the issue however proves that the EU is not a third party; it has become a direct party to the conflict. Two of its Member States have been and still are directly involved in the island: Greece via its ethnic link to the population on the south of the island and the political importance of *Enosis*; and Britain as a result of its colonial past and its military bases in Cyprus.⁷⁵ Moreover, the EU as a whole has sided with the Greek Cypriots in the conflict and arguably it is privileging Greek over Turkish interests according to many scholars by virtue of the customs union and by granting the RoC EU candidacy and subsequently membership.⁷⁶ This does not necessarily mean that the Union should have acted differently; it just simply highlights the fact that as a result of this setting, the EU can no longer be the neutral mediator it should have been in this conflict.⁷⁷

Nevertheless, it should be noted that the civil society in the north of the island saw the RoC's accession as an excuse to generate support to remove hardliner Denktaş from power and accumulate support for a settlement; thus, they somewhat negated the oxymoron argument.⁷⁸ Overall, it still seems as though the EU's impact on the conflict did not change as a result of the Greek's failure to use the chances offered by the club, but because the Union intentionally or unintentionally (depending on interpretation), gave the Greek Cypriots the power and permission to behave in such a way. What is heartbreaking is that the EU membership could have resolved the differences between the two conflicting Cypriot parties in the long-run, but unfortunately the candidacy of the troublesome island caused more problems than support for the EU's resolution of the predicament.⁷⁹

⁷⁵ Akrotiri and Dhekelia, officially the Sovereign Base Areas of Akrotiri and Dhekelia, are a British Overseas Territory on the island of Cyprus. The Areas, which include bases and other land, were retained by the British, under the 1960 Treaty of Independence of Cyprus agreed and signed by the United Kingdom, Greece, Turkey and representatives from the Greek and Turkish Cypriot communities, which granted independence to the Crown colony of Cyprus. The territory serves an important role as a station for Signals Intelligence and provides a vital strategic part of the United Kingdom communications gathering and monitoring network in the Mediterranean and the Middle East. Sovereign Base Areas <<http://www.sbaadministration.org/index.php>> accessed 13 July 2015.

⁷⁶ Kramer (n 17) 25; Philip H Gordon, 'Storms in the Med Blow towards Europe', *The World Today* (February 1998) 43; Christopher Brewin, 'Turkey, Greece and the European Union' in Clemens H Dodd (ed), *Cyprus: The Need for New Perspectives* (Eothen Press 1999) 148, 155.

⁷⁷ Diez (n 16) 147.

⁷⁸ Ibid.

⁷⁹ AB Yesilada and A Sozen, 'Negotiating a Resolution to the Cyprus Problem: Is Potential European Union Membership a Blessing or a Curse?' (2002) 7(2) *Journal of International Negotiation* 261, 269 <<http://academos.ro/sites/default/files/biblio-docs/837/game.pdf>> accessed 13 July 2015.

4.3. A Basic Game Theory Approach

The events that have taken place during the bargaining process of Cyprus' application and candidacy can be evaluated as a 'game theory' which is what psychologists refer to as the theory of social situations as it is the study of strategic decision making.⁸⁰ This theory encompasses a game called the 'deadlock' which will provide a background to the current situation in Cyprus and unravel the strategies of the two conflicting parties that have caused this impasse. According to the 'game theoretic' model, the Cyprus conflict is composed of a prolonged chain of events based on haggling where the parties have to deal with choices of cooperative and non-cooperative behaviour. The current status of the Cyprus conflict is categorised as non-cooperative behaviour.⁸¹ Domestic and international elements have caused the conditions for both sides of the conflict to seek unilateral victory instead of compromise. The 'game theory' also encompasses a game called the 'prisoner's dilemma' which requires a talented mediator such as the EU, to induce compromise via binding agreements and side-payments, and this game will only be successful once it is repeated a number of times. It should be noted that, the role played by the mediator, hence the EU, in this game will be extremely crucial since the side-payments will have to be ratified by each Member State's legislature in order to encourage the conflict parties to cooperate.⁸²

The current 'deadlock game' has been caused by both the north and the south of Cyprus receiving side-payments that permit them to practise a self-interested strategy of refusing to move. Thus, the guarantee of membership by the EU to the Greek Cypriots without the need for a settlement on the island imposes the non-cooperative strategy as the promise acts as a side-payment. Similarly, Turkey's hefty military presence on the island, and its absolute support for the Turkish Cypriots, allows the Turkish Cypriots to maintain their stubborn position in the negotiations.⁸³

Even though the two parties have become dangerously inflexible due to the received side-payments and the lifted conditionality, side-payments that are given in the aim of endorsing compromise from now on, potentially can move the parties away from

⁸⁰ There are two main branches of game theory: cooperative and non-cooperative game theory. RB Myerson, *Game Theory* (Harvard University Press 2013).

⁸¹ Yesilada & Sozen (n 79) 270.

⁸² Christou (n 65).

⁸³ Yesilada & Sozen (n79) 261.

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the ‘deadlock game’ to the ‘prisoner’s’ dilemma’ game;⁸⁴ nevertheless, this all depends on whether the parties maintain a high valuation for future cooperative relations or not.⁸⁵ As soon as the conflict is treated as a ‘prisoner’s dilemma’, the conflicting parties can achieve *Pareto* improvements; these improvements will only occur once both sides agree to make concessions.⁸⁶ The *Pareto* principle claims that approximately 80% of the effects come from 20% of the causes for most events.⁸⁷ Unfortunately, the EU’s involvement in the Cyprus problem worsened the situation according to the abovementioned conditions. The EU also managed to hinder the efforts of the UN which was preparing initiatives within the framework of ‘Confidence-Building measures’ in order to bring the two disputants back to the negotiation table. The Turkish Cypriots broke off all contact with the Greek Cypriots and began to economically integrate with Turkey once the European Council announced the inclusion of Cyprus in the next membership expansion and utterly discounted the 1960 Treaties and Constitution of Cyprus. The overall result was a ‘deadlock game’ as the Turkish Cypriots applied the ‘Tit-for-Tat strategy’ in the direction of non-cooperative behaviour which eventually shifted to a ‘bully strategy’, whilst the Greek Cypriots supposedly sustained the ‘prisoner’s dilemma strategy’. Thus, the Cyprus game sincerely deteriorated throughout the 90s as it transformed from a game of ‘chicken’ to a game of ‘deadlock’.⁸⁸

4.4. The Logic Behind EU Expansion

European integration is in its spirit about providing security and peace across Europe and without EU enlargement these two goals will not be achieved. It can however be argued that enlargement and integration can be classified as a zero-sum game since the EU’s enlargement strategy for Cyprus created a new division across Europe whilst trying to erode borders.⁸⁹ If the predominant rationale behind the Union’s enlargement is to reduce inequality, division and exclusion, the Union’s strategy of commencing accession negotiations with the RoC and ignoring the existence of the northern part of the island, undermined instead of enhanced this objective, regardless

⁸⁴ Ibid (n 79) 277.

⁸⁵ Ibid 272.

⁸⁶ Ibid 271.

⁸⁷ Mind Tools, ‘Pareto Analysis: Using the 80:20 Rule to Prioritize’ <http://www.mindtools.com/pages/article/newTED_01.htm> accessed 6 March 2013.

⁸⁸ Yesilada & Sozen (n 79) 273.

⁸⁹ Jan Zielonka, ‘The Politics of the EU’s Eastward Enlargement’, EES Discussion, Meeting Report #232, Wilson Center <<http://www.wilsoncenter.org/publication/232-the-politics-the-eus-eastward-enlargement>> accessed 20 March 2013.

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of any dignified reasons. According to the Treaties, enlargement is a reactive process; thus, the Union will not plead for new members; it will wait for individual States to apply for membership. Although, Graham Avery⁹⁰ believes that the EU lacks a strategy for enlargement *per se*, there are intents and ambitions behind the Union's enlargement procedure; therefore, it could be contended that the EU has an 'enlargement agenda' instead of an 'enlargement strategy'.⁹¹ The origins of enlargement in the Treaty establishing the European Coal and Steel Community⁹² were highlighted by Professor Dimitry Kochenov;⁹³

Any European State may request to accede to the present Treaty. It shall address its request to the Council, which shall act by unanimous vote after having obtained the opinion of the High Authority; the Council shall also determine the terms of accession, likewise acting unanimously.⁹⁴

Albeit the Community had an economic mission at the time, the fact that the terms of accession were to be decided by the Council acting unanimously in this primary vision of enlargement, implies that accession was to be solely based on the political programme of Member States. This primary enlargement process has since been enhanced and is now governed by Article 49 TEU which emphasises the magnitude of Europeanisation in relation to values and geography; hence, enlargement politics will supposedly be shaped by ideational, cultural factors. 'Applicants and members "construct" each other and their relationship on the basis of the ideas that define the community represented by the international organization.'⁹⁵

The enlargement agenda of the EU today can be said to be driven by two aims, namely; ensuring that Europe is in a state of peace and achieving economic growth.⁹⁶

⁹⁰ Senior Member of St Antony's College, Oxford and Senior Adviser at the European Policy Centre, Brussels.

⁹¹ European Union Committee, 'The Future of EU Enlargement' HL 2012-13, 129, 9 <<http://www.publications.parliament.uk/pa/ld201213/ldselect/ldcom/129/129.pdf>> accessed 19 March 2013.

⁹² The ECSC was signed in 1951.

⁹³ Chair in Constitutional Law of the EU at the University of Groningen.

⁹⁴ Article 98 Treaty establishing the European Coal and Steel Community. 'The High Authority was the ECSC

original equivalent to the European Community's Commission and was eventually merged with it. The Treaty

establishing the ECSC expired in 2002.' European Union Committee (n 91) 9.

⁹⁵ F Schimmelfennig and U Sedelmeier, *Theorizing EU Enlargement: Research, Focus Hypotheses, and the State of Research* (2002) 9 *Journal of European Public Policy* 500, 513 <http://www.eup.ethz.ch/people/schimmelfennig/publications/02_JEPP_TheorizingEnlargement.pdf> accessed 13 July 2015.

⁹⁶ *Ibid* 10.

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The majority of Europe's diplomats tend to believe that the former element plays the predominant role in the EU's enlargement scheme and this can be referred to as the geopolitical argument for enlargement.⁹⁷ The fact that there are no set boundaries and every country has the right to approach the Union for potential guidance makes the EU a 'successful' stability promoter as Article 49 prompts that any European country respecting EU values⁹⁸ can apply for membership and thus it leaves the right of initiative with the States and not with the EU.⁹⁹

Nevertheless, this lack of clarification and uncertainty should not be applied to the pre-accession strategy of the EU as this could cause utter turmoil in the long-run. For the time being, it is acceptable to assert that the EU does not have a clear cut enlargement strategy and thus the Union's enlargement develops not by design or geography, but by default as argued by Zielonka.¹⁰⁰ Nevertheless, enlargement is constitutionally innate in the EU; second Preamble consideration of the EU Treaty stipulates that there is 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe.'¹⁰¹ Furthermore, the Treaty establishing the EEC affirmed in its Preamble that signatory States were 'determined to lay the foundations of an ever closer union among the peoples of Europe.'¹⁰² Arguably, the EU is not an *elite* club but in fact open to everyone in Europe; thus the criteria for accession should not be unreachable.

Undoubtedly, EU integration entices change in ethno-political conflicts; yet, does the Union promote 'unconstructive engagement?' Naturally, the EU has different interests and objectives in different conflict areas, thus the conflict dynamics adopted by the Union will vary accordingly; for example, the Embassy of the Republic of Serbia proclaimed that by 'leaving Western Balkan countries outside' the EU, would

⁹⁷ European Union Committee (n 91).

⁹⁸ These norms and values are: democracy, human rights, the rule of law and fundamental freedoms.

⁹⁹ EurActiv.com, 'Future Enlargement: "Absorption Capacity" Coming to the Fore?' (23 March 2006) <<http://www.euractiv.com/enlargement/future-enlargement-absorption-ca-news-216108>> accessed 13 July 2015.

¹⁰⁰ Zielonka (n 89).

¹⁰¹ Maastricht Treaty, Consolidated Version of the Treaty on European Union (TEU) [1992] OJ C 325/5.

¹⁰² Treaty establishing the European Economic Community (EEC Treaty) 25 March 1957.

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be ‘risky’ and ‘expensive’¹⁰³ and therefore eight countries from the Western Balkans are currently participating in the enlargement process.¹⁰⁴ The same ideology was adopted by the EU when it triggered the ‘big bang’ enlargement of the ten CEECs¹⁰⁵ in 2004 and enabled the accession of Romania and Bulgaria in 2007.

Zielonka believes that a widened EU will ‘resemble a neo-medieval empire rather than a neo-Westphalian federal state’ and consequently this empire will be too problematic and varied to sustain a flourishing institutional structure.¹⁰⁶ Since the EU has not been very efficient in dealing with the problem of inclusion and exclusion and finding an alternative to membership that will satisfy the applicants, it has been suggested that the Union should compensate ‘exclusion costs to potential losers’¹⁰⁷ instead of allowing in States that would damage the image of the EU in the short and long-run, such as Cyprus. An irrational expansion of the EU will trigger a crisis and it already has. Crisis derives from the Greek word ‘κρίσις’ translating as ‘decision and judgement’;¹⁰⁸ the EU has attained a high level of unrecognised interdependencies, notably this lead to a transmission of chaos.¹⁰⁹ To prevent further crisis, the EU must utilise the literal meaning of the word and adopt correct decisions regarding accession of new States into the European family.

The EU has been expanding for more than three decades, but conditionality only arose as a response to the anticipation of enlargement to follow after the termination of the Cold war which ended in 1991.¹¹⁰ Enlargement is now said to rely on the

¹⁰³ European Union Committee (n 91) 11.

¹⁰⁴ 1 July 2013 Croatia joined the EU after a decade of negotiations.

(1) Iceland (candidate) – negotiations open; 11 chapters provisionally closed;

(2) Montenegro (candidate) – negotiations open; 1 chapter provisionally closed;

(3) Turkey (candidate) – negotiations open; 1 chapter provisionally closed;

(4) Former Yugoslav Republic of Macedonia (candidate) – negotiations not yet open;

(5) Serbia (candidate) – negotiations not yet open;

(6) Albania (potential candidate);

(7) Bosnia and Herzegovina (potential candidate);

(8) Kosovo (potential candidate).

¹⁰⁵ The Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

¹⁰⁶ Zielonka (n 89).

¹⁰⁷ Ibid.

¹⁰⁸ JC Trichet, ‘Shaping a New World: The Crisis and Global Economic Governance’, speech by Jean-Claude Trichet, President of the ECB, at Bocconi University, Aula Magna Milan, 9 April 2010 <http://www.ecb.europa.eu/press/key/date/2010/html/sp100409_2.en.html> accessed 20 March 2013.

¹⁰⁹ Ibid.

¹¹⁰ Aurélien Hassin, ‘The EU’s Integration Capacity: Political Precondition or Technical Evasion?’ Policy Brief, Notre Europe Studies & Research (January 2007)

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Copenhagen criteria¹¹¹ and a technical process.¹¹² Conversely, the connection between the political urgency to amalgamate the CEECs into the Union and the procedural conditions for accession have been dramatically constricted to avert the diminution of the European momentum as a result of a new Member State failing to uphold the *acquis* and meet the political requirements.¹¹³ Some believe that there has been ‘a shift from the integration capacity *OF* the EU towards the integration capacity *INTO* the EU.’¹¹⁴ After decades of communist rule the EU could not risk permitting the CEEC’s immediate membership.¹¹⁵ Consequently, the EU offered a set of bilateral association agreements- the Europe Agreements (EAs) - which formed the legal framework for pre-accession. These agreements were said to be the final call of the ‘iron curtain.’ The guinea pigs were Poland, Hungary and Czechoslovakia,¹¹⁶ subsequently, joined by Bulgaria, Romania, Estonia, Latvia, Lithuania, Slovakia and lastly Slovenia.¹¹⁷ The agreements included the establishment of a political dialogue, a free trade area, provisions on approximation of laws,¹¹⁸ financial assistance, such as PHARE, and training activities.¹¹⁹

<http://www.institutdelors.eu/media/bref6-capacited_integration-en.pdf?pdf=ok> accessed 15 July 2015.

¹¹¹ The Copenhagen criteria, first defined in 1993 and reinforced in 1995, require countries wishing to join to have: i) stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; ii) a functioning market economy and the capacity to cope with competition and market forces in the EU; and iii) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union. In addition, the EU's capacity to absorb new members while maintaining the momentum of European integration is also an important consideration in the accession process. European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency SN 180/1/93 REV 1 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf> accessed 11 July 2015.

¹¹² European Union Committee (n 91) 9.

¹¹³ Hassin (n 110).

¹¹⁴ Ibid.

¹¹⁵ Nils Meyer-Ohlendorf, ‘EU-Enlargement- A Success Story?’ (Ecologic, Institut für Internationale und Europäische Umweltpolitik gGmbH 2006) 5 <http://www.ecologic.eu/download/projekte/200-249/221-02/221_02_gruene_eu_erweiterung.pdf> accessed 3 July 2015. Thus, there was fear that the enlargement would lead to a rise in crime as borders opened up.

¹¹⁶ In 1994, these three countries made major sacrifices despite their economy, such as terminating their COMECON agreement with the Soviet Union in order to have something with the EC. The Commission was in turn very prolific and dynamic. EAs consisted of mixed agreements between the twelve Member States of the Community, the European Economic Community, Steel Coal Community and these three countries. J Volkai and Joseph HH Weiler, ‘The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions: Seminar and Workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO’ Harvard Jean Monnet Working Paper (Harvard Law School 1999).

¹¹⁷ Slovenia was the most advanced country emerging out of the ashes of Yugoslavia, thus they were allowed to have an EA. (1999)

¹¹⁸ These provided a list of priority areas such as customs, insurance, banking, compensation, nuclear law, taxation, environmental protection and completion law.

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Undoubtedly, the EAs kept acceding countries on a leash and saved them from going into shock on the date of accession; for example the Polish regarded the obligation of approximation of laws as the pre-accession version of ‘indirect effect.’¹²⁰ Another euro-friendly act came from the Czech Constitutional Court, where a penalty imposed in accordance to Community competition considerations was ruled as constitutional.¹²¹ Now, the EU adopts Stabilisation and Association Agreements¹²² (SAAs) for the applicant Western Balkan countries for the implementation of the Stabilisation and Association Process, since they are too volatile to be covered by the EAs.¹²³ Although Cyprus was not a communist country, the continued division on the island should have been a valid reason for the EU to devise a bilateral association agreement with Cyprus in order to prepare the weaker north for potential reunification with the south and thus accession; yet, Cyprus was surprisingly offered *unconditional* membership.

The fifth enlargement was a ‘Cinderella story’¹²⁴ even though the EU had a wider policy making role.¹²⁵ Evidently, the EU survived ‘the surgery’. However the ‘patient’ is struggling to breathe from the sixth enlargement which welcomed Bulgaria and Romania in 2007 and also from the case of Cyprus. Paradoxically, the

¹¹⁹ Ranging from aid for translation to stipulations of early information in legislation and the PHARE: Financial Programmes for Poland, Hungary and Czechoslovakia. Institute of Competition Law, Glossary of Competition Terms ‘Europe Agreements’ <http://www.concurrences.com/article.php?id_article=20095&lang=en> accessed 14 July 2015. See also European Commission, ‘Europe Agreements with Poland and Hungary: Entry into Force 1 February 1994 (press release 31 January 1994)’ <http://europa.eu/rapid/press-release_MEMO-94-7_en.htm> accessed 15 July 2015.

¹²⁰ The Polish Supreme Administrative Court displayed its respect towards the Association Agreement by ruling that any improper legislative implementation at the domestic level that discounted the EU *acquis* would constitute a violation of obligations.

¹²¹ See the Skoda Auto Case of 1997, Case III US 31/97 (*Sbirka rozhodnutí Ústavního soudu*) Collection of Decisions of the Constitutional Court of the Czech Republic vol 8 in J Zemanek, ‘The Constitutional Courts in the New Member States and the Uniform Application of European Law’ in I Pernice, J Kokott and C Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (6th International ECLN Colloquium / IACL Round Table Berlin 2005) (Nomos 2006) 258.

¹²² ‘The agreements are adapted to the specific situation of each partner country and, while establishing a free trade area between the EU and the country concerned, they also identify common political and economic objectives and encourage regional co-operation. In the context of accession to the European Union, the agreement serves as the basis for implementation of the accession process.’ European Commission, Glossary <http://ec.europa.eu/enlargement/policy/glossary/terms/saa_en.htm> accessed 14 July 2015.

¹²³ Meyer-Ohlendorf (n 115) 3.

¹²⁴ Heather Grabbe, *The EU’s Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Studies in European Union Politics 2006).

¹²⁵ Such as the creation of specific demands for individual countries (the closure of nuclear plants in Lithuania, the improvement of treatment to children in Romania, the non-negotiable application of Schengen and monetary union).

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pre-accession policy that has been the ideal integration mechanism so far is in need of urgent change since it has caused the Union to question whether it has fulfilled its own accession principle embedded in the Treaty of Lisbon preamble: the absorption capacity.¹²⁶

In EU terminology, absorption capacity is the need for the Union to re-define its potentials in relation to future enlargements.¹²⁷ Christian Democrat politicians like Schüssel¹²⁸ have argued that the Union's capacity rather than the 'preparedness of the candidates' should be the critical criterion for expansion.¹²⁹ For example, does the EU have the capacity to deal with a Member State that is only applying the *acquis* in one half of its land? Does it have the capacity to deal with a Member State that is in conflict with a candidate State? The importance of EU functioning is not a matter to be disputed; even 'wideners' such as Grant,¹³⁰ visualise the absorption capacity as a justifiable concern. Therefore, future enlargements should be rationalised by a methodology which will enhance the Union.¹³¹ For instance, it could be contested that the EU failed to apply the Copenhagen criteria meticulously during Romania's and Bulgaria's candidacy and subsequently a premature accession took place, where the two countries were unable to fully fulfil the obligations of membership. This watered-down application of the criteria triggered the use of an inadequate post-accession mechanism referred to as the Cooperation and Verification mechanism, for the two failing Member States.¹³² The Commission acquired disciplinary equipment via the Treaty alongside the enforcement appliances it had to secure the internal market of the EU.¹³³ Lungescu¹³⁴ proclaims that these Cooperation and Verification mechanisms are implemented as a means to reassure

¹²⁶ F Schimmelfennig and U Sedelmeier 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11(4) *Journal of European Public* 669, 678.

¹²⁷ EurActiv (n 99).

¹²⁸ Former Chancellor.

¹²⁹ European Union Committee (n 91) 43.

¹³⁰ Director of the Centre for European Reform.

¹³¹ European Union Committee (n 91) 43.

¹³² *Ibid* 13.

¹³³ The main policy instruments of this strategy were based on Council Regulation 622/98/EC Council Regulation (EC) No. 622/98 of 16 March 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 L 85/1. Tamara Takács, 'The Application of EU Law in Hungary: Challenges and Emerging Practices' in A Lazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (TMC Asser Press 2010).

¹³⁴ BBC journalist.

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EU citizens and to warn the other Balkan nations seeking membership.¹³⁵ Since Bulgaria and Romania's fully-fledged membership, constant checks are being imposed on their national policies; some would argue that the Commission is punishing the two newcomers.¹³⁶

Similarly, the Copenhagen criteria were not rigorously applied *vis-à-vis* Cyprus and as a result, half of the island joined the EU whilst the other half was left in the dark. Lindblom's theory of incrementalism suggests that decision makers prefer to initiate small changes to revolutionise a dilemma rather than adopt a radical substitute to erode the problem.¹³⁷ This theory resembles the policies of the EU pre-accession strategy; they have solved problems without taking great risks only because the decision makers are aware that radical changes will be confronted by outrage. The political problems that arose after Cyprus' accession, which will be discussed in the following chapters, proves that the pre-accession strategy should not be configured according to the incrementalism theory.

When Cyprus joined the eurozone in 2008, analysts were wondering what would become of the poorer north of the island as the southern part of the island had a very prosperous economy at the time; Dimitriades, who works for the EU presidency, stated that; 'It was like one of the most prosperous economies in the EU. That was not an exaggeration.'¹³⁸ Analysts were completely aware that the EU had ruined the foundation for the two conflicting parties to reach a sustainable agreement once the Greek side of the island acceded, since the Greek Cypriots would no longer have the need or desire to share their economic power with the Turkish Cypriots. This was first evidenced when the border dividing the island was opened in 2003; the Turkish Cypriots who have always been subjected to economic embargoes had hoped that they would have a chance to partner with the blooming south and *ipso facto*, with

¹³⁵ BBC News 'EU Approves Bulgaria and Romania' (26 September 2006) <<http://news.bbc.co.uk/2/hi/europe/5380024.stm>> accessed 19 March 2013.

¹³⁶ Ibid.

¹³⁷ R Dumitriu and R Stefanescu, 'An Incremental Approach to the European Union Enlargement' (2007) 16(1) *Analele Universității Din Oradea* 226 <<http://ssrn.com/abstract=2437582>> accessed 15 July 2015.

¹³⁸ J Kakissis, 'For Cyprus' North and South, a Reversal of Fortunes' (2012) <<http://m.npr.org/story/166022822>> accessed 21 March 2013.

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Europe, but the Greek Cypriots rejected unification,¹³⁹ which in turn deepened the division and dependencies.

According to Ersin Tatar,¹⁴⁰ since the Greek Cypriots adopted the Euro, the Turkish Lira has become a lot stronger, and even though a strong currency does not necessarily indicate a strong economy, this strength has been reflected in northern Cyprus; thence, there has been a reversal of fortunes.¹⁴¹ The corollary of this is that, had the EU forced Cyprus to reunite before permitting the island's accession, the south of the island may not have faced this terrible economic crisis since 2012. The reunification of the island would have meant that seventy percent of the island's wealth producing resources would have been restored; sixty-five percent of its hotels, forty-six percent of its industrial sector and fifty-six percent of its mining and quarrying production would have been regained.¹⁴² Therefore, it could be argued that the EU failed to see the bigger picture of welcoming into the Union a divided country with a divided economy- which was bound to breakdown one day.¹⁴³ The real question is: would southern Cyprus have agreed to reunify with the north in the name of EU membership? Was membership that important to the Greek Cypriot community? Or was the RoC's membership crucial for the EU?

4.5. The Power of Membership (*In More Detail*)

Vachudova said that the 'benefits combined with the substantial requirements of membership have set the stage for the EU's unprecedented leverage on the domestic policy choices of aspiring member states.' It is hard to force sovereign States to subject themselves to multifaceted verification strategies and thus weaken their independence for an international organisation.¹⁴⁴ Withal, the EU should not be

¹³⁹ The Annan Plan referendum.

¹⁴⁰ The Turkish Cypriot finance minister, see Kakissis (n 138).

¹⁴¹ 'The Turkish Cypriot economy has grown by 5 percent annually in recent years ... thanks in part to an education industry financed by Turkey ... Turkey's much stronger, and because Turkey's stronger, that strength is reflected in north Cyprus ... We have more Turkish tourists, more Turkish companies, Turkish commercial flights. Turkey is opening us up to the world.' Kakissis (n 138).

¹⁴² Country Profiler 2011 'Cyprus Country Report' (2011) <[http://www.businessincyprus.gov.cy/mcit/psc/psc.nsf/cke18_gr/78CEBDCB86B3A1BEC22575EE02F66F7/\\$file/%CE%88%CE%BA%CE%B8%CE%B5%CF%83%CE%B7%20%CE%B3%CE%B9%CE%B1%20%CF%84%CE%B7%CE%BD%20%CE%9A%CF%8D%CF%80%CF%81%CE%BF%20\(%CE%95%CE%9D\).pdf](http://www.businessincyprus.gov.cy/mcit/psc/psc.nsf/cke18_gr/78CEBDCB86B3A1BEC22575EE02F66F7/$file/%CE%88%CE%BA%CE%B8%CE%B5%CF%83%CE%B7%20%CE%B3%CE%B9%CE%B1%20%CF%84%CE%B7%CE%BD%20%CE%9A%CF%8D%CF%80%CF%81%CE%BF%20(%CE%95%CE%9D).pdf)> accessed 21 March 2013.

¹⁴³ *Kibris Postasi* 14 December 2012 'Kucuk: "KKTC, Rumlara ekonomik yardimda bulunabilir"' <http://www.kibrispostasi.com/index.php/cat/35/news/94655/PageName/KIBRIS_HABERLERI> accessed 21 March 2015.

¹⁴⁴ MA Vachudova, 2004, 'The European Union, the Balkans and Turkey: Can "Soft Power" Bring Stability and Democracy?' EES Newsletter (Woodrow Wilson International Center, January-February

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categorised as an international organisation *per se* since the cost-benefit analysis of joining the EU is different from that of an international organisation, its psychological benefits justify the sacrifices made by States and with the transfer of sovereignty, the EU becomes an exclusive supranational subject providing ‘pooling’ of opportunities to both States and individual citizens.¹⁴⁵ Consequently, these reasons are enough to induce heavy burdens on candidate countries.¹⁴⁶ Conditionality has transferred the onus of Europeanisation on national elites who are ‘pressured to speed up reforms in order to meet EU accession criteria.’¹⁴⁷ Subsequently, triumphs of pre-accession policies depend purely on the enthusiasm of the candidates, and not on the EU’s architectural strategy.¹⁴⁸ The ideology underpinning EU conditionality is ‘a bargaining strategy of reinforcement by reward.’¹⁴⁹

Nonetheless, there is not always a causal link between conditionality and the adoption of policies. For instance, the CEECs may have implemented ‘rules’ as a result of the processes of persuasion in which the EU actors socialised the applicants’ actors in place of pressurising them, or the EU rules may have simply been efficient solutions to national dilemmas.¹⁵⁰ Thus, some would argue that the EU should not worry about creating stricter accession policies to befriend those who do not want to aid European harmonisation.¹⁵¹ Nevertheless, the very lack of a strict pre-accession strategy is the reason why Cyprus, Romania and Bulgaria have caused problems for the EU once they became Member States. It can be argued that these

2004) 1-2<<http://www.wilsoncenter.org/publication/280-the-european-union-the-balkans-and-turkey-can-soft-power-bring-stability-and>> accessed 15 July 2015.

¹⁴⁵ P Ralchev, ‘EU Conditional Assistance as a Foreign Policy Tool towards Southeastern Europe’ (Institute for World Economics of the Hungarian Academy of Sciences, Budapest: Papers of the First Regional Scientific Seminar 2004) 2.

¹⁴⁶The momentum of accession negotiations made Bulgaria and Romania incorporate EU related elements into their everyday lives as ‘potential membership in the EU can function as an incentive for the modernization of the political, economic and social systems of candidate countries.’

A Spendzharova, 2003 ‘Bringing Europe in? The Impact of EU Conditionality on Bulgarian and Romanian Politics’ (2003) 4(2-3) Southeast European Politics 141.

¹⁴⁷Roadmaps to membership were given to both entrants to help their governments and the EU officials recognise problematic areas in the short, medium and long term viewpoint.

Ibid.

¹⁴⁸ Ibid 149.

¹⁴⁹The espoused pre-accession policy for the CEECs also worked although the phenomenon was gradual.

Balkan Civil Society Development Network, ‘The Successes and Failures of EU Pre-accession Policy in the Balkans: Support to Civil Society’ (2009) 2 <www.humanitarianforum.org/.../the-successes-and-failures-of-eu-pre-accession-policy-in-the-balkans> accessed 20 March 2013.

¹⁵⁰ Schimmelfennig & Sedelmeier (n 126) 670.

¹⁵¹ Ralchev (n 145) 3.

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three Member States truly do belong in the EU family and thus it would have been wrong to have kept them outside; but, they should not have been let in so easily and quickly even if enlargement was the imperative.

The EU did not neglect taking precautions before permitting the membership of the two laggards, Romania and Bulgaria. The unprecedented ‘postponement safeguard clause’ in the Accession Treaty¹⁵² authorised the Council to delay the membership of both States for twelve months.¹⁵³ The Treaty also encompassed safeguard clauses from the previous Treaty of Accession; as a result, the 2005 Treaty ‘extended the powers of the college beyond the traditional set of infringement procedures....’¹⁵⁴ It was the first to give the EU power to postpone a country’s membership with which an Accession Treaty had already been signed;¹⁵⁵ ergo, it was a wand in the hands of the Member States, although its use may have brought with it serious legal consequences.¹⁵⁶ Respectfully, the clause was a *fig-leaf* hiding the fact the enlargement was guaranteed.¹⁵⁷ Moreover, if it was used, the political impetus of enlargement would have been damaged ‘without giving the European Union legal instruments to enforce its reinforced conditionality.’¹⁵⁸ By accepting these two into the European family, the EU gained the opportunity to deepen a prolonged pre-accession strategy which was mixed with the enforcement mechanisms found in the EC Treaty.¹⁵⁹ This wand could have created wonders if it was given to the Member States during the accession process of Cyprus.

¹⁵² The 2005 Accession Treaty also lays down specific tasks for Romania in Annex IX of the Treaty, Treaty of Accession of the Republic of Bulgaria and Romania [2005] OJ L 157.

¹⁵³ Takács (n 133) 414.

¹⁵⁴ Ibid 413. The areas covered by these safeguard clauses include justice and home affairs, the internal market, and the environment (especially targeted at Romania).

¹⁵⁵ Article 4.2 of the Accession Treaty juxtaposed to Article 39 of the Act provide ‘clear evidence that the state of preparations or adoption and implementation of the *acquis* in Bulgaria or Romania [was] such that there [was] a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas’. Ibid 413.

¹⁵⁶ The rationale behind the Union not activating the membership postponement clause for these two countries was founded on the premise that the EU legal and political tools would be a lot more useful than predominantly pre-accession political instruments.

¹⁵⁷ Realistically a postponement of twelve months would not have transformed the two unprepared countries. Lazowski (n 133) 416.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid 416.

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If the EU is to say ‘no’ to a country which has fulfilled its duties, then it will have to deal with a hefty political price tag.¹⁶⁰ Nevertheless, if the EU is to say ‘yes’ to a country which has yet to fulfil its obligations arising out of the Copenhagen criteria, then the Union will have to deal with an even heftier political price tag. Perhaps, the EU’s previous experience with enlargement will inspire it to devise a post-accession type of conditionality with teeth in order to uphold democratic practices and values inside the EU in a more systematic and pro-active manner. However, this will all depend on the political will of the Member States.¹⁶¹

4.6. The Dimensions of Enlargement: *Beyond the Copenhagen Criteria*

Albeit it seems as though there is a complex pre-accession strategy that has been in practice for two decades, it should not be assumed that the Union can foresee which country is going to join the club, when and why. Moreover, there is still no clear cut answer as to who controls the democratic terms of enlargement in the broader sense and who is going to be the beneficiary at the end of the enlargement process.¹⁶² Due to the fact that there are so many admission criteria, it is difficult to understand what the EU strongly values and expects from an aspirant.

Initially, it was assumed that Agenda 2000 would bring some clarity to the enigmatic admission requirements; yet, it failed to provide weighting of individual criteria and a system of judging their significance. The consequences of EU enlargement are extensive not only for the institutional set-up and the policies of the Union, but also for the political shape of Europe as a whole. The current representation of Member States in the EU institutions and the organisation of the Council’s structure and voting system are all consequences of enlargement;¹⁶³ moreover, enlargement affects

¹⁶⁰ M Cremona and C Hillion, ‘L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU foreign and Security Policy’ (2006) European University Institute Working Paper EUI LAW 2006/39, 3.

¹⁶¹ R Balfour and C Stratulet, ‘The Enlargement of the European Union’ (2012) European Policy Centre Discussion Paper 5
<http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> accessed 14 July 2015.

¹⁶² Zielonka (n 89).

¹⁶³ The Treaties of Amsterdam and Nice had already made extensive changes to the system of voting in the Council in order to adapt it to the successive enlargements of the EU. The system of vote weighting has now been abolished and replaced by a new dual majority system. Council of the European Union (2009)
<http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0008_en.htm> accessed 21 March 2015.

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factors such as the budget, the agricultural and the regional policies that are negotiated by the governments of the Member States.¹⁶⁴

Nevertheless, the enlargement of the EU is a political shaping mechanism and thus can be classified as a process of ‘gradual and formal horizontal institutionalization of organizational rules and norms.’¹⁶⁵ The process leading to the enlargement of the Union has been segmented into three dimensions or in other words ‘to decisions on formal acts of horizontal institutionalization’; these three dimensions are: the applying states’ enlargement politics, Member State enlargement politics and the EU enlargement politics.¹⁶⁶

Applicant enlargement politics is concerned with why and under which conditions non-members want to become members of an organisation and which type of institutional relationship these non-members desire.¹⁶⁷ Professor Danny Nicol has stipulated that; ‘Human beings are herd animals’ in the world of politics, since they have an urge towards collective action.¹⁶⁸ Although Professor Nicol’s argument is correlated to constitutional reform, it can also be used to explain the reason the government of non-members choose to join a popular organisation. Thus, non-members are driven to join organisations simply because it is a recurring trait, in other words, a dominant political trend of the age that has been adopted by the majority surrounding them; it contends that desire for membership cannot be seen as somehow uninfluenced by political herding.¹⁶⁹ Likewise, there is herding of existing Member States towards either widening or deepening. Unsurprisingly, herding could be dangerous; logic becomes blurred as the focus is solely on achieving the end goal, meaning that the obstacles preventing this objective are simply bypassed and not eradicated. This is exactly what happened in Cyprus’ EU journey; the Union was so determined to welcome Cyprus into the family that the political conflict on the island was rendered unimportant to that aim, even though the problems that would arise from such a membership were apparent.

¹⁶⁴ Schimmelfennig & Sedelmeier (n 95) 501.

¹⁶⁵ Ibid 503.

¹⁶⁶ Ibid 504.

¹⁶⁷ W Mattli, *The Logic of Regional Integration. Europe and Beyond* (CUP 1999).

¹⁶⁸ D Nicol, ‘Progressive Eras, Periods of Reaction and Constitutional Change’ (2014) 15 (3) German Law Journal 437.

¹⁶⁹ Ibid 438.

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Member State enlargement politics asks the question, under which conditions a Member State of an organisation, supports or contests enlargement to a specified non-member? Habitually, this dimension has only concentrated on the political intentions of the governments of singular Member States;¹⁷⁰ however, it would be interesting to see theoretical research focus on the intentions of the institutional actors within the organisation, such as the Council, the Commission and the Parliament of the EU.

The EU enlargement politics dimension, analyses the reasons the Union makes a specific State a member or changes its institutional relationship with a non-member. Within this final dimension, there exist two methodically independent dimensions of enlargement, namely; macro dimension and substantive dimension.¹⁷¹ These two sub-dimensions are the most applicable for the case of Cyprus in terms of understanding the reason why it was accepted into the EU as divided Member State.

The EU is classified as a polity by the macro dimension which deals with the question of applicant selection and traits of national membership of the EU. Hence, it is primarily concerned with why the EU chooses to allow one specific country into the club instead of another country;¹⁷² such as, why the Union preferred to work with just the south of Cyprus instead of the entire island. Secondly, it questions why the organisation opts for membership instead of another form of integration or no relationship between the non-member and itself.¹⁷³ The substantive dimension of EU politics refers to the existing essence of the EU norms, rules and values that are 'horizontally institutionalised'.¹⁷⁴ This sub-dimension is predominantly concerned with analysing the results of accession negotiations, the character of pre-accession conditionalities and the nature of SAAs, EAs and Association Agreements. The aim of examining these agreements and negotiations is to bring to light whether or not the results reflect the demands of specific actors within the EU, such as certain dominant Member States, institutional actors, candidate States and interest groups or

¹⁷⁰ A Hyde-Price, *Germany and European Order: Enlarging NATO and the EU* (Manchester University Press 2000).

¹⁷¹ Schimmelfennig & Sedelmeier (n 95) 506.

¹⁷² Ibid.

¹⁷³ The literature on this dimension mainly concerns the eastern enlargement of the EU. L Friis, ' . . . And then They were 15: The EU's EFTA Enlargement Negotiations' *Cooperation and Conflict* (1998) 33(1) 81.

¹⁷⁴ Schimmelfennig & Sedelmeier (n 95) 507.

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countries.¹⁷⁵ Nevertheless, with regards to horizontal institutionalisation, enlargement also affects the new member to the organisation and non-members that are in some way connected to the newly admitted member; such as the effect of the RoC's membership on Turkey and the TRNC. It should also be noted that membership of the EU alters the actions, interests and persona of governmental actors.¹⁷⁶

The rationalist explanation to enlargement is the most applicable theory to Cyprus' membership journey even though 'rational choice' is not a theory based directly on EU integration or politics; it is a framework for understanding and modelling social and economic behaviour.¹⁷⁷ The rationalist explanation to enlargement revolves around two steps; firstly, the description of the enlargement choices of the applicant and the preferences of the Member States; secondly, the explanation of collective EU enlargement verdicts at macro levels.¹⁷⁸ As contended by Pollack, it cannot be denied that rational choice theories suffer from 'ontological blindness' to empirically crucial matters such as 'the issues of endogenous preference formation and change.'¹⁷⁹ Nonetheless, this theory rightly asserts that 'expected individual costs and benefits determine the applicants' and the member states' enlargement preferences. States favour the kind and degree of horizontal institutionalization that maximizes their net benefits.'¹⁸⁰ On the whole, a Member State will prefer the inclusion of a non-member, and a non-member will aim to work its way into the organisation, only if its membership will trigger positive net benefits and that these benefits will surpass the benefits that would come about from an alternative type of horizontal institutionalisation.¹⁸¹

Evidently, the enlargement process is habitually exploited by Member States in order to gain leverage in bilateral polemics with candidate or applicant States.¹⁸² Correspondingly, Hillion asks the question 'does this mean that the Member States

¹⁷⁵ U Sedelmeier, 'The European Union's Association Policy towards the Countries of Central and Eastern Europe: Collective EU Identity and Policy Paradigms in a Composite Policy' (PhD Thesis, University of Sussex 1998).

¹⁷⁶ Schimmelfennig & Sedelmeier (n 95) 507.

¹⁷⁷ AM Pollack, 'Rational Choice and EU Politics' in KE Jørgensen, MA Pollock and B Rosamond (eds), *Handbook of European Union Politics* (Sage 2006) 31.

¹⁷⁸ Schimmelfennig & Sedelmeier (n 95) 510.

¹⁷⁹ Pollack (n 177) 32.

¹⁸⁰ Schimmelfennig & Sedelmeier (n 95) 510.

¹⁸¹ Ibid.

¹⁸² European Union Committee (n 91) Summary.

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have an unfettered freedom to define the modalities of EU enlargement?’¹⁸³ He argues that the ECJ’s *Mattheus v Doego*¹⁸⁴ ruling infers that the provisions of Article 49 give the Member States such unlimited freedom; the ECJ held that the provisions establish:

[a] precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself. Thus the legal conditions for such accession remain to be defined in the context of that procedure without it being possible to determine the content judicially in advance.

The ECJ rather explicitly stated that such legal conditions are to be determined by the Member States and that their negotiating powers are to be fully conserved; ‘it is impossible to determine the content of the legal conditions for admission in advance.’¹⁸⁵ Enlargement has often been treated as a ‘radical break in the history of the EU’; ¹⁸⁶commentators tend to find the very concept of enlargement mysterious. However, it can be strongly argued that the process of enlargement and its effects are anything but mysterious; accession is only promoted if Member States believe that enlargement is in their national interest either in the short or long-run.¹⁸⁷ But it should also be noted that membership still remains a matter of State power and national interest.¹⁸⁸ Albeit the candidate States are generally aware that the Member States are playing a pragmatic game, rationalist institutionalism suggests that the adaptational pressure coming from the Union alters the opportunity configuration for utility-maximising national actors in the acceding States. Hence, according to March and Olsen, the EU’s domestic force relies on a ‘logic of consequences’ instead of a ‘logic of appropriateness.’¹⁸⁹ Therefore, the case of Cyprus proves that the EU is aware that it can only impose the strictly necessary criteria upon the candidates;

¹⁸³ C Hillion, ‘The Limits to Member States’ Discretion in EU Enlargement Negotiations: Turkey’s Accession as a Case Study’ (2007) Demos EUROPA, Centre for European Strategy <<http://www.demoseuropa.eu/upload/editor/demos/File/KOMENTARZE/Ch.Hillion%20july07.pdf>> accessed 8 June 2015.

¹⁸⁴ Case 93/78 *Mattheus v Doego* [1978] ECR 2203.

¹⁸⁵ Ibid. See also C Hillion, ‘Negotiating Turkey’s Membership to the European Union: Can the Member States Do as They Please?’ (2007) 3(2) *European Constitutional Law Review* 269.

¹⁸⁶ A Moravcsik and A Vachudova, ‘National Interests, State Power, and EU Enlargement’ (2003) 17(1) *East European Politics and Societies* 42.

¹⁸⁷ Ibid 43.

¹⁸⁸ Ibid.

¹⁸⁹ J G March and J P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press 1989) 160.

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¹⁹⁰alternatively, the Union could lose out on the benefits that are to arise out of gaining a specific member if that aspirant decides to face the consequences of non-membership rather than undergo painful reforms.

Perhaps, the Member States were adamant that the Greek Cypriot administration would withdraw its application if a settlement prior to accession was set as a pre-accession conditionality and as a result, Greece would veto the customs union; therefore, the EU felt pressurised to detach the Cyprus problem from the RoC's membership journey. The satisfaction of the RoC was clearly more important than mediating the Cyprus conflict for the EU; thus, this accession route was planned according to the demands of the applicant and the needs of the individual Member States. Cyprus' strategic and geographical location offers the Union obvious advantages to increase its control under the Euro-Mediterranean Partnership and moreover, the island offers a crucial trading route for the Union, and for this reason alone, Cyprus' membership is necessary, if not vital to all other Member States.¹⁹¹ This membership would also give Member States, such as Germany, France and Austria the chance to obstruct Turkey's EU journey by creating new conditions for the advancement of the accession negotiations.¹⁹²

So, today, the Copenhagen criteria are not the sole source of Union standards for the accession of new States; the conditions are also found in *acquis*, in the Council Conclusions which set higher standards and in the Treaty of Lisbon, which proclaims that additional conditions for membership can be laid down by the Union via the European Council. As a result, the bar for accession is set higher than in the past and it could also be possible that the standards are further raised during the process, depending on the needs of the existing Member States. Discussions have taken place in Brussels with regards to changing the Copenhagen criteria; however, such proposals have not been translated into political action just yet. For instance, Romania wanted to add the treatment of the Vlach minority on the issues to be assessed prior to granting Serbia candidacy; unfortunately, the other Member States did not agree with this. Yet, this does not rule out the possibility of such proposals

¹⁹⁰ Ibid.

¹⁹¹ AC Chrysafi, *Who Shall Govern Cyprus: Brussels or Nicosia?* (Evandia Publishing UK Limited 2003) 121.

¹⁹² S Akşit, Ö Şenyuva and Ç Üstün (eds) *Turkey Watch: EU Member State's Perceptions on Turkey's Accession to the EU* (Center for European Studies, Middle East Technical University 2009).

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returning in the near future.¹⁹³ But, overall, the Member States are able to hijack the accession process to resolve bilateral issues to their own advantage;¹⁹⁴ Croatia's negotiations were blocked for a year as a result of a disagreement with Slovenia over the Gulf of Piran.¹⁹⁵ With regards to the CEECs, the Union sponsored an initiative through which each country signed bilateral and multilateral agreements with its neighbours on mutual recognition of minorities, borders and good neighbourly relations, before the accession negotiations commenced. Moreover, regional cooperation was set as a requirement for the Balkans after the initiation of the Stabilisation and Association Process, which came after the war for Kosovo.¹⁹⁶ Thus, there were means of making the resolution of the Cyprus problem a requirement for accession. However, it must be highlighted that the enlargement process in itself is bilateral and thus cannot incorporate such conditions. Also, the Union does not have a common definition of a 'minority', does not have legislation in the field, and has no *acquis* on border problems; *ipso facto*, its policy formats lack the power to alter the status quo.¹⁹⁷

Even though enlargement is the best form of dealing with any issues on the Union's doorstep and it is a policy field which helps maintain the Union's credibility as an organisation which eradicates conflicts in Europe, the problems that have surfaced as a result of the RoC's membership are a direct consequence of its inclusion in the family. The EU has solidified a pre-existing border in Europe by welcoming a divided state.¹⁹⁸

¹⁹³ Balfour & Stratulet (n 161).

¹⁹⁴ The Commission, in its 2009 strategy paper, referred to the tendency of bilateral issues damaging the enlargement process. See: European Commission, 'Communication from the Commission to the European Parliament and the Council - Enlargement Strategy and Main Challenges 2009-2010' COM (2009) 533, 6. The Commission repeated its concern in its 2010-2011 strategy paper. See European Commission, 'Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2010-2011' COM (2010) 660, 11. C Hillion, 'EU Enlargement' in PP Craig and G De Burca (eds) *The Evolution of EU Law* (OUP 2011) 210.

¹⁹⁵ R Balfour and D Basic, 'A Bridge over Troubled Borders: Europeanising the Balkans' (EPC Policy Brief, European Policy Centre November 2010) <http://www.epc.eu/documents/uploads/pub_1170_a_bridge_over_troubled_borders.pdf> accessed 15 July 2015.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ 'As long as Cyprus is divided, in a way, Europe will be divided.'

H Van Rompuy, President of the European Council, Speech at the Official Opening Ceremony of the Cyprus Presidency at Nicosia on 5 July 2012, EUCO 137/12 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131560.pdf> accessed 14 July 2015.

5. The Accession and The EU's Capability to Accommodate a Future Cyprus Solution

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

The EU accession process unfortunately did not act as a catalyst for the reunification of Cyprus, and the signing of the Accession Treaty 2003 completely changed the dynamics of the conflict.² Both sides of the island hoped that the accession of Cyprus would have encouraged a settlement to be achieved; ironically, the Turkish Cypriots hoped for this to occur via the Annan Plan-which will be examined in the following chapter- whilst the Greek Cypriots believed that the RoC's EU membership would augment their leverage and better address their interests later on.³ Thence, the RoC's

¹ Nikos Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Hart Publishing 2011) 55.

² Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ L 236/2003, 17.

³ George Kyris, 'Europeanisation and "Internalised" Conflicts: The Case of Cyprus' (GreeSE papers 84, Hellenic Observatory Papers on Greece and Southeast Europe. The London School of Economics and Political Science 2014) <http://eprints.lse.ac.uk/56645/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repositor_y_Content_Kyris%2C%20G_Europeanization%20and%20the%20Turkish-Cypriot%20Political%20Parties_Kyris_Europeanisation_Internalised_conflicts_2014.pdf> accessed 15 July 2015.

membership is a crucial variable introduced to the conflict. Although the official view of the Union was that the EU would aid Cypriots resolve their differences via accession, this chapter advances the argument that, albeit the Union's framework is robust, EU internalisation of the conflict is counterproductive to resolution⁴ as the Union is now legally restricted in the means it can adopt to arbitrate this conflict. As a result, there is a need to reconsider the role that the Union can play in resolving this conflict.

Can the Union now play the role of the principal mediator in this age-old conflict or has it now become a party to the conflict? Furthermore, can the EU's framework accommodate a comprehensive settlement plan and does the plan need to be in strict compliance with the *acquis*? Unfortunately, as will be seen from this chapter, legal arguments will be used as a weapon by the two conflicting parties in order to prevent the two possible visions for the role of the Union to the conflict from becoming a reality.

As it stands, apart from the obvious political obstacles, there is no legal basis for the EU to assume this principal mediator role in a possible future proposal. However, the Union has proclaimed that it is willing to accommodate a solution to the Cyprus problem based on the principles of bi-zonality, bi-communality and political equality of the two Cypriot communities; nonetheless, this will require the Union to be flexible in its approach, as tensions exist between the Union's legal order and the principles upon which the future federal solution will be based. Protocol No 10 to the Accession Treaty 2003 provides a legal base for the EU to accommodate derogations in the event of a settlement, as long as that framework respects the core principles on which the Union is founded.

The chapter will also discuss whether or not the EU would permit northern Cyprus to declare its independence from the south and continue to exist within the European family. Indeed, legal and political limitations will surface in every possible solution envisaged for this conflict; however, this chapter elucidates how these constraints can be overcome if and when necessary, despite the fact that the internalisation of the conflict by the EU limits the ability of the Union to act in the dispute. The chapter will also visit previous examples where the Union has had to adopt a flexible

⁴Ibid 1.

approach to deal with 'special cases' and compare them to the case of Cyprus. The EU accession pending resolution of the dispute makes Cyprus a case that is significantly divergent to other well-known examples.⁵

Overall, this chapter will prove that the EU is capable of adopting a non-technical approach to the internalised Cyprus conflict; the only thing remaining is for the Cypriot parties to demonstrate the appropriate political will to resolve this ongoing political and legal problem.

5.1. The Predestined Accession of the RoC

Accession Treaties are international treaties requiring ratification of all existing EU Member States and at least one acceding country.⁶ In case of multi-country enlargements of the EU, the Member States do not sign a specific agreement with each of the acceding states, but rather a single set of documents for the acceding group.⁷ The Treaty of Accession comprises three balancing elements, namely; 'The Treaty of Accession' itself, 'The Act of Accession' with all attachments and 'The Final Act' which includes the declarations adopted by the Member States as an intergovernmental conference and the unilateral declarations.⁸ The general consensus on the admission of the ten new Member States⁹ was reached by the Council of the European Union on 14 April 2003.¹⁰ As a result, the Accession Treaty was signed by all of the Member States and the acceding countries on 16 April 2003 in Athens. Following completion of ratification procedures it entered into force on 1 May 2004.¹¹ It has been widely accepted that 'while partly imitating previous enlargement

⁵ Ibid.

⁶ Treaty of Accession (n 2) Article 2.

⁷ This was the case for the ten new Member States in 2003.

⁸ See K Inglis, 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible' (2004) 41 *Common Market Law Review* 937; C Hillion, 'The European Union is Dead. Long Live the European Union: A Commentary on the Treaty of Accession 2003' (2004) 29 *European Law Review* 583.

⁹ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

¹⁰ Decision of the Council of the European Union of 14 April 2003 on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ L 236; General Affairs And External Relations Council, 2501st Council Meeting, Luxembourg, 14 April 2003, 7705/02 (Presse 91) 7.

¹¹ Treaty of Accession (n 6) Article 2(2).

practice, the Treaty of Athens nevertheless contains more elaborate arrangements than earlier Accession Treaties, both quantitatively and qualitatively.¹²

Although the prospect of a settlement on the island prior to accession was not foreseeable or even necessitated by the EU, some scholars, inter alia, Tocci and Emerson proposed several methods on to how to incorporate the Turkish Cypriots within the accession process as effectively as possible in the event of a reunification on the island prior to accession. The proposed methods predominantly depended on the timing of an agreement.

According to the abovementioned scholars, the first and foremost option would have been to make a settlement conditional upon EU accession and *ipso facto* the inclusion of the terms of a settlement in the Accession Treaty. This would have only been achieved if an agreement was reached between the two conflicting parties in Cyprus by 2002. If this was the case, then the implementation of EU laws and regulations in northern Cyprus would have required extended transitional periods; nevertheless, if certain deviations from the *acquis* were incorporated into Cyprus' Accession Treaty, they would have had the highest possible legal ranking and consequently, they would have been least exposed to the attack of the ECJ. Overall, the arrangements made between the EU and the Turkish Cypriot community would have been protected from unfavourable ECJ rulings.¹³

Tocci and Emerson introduced a second scenario; if an agreement was not reached by the end of 2002,¹⁴ but the prospect of a settlement was anticipated in the near future, then the Accession Treaty would be signed with the RoC. This would in turn necessitate an agreement of a separate Protocol with the Turkish Cypriot authorities after the conclusion of a settlement. The Treaty would need to contain provisions allowing revisions that are to come about from a settlement.¹⁵ Nevertheless, this second scenario would only have been applicable if an agreement was reached latest by 2003; unfortunately, it was not.

¹² Hillion (n 8) 588.

¹³ M Emerson and N Tocci, *Cyprus as Lighthouse of the East Mediterranean Shaping EU Accession and Re-unification* (Centre for European Policy Studies 2001) 68.

¹⁴ The cut-off date for Accession Negotiations was November 2002.

¹⁵ Emerson and Tocci (n 13)

The third scenario, which is the status quo, was classified as being 'the worst-case scenario.'¹⁶ The push for accession of the RoC resulted in success and the Treaty of Accession was signed with the Republic which acceded to the EU as the sole representative of the entire island simply because a settlement was not reached by 2004.¹⁷ The implementation of *acquis* however, is limited to the south of the island until a solution to the Cyprus problem is found. The consequences of this final scenario have been unpleasant; there is now a *lacuna* in the legal order of the Union which is an irritation for the political and legal life of the bloc.¹⁸

The fact that the Commission refused to establish regular contact with the Turkish Cypriot authorities during the pre-accession process in order to listen to their concerns or inform them about the obligations, transition periods, derogations to the *acquis* and the benefits of EU membership, suggests that the EU had a pre-conceived idea about Cyprus' EU journey. The Commission's explanation for this decision of non-inclusion was that the creation of official relations with the Turkish Cypriot authorities would have been tantamount to recognition of the TRNC.¹⁹ As a result, the only solution to this problem would have been the conclusion of a settlement just before the expiration of the accession timetable for Cyprus. A settlement would have dismantled the TRNC and would have given the Turkish Cypriot community on the island a new status; thus, contact between the EU and the Turkish Cypriots would have been legally acceptable. Since the prospect of a settlement was out of the question at that point in time, the only contacts with the Turkish Cypriot authorities were via information missions by the officials of the EU Commission in non-official venues, such as, universities and chambers of commerce.²⁰

Nonetheless, the issue of recognition could have been easily worked around by the EU; the fact that they opted to maintain the problem, would suggest that the Turkish Cypriot community was simply unwanted in the accession from the very beginning. Contact with the Turkish Cypriot officials could have been accommodated if they were simply categorised as the representatives of the 'future common state of Cyprus'. The Greek Cypriot authorities have been and still are conducting

¹⁶ Emerson & Tocci (n 13) 68.

¹⁷ Ibid.

¹⁸ RP Hugg, 'Perceptions: Cyprus Advances towards Europe: Realism and Rationalism' (2001) 6(3) *Journal of International Affairs*.

¹⁹ Emerson & Tocci (n 13) 69.

²⁰ Ibid.

negotiations with the Turkish Cypriot authorities on a regular basis without recognising the TRNC;²¹ similarly, the U.S.A. has hosted a reception in its premises in northern Cyprus as a motion of encouragement towards peace without recognising the TRNC and in 2008 the 'Inforum World Conference'²² was held in north Cyprus.²³ Whether or not an imperative momentum would have been added to the inter-communal talks on the island if the Union had established relations with the Turkish Cypriot community is doubtful.²⁴

According to the EU officials, they would have further encouraged the Turkish Cypriot intransigence as regards to reaching a settlement, if they had refused to allow Cyprus to accede on the grounds that there was an ongoing political conflict on the island.²⁵ Can it not be argued that the very act of participating in settlement negotiations during the pre-accession period of Cyprus indicates that the Turkish Cypriot authorities were willing to compromise and conclude some sort of an agreement with the south? Ironically, it was the EU's decision to allow Cyprus to accede in a divided manner that reignited the nationalism in the north of the island. A few years after the accession, the Turkish Cypriot leadership and the nationals of the TRNC turned against the prospect of reunification; ex President of the TRNC, Eroglu, firmly claimed that the 'absence of an agreement is also an agreement.'²⁶ Furthermore, as a result of the EU's reluctance to meet with the Turkish Cypriot authorities during Cyprus' pre-accession stage, the authorities in the north have since claimed that they would only accept official contacts with the EU if they were not subordinated to the Union's dealing with the Greek Cypriot authorities;²⁷ this is an example of the game theory's non-cooperative behaviour,

²¹ Ibid 70.

²² The aim of these conferences is to advance the work of empirical input-output modeling, analysis, and data development techniques through the presentation and publication of papers representing the work of Inforum activities worldwide.

²³ Inforum World Conference 2008, 'The Sixteenth Inforum World Conference in Cyprus' <<http://inforumweb.umd.edu/organization/conferences/iwexvi/iwexvi.html>> accessed 5 June 2015.

²⁴ Emerson & Tocci (n 13) 70. For a discussion on sub-national entities and the EU see, J Hopkins, 'The Future of Sub-National Governments in a Supra-National World: Lessons from the European Union' (2007) 38 Victoria University of Wellington Law Review 19 <<http://www.upf.pf/IMG/pdf/03-Hopkins.pdf>> accessed 1 July 2015.

²⁵ O Demetriou, 'EU and the Cyprus Conflict: Perceptions of the Border and Europe in the Cyprus Conflict' (2005) Working Papers Series in EU Border Conflicts Studies, The European Union and Border Conflicts, No 18 (Intercollege) 9.

²⁶ *Kibris Postasi* 26 February 2013 'Eroglu: "Anlasma olmamasi da bir anlasmdir"' <http://www.kibrispostasi.com/index.php/cat/35/news/99867/PageName/KIBRIS_HABERLERI> accessed 7 May 2015.

²⁷ Emerson & Tocci (n 13) 69.

which was briefly mentioned in the previous chapter. Thence, the EU's and the Member States' disinclination to become politically involved in the Cyprus dispute did not last long; 'the choice was not whether, but on whose side to become involved' and they chose to side with the Greek Cypriots by lifting conditionality on the south.²⁸ Nonetheless, the EU camouflaged its choice by stipulating that it aimed to catalyse a solution on the island. The catalysis effect of membership worked surprisingly well up until 2004.

The two community leaderships on the divided island decided to go ahead with another round of UN-brokered negotiations which classified the completion of Cyprus' EU accession negotiations in December 2002 as the date for a settlement to be established. It is exactly at this point that the EU's influence on the Cyprus problem can be viewed as being positive and effective in terms of catalysing a solution; for instance, the civil society in the TRNC campaigned in support of an entry of a reunited island into the EU and the majority of the Turkish Cypriot society went against the official position of their leader; the 2002 municipal elections put the opposition parties in charge of all of the TRNC's major urban regions.²⁹ Yet, the surfacing of this fissure between the Turkish Cypriot society's will and that of their leadership did not lead to the conclusion of a settlement by the end of 2002; nevertheless, it did set another deadline for a settlement-April 2003, when the signing of the Accession Treaty by the RoC was due to take place. The majority of the Turkish Cypriots believed that by putting pressure on their representatives, they would see results; unsurprisingly, history had repeated itself and the talks failed in February 2003.³⁰ The Turkish Cypriots watched from afar as the Accession Treaty was signed in April by the Greek Cypriots, who are now referred to as the sole representatives of Cyprus. The EU opted to maintain Europe's last remaining 'Berlin Wall' separating its Greek and Turkish Cypriot communities.³¹

²⁸ Demetriou (n 25) 9.

²⁹ Ibid.

³⁰ Ibid.

³¹ Emerson & Tocci (n 13) 98.

5.2. The Suspension of *acquis*

Protocol No10 on Cyprus of the Act of Accession 2003³² acknowledges the fact that the RoC does not control part of its territory. As already mentioned, the Accession Treaty can only enter into force once it has been ratified by its signatories, in accordance with their constitutional requirements. Since a comprehensive settlement was not reached prior to accession, the Member States believed that it was necessary to provide for the suspension of the application of the *acquis* in northern Cyprus until the Cyprus problem is resolved.³³ This Protocol also specifies which provisions of EU law will apply to the line between northern Cyprus and both the south and the U.K. Sovereign Base area. The purpose of suspending the application of the *acquis* in the 'Areas'³⁴ is to minimise the responsibilities and liability of the RoC as a Member State since the Greek Cypriot authorities cannot ensure the effective implementation of the *acquis* in the north, despite the fact that the entire island has joined the EU.³⁵ This legal solution has prevented the status quo from being challenged in front of the ECJ.³⁶ It is important to note that this suspension is in fact territorial, thus the Turkish Cypriots are technically EU citizens and they can enjoy the rights that emanate from the EU via the RoC.³⁷

According to the Court of Justice, 'Protocol No 10 constitutes a transitional derogation based on the exceptional situation in Cyprus.'³⁸ Thus, in order to withdraw the suspension of the *acquis*, the Council will have to act unanimously on the basis of a proposal from the Commission. It is interesting to note that, the partial withdrawal of the suspension is permitted; yet, this also requires unanimity in the Council once a proposal has been sent from the Commission.³⁹ It has been highlighted by the Commission that the aim of the Protocol is not 'to exclude the application of all provisions of Community law with a bearing on areas under the

³²Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 10 on Cyprus [2003] OJ L 236.

³³ Ibid, Protocol no 10 Article 1.

³⁴ The 'Areas' refer to northern Cyprus.

³⁵Case C-420/07 *Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571 paras 40-41.

³⁶ C Tomuschat, 'The Accession of Cyprus to the European Union' in P Haberle, M Morlok & V Skouris (eds), *Festschrift für D Tsatsos* (Nomos 2003) 685.

³⁷ M Uebe, (2004) 46 'Cyprus in the EU' German Yearbook of International Law 384.

³⁸*Apostolides v Orams* (n 35) para 34.

³⁹ Protocol no 10 (n 32) Article 2(1).

control of the Turkish Cypriot community.⁴⁰ This is a glimpse of hope for the Turkish Cypriot community which felt abandoned as a result of the accession; Article 3 permits measures with a view of promoting the economic development of the north; the limits of which will be discussed in chapters 8 and 9 of this thesis.

Once a settlement is reached in Cyprus, Article 4 of the Protocol states that the Council will have to unanimously decide on the adaptations of the terms relating to the accession of Cyprus with regard to the Turkish Cypriot community.⁴¹ Thence, the EU's legal order is capable of incorporating the terms of a solution to the Cyprus problem;

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.⁴²

5.3. Comparative History: Cyprus, you are not the first and you won't be the last!

As argued by Skoutaris, the island of Cyprus is not the sole territorial or geographical exception to the application of Union law.⁴³ For instance, a Protocol was negotiated, signed and annexed to the Treaty of Lisbon for Poland and the U.K. which contains derogations from the application of the Charter of Fundamental Rights.⁴⁴ This is an example of a derogation that applies to the entire Member State; thus, it does not necessarily compare to the situation in Cyprus. However, Skoutaris has exemplified many other Member States where

there are special territories which for either historical, geographical or political reasons have differing relationships with their national

⁴⁰ *Apostolides v Orams* (n 35) Opinion of AG Kokott, para 40.

⁴¹ Skoutaris (n 1) 48.

⁴² *Ibid.* See also Uebe (n 37) 390.

⁴³ Nikos 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 International 2011).

⁴⁴ Article 1(2) of Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland or 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.' Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/0001.

Governments-and consequently also the European Union-than the rest of the Member State's territory.⁴⁵

Whilst some of these special territories have no formal bond with the EU, the others take part in EU programs in accordance with the provisions of EU directives, regulations or protocols annexed to the EU Treaties and specifically the relevant Treaties of Accession.⁴⁶

There are seven Outermost Regions where the *acquis* applies by virtue of Article 355(1) TFEU,⁴⁷ namely; the French Guadeloupe, French Guiana, Martinique, and Réunion, Saint Barthélemy, Saint Martin, the Spanish Canary Islands and the Portuguese Azores and Madeira. The reason there are derogations to the application of EU law in these regions, despite the fact that EU law applies fully, is because the Council is 'taking account of the structural social and economic situation' of these areas 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' prior to deciding the conditions of application of the Treaties to those regions, including common policies.⁴⁸ For instance, the Canary Islands are outside the EU Value Added Tax Area.⁴⁹

Interestingly, the Council can adopt these special measures via acting by a qualified majority on a proposal from the Commission and after consulting the Parliament, whereas even the partial withdrawal of the suspension in northern Cyprus necessitates unanimity in the Council once a proposal has been sent from the Commission; already, the difference between the case of Cyprus and these territories is evident. There is a general prerequisite that the derogations need to be limited in time.⁵⁰ Paradoxically, albeit, the suspension of the *acquis* in northern Cyprus will be lifted once a settlement is achieved on the island-hence a limit has been set- there is the probability that such a settlement will not take place. Consequently, with the suspension of the *acquis* in northern Cyprus, the Turkish Cypriots are 'trapped in

⁴⁵ Skoutaris (n 1) 49.

⁴⁶ See 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.

⁴⁷ Ex Article 299(2) TEC [2012]OJ C 326.

⁴⁸ TFEU (n 44) Article 349.

⁴⁹ 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.

⁵⁰ Case C-212/96 *Paul Chevassus-Marche v Conseil Régional de la Réunion* [1998] ECR I-743.

paradise'; they are unable to directly utilise the benefits arising out of EU membership and the embargoes inflicted upon them cannot be lifted as a result of the requirement of unanimity in the Council in order to enact certain proposals coming from the Commission.⁵¹

The Outermost Regions are not the only territories which have special arrangements with the Union. There are other territories which also have customised relationships with the club. '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.'⁵² For instance, Gibraltar is covered by Article 355(3) TFEU,⁵³ which proclaims that the Treaty applies to 'the European territories for whose external relations a Member State is responsible.' Gibraltar-a British overseas territory- joined the EEC in 1973 alongside the U.K. In Article 28 of the U.K.'s Accession Treaty it is stated that Gibraltar is outside the Customs Union and Value Added Tax Area; furthermore, it is excluded from the CAP. The Treaties also apply to the Åland Islands-a group of Swedish speaking Finnish islands off the Swedish coast-pursuant to Article 355(4) TFEU.⁵⁴ According to Protocol No 2 of the Finnish Act of Accession 1994, there are derogations to the free movement of people and services, the right of establishment and the purchase or holding of real estate in the islands and they are also outside the Value Added Tax Area.⁵⁵ It should also be mentioned that the Treaties also apply to the Channel Islands and the Isle of Man; yet, according to the arrangements laid down in Protocol No 3 of the Act of Accession 1972, they are only part of the Union for the purposes of customs and the free movement of goods.⁵⁶

Evidently, derogations are not unusual in Accession Treaties; however, the abovementioned examples are significantly different from the case of Cyprus. In the majority of the areas mentioned, there are derogations to the application of the

⁵¹ This issue will be thoroughly examined in the chapter 8.

⁵² Skoutaris (n 1) 50.

⁵³ Ex Article 299(4) TEC.

⁵⁴ Ex Article 299(5) TEC.

⁵⁵ 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.

⁵⁶ Article 355(6)(c) TFEU [ex Article 299(6)(c) TEC].

acquis, whereas in northern Cyprus, there are derogations to the suspension of the application of the *acquis*. As mentioned earlier, this territorial nature of the suspension in northern Cyprus means that the Turkish Cypriots can make use of the rights that come with membership, as long as they are not linked to the territory *per se*. This scenario is comparable to the status under EU law of the citizens of the Overseas Territories.⁵⁷ These Overseas Territories are all connected in some way to one of the Member States and they were asked to form Association Agreements with the Union.⁵⁸ Furthermore, they have the option of utilising the provisions on freedom of movement for workers,⁵⁹ and freedom of establishment.⁶⁰ They can even claim customs duties on goods imported from the Union on a non-discriminatory basis,⁶¹ even though they are not subject to the common external tariff of the Union.⁶²

In sum, EU law will only apply to these territories 'insofar as is necessary to implement the association agreements' as they are not directly part of the EU family.⁶³ Thus, this implies that the authorities of the Overseas Territories which are in agreement with the relevant Member States, can negotiate the level of EU integration they desire. This is in direct contradiction to the situation in northern Cyprus; the fact that the RoC is classified by the Union as the sole representative government of Cyprus and that it cannot exercise effective control in the 'Areas', means that it can decide the degree of northern Cyprus' integration to the EU. Hence, the Greek Cypriot authorities control the fate of their counterparts in the north as a result of an EU legal instrument. Is this not indirect political domination of the Greek Cypriots over the Turkish Cypriots via the use of a legal tool provided for by the Union? Does this not hinder the principle of equality on the island?⁶⁴

Another similarity between the case of the Overseas Territories and northern Cyprus is the concept of EU citizenship; like the citizens of northern Cyprus, the citizens of

⁵⁷ Case C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055.

⁵⁸ Article 198 TFEU [ex Article 182 TEC].

⁵⁹ Article 202 TFEU [ex Article 186 TEC].

⁶⁰ Article 199 TFEU [ex Article 183(5) TEC].

⁶¹ Article 200(3) TFEU [ex Article 184(3) and (5) TEC].

⁶² Article 200(1) TFEU [ex Article 184(1) TEC].

⁶³ Article 355(2) TFEU [ex Article 299(3) TEC].

⁶⁴The RoC, quite understandably, has made use of this legal tool in order to achieve its political objectives quite habitually; for instance, it has prevented the further integration of northern Cyprus by vetoing the adoption of the direct trade regulation- which will be visited later on in the thesis.

Skoutaris (n 1) 52.

the Overseas Territories are also theoretically considered to be EU citizens, despite the fact that the territories fall outside the territorial ambit of the Treaties. 'So for example, by virtue of the British Overseas Territories Act 2002, all the British Overseas Territories citizens became British citizens'⁶⁵ and consequently citizens of the EU. Nonetheless, significant differences still exist between the status of the Overseas Territories under EU law and the relevant status of northern Cyprus.

On the one hand, the ECJ held in *Kaefer and Procacci*⁶⁶ that 'the Tribunal administratif, Papeete, is a French court'⁶⁷ and thus a court of a Member State, even though French Polynesia does not fall under the territorial scope of EU law; on the other hand, Advocate General Kokott, in *Apostolides v Orams*,⁶⁸ elucidated that the courts in northern Cyprus are definitely not Union Courts even though the entire island is in the EU. It was claimed that it is not possible for 'the recognition and enforcement of a judgement of a court of a Member State in the northern area of Cyprus' and that it is also not possible 'for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State'⁶⁹ under Regulation 44/2001.⁷⁰ So, the military intervention of Turkey to prevent the annexation of Cyprus to Greece in 1974, its continued presence on the island, and the failure to find a settlement to the Cyprus problem during the pre-accession phase of the RoC, are the reasons why the Turkish Cypriots are isolated in the north today.⁷¹ Thus, it could be justifiably concluded that, since the Turkish Cypriots did not have a chance to express their will with regards to the accession of the island and subsequently, the suspension of the *acquis* in the north, the Member States should have adopted more of a contextualised legal approach whilst drafting Protocol No 10. The EU should have taken into account the sensitivities of the Turkish Cypriots; hence, the historical, social and political climate of Cyprus. Undoubtedly, the EU and its institutions are capable of being flexible in 'special cases' as seen above and

⁶⁵ Ibid.

⁶⁶ Joined Cases C-100 and C-101/89 *Kaefer and Procacci v France* [1990] ECR I-4647.

⁶⁷ Ibid para 8.

⁶⁸ *Apostolides v Orams* (n 35).

⁶⁹ *Apostolides v Orams* (n 35) Opinion of AG Kokott, para 31.

⁷⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L12/1.

⁷¹ Skoutaris (n 1) 53.

Union law can also be stretched.⁷² However, the accession of the entire island accompanied by Protocol No 10 has allowed the RoC to move into the 'space' of the TRNC and exert indirect control over the lives of the Turkish Cypriots.⁷³

The German experience is the closest example to the case of Cyprus as regards the representation of a State that is divided; the western Allies had recognised the Government of the Federal Republic of Germany as the only legitimate government of the whole of Germany before the reunification of the country took place. Conversely, the Government of the Federal Republic of Germany did not act, with legal effect, for the territory of the German Democratic Republic at any point. The status of the relationship between the Community and the German Democratic Republic was explained by the ECJ in Case 14/74 *Norddeutsches Vieh-Und Fleischkontor GmbH*;⁷⁴ it stated that the relevant rules pardoning 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'.⁷⁵ In Cyprus however, the government of the RoC represents the entire island in the EU, despite the fact that EU law will not apply in the north until a solution to the Cyprus problem is found.⁷⁶ Although it was argued in chapter 3 that it would make more sense for the entire island to join the EU in order to avert the reoccurrence of the rushed East Germany experience as regards to accession, the Union should not have allowed the RoC to act, with legal effect, for the territory of the TRNC as this is disregarding the democratic right of self-determination of the Turkish Cypriot community.

5.4. The Conservation of the *Acquis*: The Main Aim of the EU
In order for a practicable solution to the Cyprus problem to be achieved, the Union has agreed to accommodate a solution that would necessitate derogations from EU

⁷² See Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-011177; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279.

⁷³ See A Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere (Space, Materiality and the Normative)* (Routledge 2014).

⁷⁴ Case 14/74 *Norddeutsches Vieh- Und Fleischkontor GmbH v Hauptzollamt Hamburg-Jonas-Ausfuhrstattung* [1974] ECR 899.

⁷⁵ *Ibid* para 6.

⁷⁶ Skoutaris (n 1) 54.

law. The next section will examine the issue of derogating from the *acquis* and the potential restrictions to these derogations.

5.4.A. *The Attainability of Derogations*

Derogations from the *acquis* perfectly exemplify how the EU can adopt a contextualised legal approach in order to accommodate 'special' circumstances. Article 49(2) EU proclaims that the conditions of admission to the Treaty on which the EU is founded is provided for in every Accession Treaty. As well as integrating the new Member States into the Union, these Accession Treaties contain agreements between the existing and acceding Member States which give way to either permanent or temporary derogations. It should also be noted that derogations from novel developments or provisions of the EU can be negotiated during the process of Treaty amendments; for instance, the U.K. and Denmark opted out of the monetary union in this manner. Derogations have the force of primary law as they are found in either Treaties or in Protocols to Treaties.⁷⁷ Therefore, if Cyprus reunifies in the foreseeable future, it would be legally possible for the newly unified Member State to ask the other Member States to consent to temporary or permanent derogations from the EU *acquis* through Treaty amendments, for the aim of accommodating a settlement on the island.

Furthermore, according to the 5th Recital of the Preamble to Protocol No 10, the EU can accommodate the terms of a settlement in Cyprus as long as they are in concert with the founding principles of the Union; thus, a simplified procedure that will allow the EU to incorporate the terms of a bi-zonal, bi-communal settlement is obtainable, pursuant to Article 4 of Protocol No 10.⁷⁸ The simplified procedure requires the Council, 'acting unanimously on the basis of a proposal by the Commission, to decide the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot community.'⁷⁹ The legislative acts under such an enabling clause, whose aim would be to accommodate the future settlement, can be formally incorporated into primary law for the purpose

⁷⁷ Skoutaris(n 1) 184.

⁷⁸ This was also confirmed in the Seville European Council in June 2002. Here, it was added that Cyprus, as a Member State, will need to speak with a single voice and guarantee the correct application of EU law. Council of the European Union, Seville European Council 21 and 22 June 2002, Presidency conclusions, para 24.

⁷⁹ Protocol no 10 (n 32) Article 4.

of ensuring legal security within the EU's legal order.⁸⁰ Thus, even though these acts cannot consist of primary law- as they are not adopted according to the procedure set out in Article 48 TEU- the Treaties can possibly foresee special procedures for their amendment.⁸¹ Hence, the Council can at times amend primary law in a simplified procedure *sans* ratification of the Member States.⁸²

It could be argued that Article 4 of Protocol No 10 was drafted rather broadly as it came at a time where there was a lot of hope that the Annan Plan would have been accepted by the conflicting Cypriot parties prior to accession; therefore, the request for substantial derogations from the *acquis* by the peace plan, with regards to property and residency rights, would have most probably been accommodated. Article 4 would have allowed the EU, by a unanimous Council Decision and with the approval of the reunited Cypriot state, to change the terms of Cyprus' EU accession. This would have been an amendment of primary law and those acts would have enjoyed the status of primary law.⁸³ Nonetheless, it should be emphasised that derogations will be limited by the founding principles of the Union.⁸⁴ The question is: can the terms of Cyprus' EU accession be changed if the TRNC is recognised as an independent state?

5.4.B. *But There Are Limits...*

The unfettered freedom enjoyed by the Member States in the process of enlargement has been partially limited by the judges of the ECJ, who have felt the need to highlight that Article 49 TEU is 'encompassed within well-defined limits'⁸⁵ in order not to attract too much controversy. Ironically, the Court refrained from identifying

⁸⁰ Hoffmeister F, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006) 189.

⁸¹ For example, the Treaty of Lisbon has introduced a simplified amendment procedure, with limitations. Article 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 with the Treaties and shall enter into force only when approved by the Member States in accordance with their respective constitutional requirements', Consolidated Version of the Treaty on European Union (TEU) [2002] OJ C 325/7, Skoutaris (n 1) 185.

⁸² Skoutaris (n 1) 185.

⁸³ G Ziegler, 'The EU-Dimension of a Future Comprehensive Settlement of the Cyprus Problem' in Ahmet Sozen (ed), *The Cyprus Conflict: Looking Ahead* (Eastern Mediterranean Printing House 2008) 153.

⁸⁴ As laid down in Articles 2, 6 and 49 TEU (n 81); see Hoffmeister (n 80).

⁸⁵ C Hillion, 'EU Enlargement' in Craig PP and De Burca G (eds) *The Evolution of EU Law* (OUP 2011) 214.

the shape and form of these 'limits'; however, the Commission broke the silence. Observations by the Commission were submitted to the ECJ and they claimed that the Member States are subject to three predominant constraints with regards to the accession negotiations. Primarily, derogations from EU law can only be of limited period. Secondly, Treaty adjustments can only take place if they are required by reason of the accession and that this can be proved. Last but not least, when adjustments are made to the *acquis*, at all times the Member States are obliged to abide by the founding principles of the EU.⁸⁶ The Commission's argument was based on Article 2 TEU which states that the aim of the Union is 'to maintain in full the *acquis communautaire*.'

Nevertheless, Member States have previously restricted the Four Freedoms; a relevant example would be the Danish prohibition for secondary residence provided for by the Maastricht Treaty.⁸⁷ The derogations that will be necessitated if Cyprus reunites are on a similar basis; a bi-zonal, bi-communal settlement will require derogations on the free movement of persons and capital *acquis* in order for the demographic ratio between permanent residents, who are either Greek or Turkish Cypriot, not to be drastically modified. However, as dictated by international law in the concept of *ius cogens*,⁸⁸ derogations from primary law cannot involve the core Union principles.⁸⁹ This proves that the Union is in fact an organisation based on democratic principles, as the core principles safeguard democracy, rule of law, human rights and the principle of non-discrimination. A breach of these principles can potentially trigger sanctions under Article 7 TEU. The fact that sanctions will be taken against a Member State for violating the core principles of the Union, means that not only will the solution to the Cyprus problem respect these principles, but the Union will prevent the reoccurrence of the unfortunate events that took place in Cyprus between 1963-1974. Accordingly, a future settlement on the island needs to respect these core principles; nonetheless, it is allowed to contain certain restrictions to the Four Freedoms.⁹⁰

⁸⁶ Ibid.

⁸⁷ Protocol (No 32) on the acquisition of property in Denmark Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/318.

⁸⁸ (Compelling Law).

⁸⁹ Article 48 TEU.

⁹⁰ The full application of the Four Freedoms does not fall within this 'hard core' category. Article 2 TEU.

Derogations to the internal market freedoms in a unified Cyprus will simply prove that the Union respects the inherent national identities of the Member States, and 'their essential State functions, including ensuring the territorial integrity of the State...'⁹¹ Nevertheless, will such derogations in Cyprus ensure the protection of specific human rights? Pursuant to Article 6 TEU, 'the Union 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.'⁹² Thus, the fundamental rights which are guaranteed by the ECHR are general principles of EU law according to Article 2. The core principle of respect of human rights and fundamental freedoms, which is enshrined in Article 2 TEU and further emphasised in Article 6 TEU, could possibly be breached as a result of the potential restrictions to the right to property and the right to free internal movement and residence in a solution to the Cyprus problem. Evidently, if the rights that are protected by the ECHR are respected, then the Cyprus settlement will in fact be in line with the core principle of respect of human rights and fundamental freedoms. It should be noted however that, ECHR rights-excluding the prohibition of torture- can be subject to limited restrictions. Article 1 of the additional Protocol No 1 to the ECHR claims 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'. The corollary of this is that, the derogations in relation to the property rights in the Cyprus settlement will be justifiable in the sense that the aim of the restrictions will be to resolve the property dispute on the island;⁹³ thus, such restrictions are in the public interest.

The land and property owners in Cyprus that are negatively affected by the current state of affairs on the island will not be entitled to full reinstatement upon the conclusion of any kind of a settlement. A bi-zonal settlement would mean 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.'⁹⁴ As a result, the restitution scheme will be partial reinstatement for some dispossessed

⁹¹ Article 4(2) TEU.

⁹² Skoutaris (n 1) 189.

⁹³ The property dispute in Cyprus will be examined in chapters 5,6 and 7.

⁹⁴ Commission, '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' COM (2007) 536.

owners and partial compensation for the others. It will also most probably protect the current users of the land/property who have no other place to live.⁹⁵ The ECtHR has confirmed that if it is not possible to reinstate the dispossessed owners, then the State that is in breach will need to pay compensation for the value of the property, as it is possible to value and compensate material commodities.⁹⁶

According to Article 2(4) ECHR, restrictions on the right to internal movement and residence will also be accepted in a settlement, so long as they are in line with law and justified by the public interest. Such restrictions thus need to be proportional; hence, they must be necessitated in a democratic society. It should be reminded that a biz-zonal settlement would have to include such restrictions -without manifestly ignoring the right to internal movement and residence- otherwise, it would not be a settlement based on the principle of bi-zonality.⁹⁷

The broadness of Article 4 of Protocol No 10 implies that a settlement plan based on the principles of bi-zonality, bi-communality and political equality, will be welcomed by the Union.⁹⁸ Evidently, the Union is extremely flexible as regards to accommodating the terms of a settlement and promoting spatial justice; yet, why can this flexibility not be applied to promoting the democratic right of self-determination/secession of the Turkish Cypriot community within the EU? Why can the Union not demonstrate its loyalty to its democratic principles in this manner? What will happen if a federal settlement is never achieved? The secession of the Turkish Cypriot community is an acceptable solution to the Cyprus problem; a group has the right to freely determine its political status as the right of self-determination is a liberty right according to Beran. Thus, other entities and organisations are obliged to respect this right.

Law is everywhere, it is in everything;⁹⁹ however, justice solely depends on the way in which law is applied and interpreted. If law is used in a way to give an additional political advantage to a certain State over the other, in order for the former to achieve

⁹⁵ N Loizidees and M Antoniadis, 'Negotiating the Right to Return' (2009) 46 *Journal of Peace Research* 611.

⁹⁶ *Demopoulos v Turkey* (2010) 50 EHRR SE14 paras 114-115.

⁹⁷ F Hoffmeister (n 80) 140.

⁹⁸ *Ibid.*

⁹⁹ See Philippopoulos-Mihalopoulos (n 73) for an analysis of the 'lawscape'.

its political objectives, then this is not justice.¹⁰⁰ As it stands, the Union is using law in order to justify its stance towards the Cyprus conflict and thus it is the political considerations of the Union that dictate the way in which it shapes its law around Cyprus;

For a State that is relatively more powerful and its actions more readily deemed 'legal' than the State with which it is in dispute, realism would lead us to expect State behaviour to be decided on power political grounds and law would be of relevance only in justifying the resulting policy.¹⁰¹

5.5. The Union as a Principal Mediator in Cyprus...No Chance!
Unfortunately for the EU, it cannot overlook the Cyprus conflict as if it were an irrelevant issue; all the parties involved in the conflict are either a Member State or a candidate State. Accordingly, since 1 May 2004, the Cyprus problem is a problem belonging to the EU. As a consequence, the Union is obliged to play a 'positive role in bringing about a just and lasting settlement'¹⁰² in a future proposal; especially since the Cyprus problem has damaged the political life and legal order of the Union. After the rejection of the Annan plan and the accession of the RoC, some scholars and politicians have suggested that the UN's role as a principal *locus* and actor in a possible future proposal to the Cyprus problem, should be taken over by the EU.¹⁰³ Such a replacement is not prohibited in international law;¹⁰⁴ yet, politically speaking, this would not be a 'good move'. The EU has a robust contractual tie with the Hellenic parties to the conflict and this bond is stronger than the one it has with the Turkic parties; it would be assumed that the EU would promote the interests of the RoC and Greece and as a result, it can no longer be a neutral mediator. Furthermore, Turkey's persistent stance to not recognise the RoC and the issue of representation of the Turkish Cypriots in a negotiation under the auspices of the Union, austere decrease the likelihood that the Union could productively replace the UN. It should

¹⁰⁰ R Withana, *Power, Politics, Law: International Law and State Behaviour during International Crises* (BRILL 2008) 85.

¹⁰¹ *Ibid.*

¹⁰² European Commission, 'Agenda 2000, Vol I: For a Stronger and Wider Union' (Communication) COM (97) 2000 final.

¹⁰³ Skoutaris (n 1) 163.

¹⁰⁴ Chapter VI, Article 33 of the UN Charter: Pacific Settlement Disputes:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.

also be noted that the UN has been the main mediator to this conflict for the last fifty years and it has been welcomed by both the Greek and Turkish Cypriots as an impartial third party.

Alongside the political issues, this replacement would be confronted by certain legal and institutional obstacles. As it stands, the Union's institutional and legal framework will not permit it to take on this role. Unarguably, the conflicting parties both use every avenue as another arena for their political battle. Therefore, if ever the Union tried to adopt such a principal role without having acquired the consent of the parties involved, then Protocol No 10 and the post-Lisbon Treaties will be used *contra* the procedure.¹⁰⁵

5.5.A. *The Limitations of Protocol No 10*

The legal architecture of the succinct Protocol No 10 has highly limited the role of the Union in negotiations to reach a settlement of the Cyprus problem. It can only facilitate a settlement which has already been agreed to by the parties and help the Turkish Cypriot community integrate into the European family. Thus, it can only adopt measures that will promote the economic development of northern Cyprus and unanimously decide to lift the suspension of the *acquis* in the 'Areas'.¹⁰⁶

This Protocol reflects the pragmatic policy of minimum involvement that the EU has adopted in this conflict; in fact, the Union has adopted such a policy in other similar situations, such as in the Northern Ireland conflict, where it solely interfered in the cross-border projects via the INTERREG III Programme.¹⁰⁷ Accordingly, the Union will not go against this minimalistic approach it has adopted.¹⁰⁸

Article 3 of the Protocol does not constitute a legal basis for the Union's continued support, even though it permits economic assistance to the Turkish side of the island. It must be noted that the phrase 'measures with a view to promoting the economic development of northern Cyprus',¹⁰⁹ encompasses a wide range of opportunities. For instance, it incorporates the idea of ameliorating the civil society and can provide support for a settlement and confidence-building measures, grants and scholarship

¹⁰⁵ Skoutaris (n 1) 162.

¹⁰⁶ Protocol No 10 (n 32) Article 3.

¹⁰⁷ T Salmon, 'The EU's Role in Conflict Resolution: Lessons From Northern Ireland' (2002) 7 *European Foreign Affairs Review* 337.

¹⁰⁸ Skoutaris (n 1) 166.

¹⁰⁹ Protocol 10 (n 32) Article 3.

schemes to help build a bridge between the Union and the Turkish Cypriot community and support for the Committee of Missing Persons etc. Most importantly, it encourages 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.¹¹⁰

The Union is obliged to be extremely careful whilst taking these measures in order to ensure that the recognition of the TRNC -either directly or indirectly- is not implied. As a result, the Union is habitually dealing with difficulties whilst trying to realise the objectives that would help the Turkish Cypriot community; for instance, the Greek Cypriots quite recently 'withdrew six cases filed under the Papadopoulos administration and two cases filed under the Christofias administration'¹¹¹ contra the Commission's support programs in northern Cyprus only because they won 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.'¹¹² These cases unnecessarily hindered the Commission's work on the island; 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'.¹¹³ It has been contested by some that the reason Protocol No 10 is very restrictive is merely because it was drafted during a time when there was genuine belief that the Annan Plan would have been successful in reuniting the two sides of the island prior to accession.¹¹⁴ Nonetheless, this argument is not robust as the tragic fate of the proposal of the UN Secretary-General was foreseeable the moment conditionality was lifted on the Greek side of the island for the settlement of the Cyprus problem prior to Cyprus' unilateral accession. In sum, Protocol No 10 attributes a very constricted role to the Union in negotiations to reach a settlement of this age-old dispute.

¹¹⁰ Skoutaris (n 1) 166.

¹¹¹ Ibid 165.

¹¹² Ibid.

¹¹³ International Crisis Group, 'Reunifying Cyprus: The Best Chance Yet' (Europe Report No 194, 2008)<<http://www.crisisgroup.org/en/regions/europe/turkey-cyprus/cyprus/194-reunifying-cyprus-the-best-chance-yet.aspx>> accessed 16 July 2015.

¹¹⁴ Skoutaris (n 1) 167.

5.5.B. Common Foreign and Security Policy & Article 352 TFEU

Can the Cyprus problem be handled under the CFSP label? Article 3(5) TEU stipulates that:

[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples...

As a result, it could be argued that the adoption of a legislative act that would permit the Union to be the principal *locus* and actor in a possible future proposal to the Cyprus problem could be legally based on the provisions for the CFSP. So, 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' the EU should be able to take over the UN's mediation task.

The Union would need to adopt a decision identifying the appropriate actions to be assumed in order for the CFSP scope to be accomplished.¹¹⁵ It was via the Treaty of Lisbon that the device of the CFSP decisions was introduced; this replaced the pre-Lisbon era joint actions which¹¹⁶ would address certain situations where operational activity by the Union was a prerequisite.¹¹⁷

They have concerned inter alia activities such as support for peace and stabilisation processes through the convening of an inaugural conference,¹¹⁸ general support of a specific peace process¹¹⁹ and a contribution to a conflict settlement process¹²⁰ and the appointment of a Special Representative.¹²¹

Consequently, both the past practices of the Union and the provisions of the Treaties, indicate that the EU could assume a principal mediator role in a conflict by a decision defining an action.

¹¹⁵ Article 25 TEU.

¹¹⁶ Ex Article 12 TEU.

¹¹⁷ Ex Article 14(1) TEU; Council Decision 93/728 of 20 December 1993 concerning the joint action adopted by the Council on the basis of Article J3 of the Treaty on European Union on the inaugural conference on the stability pact [1993] OJ L339/1.

¹¹⁸ Joint Action 93/278 (n 117).

¹¹⁹ Council Decision 94/276 of 19 April 1994 on a joint action 94/276 in support of the Middle East process [1994] OJ L119/1.

¹²⁰ Council Joint Action 2001/759 regarding a contribution from the European Union to the conflict settlement process in South Ossetia [2001] OJ L286/4.

¹²¹ Council Joint Action 2001/211 on the appointment of the EU Special Representative in Bosnia and Herzegovina [2002] OJ L70/7; Skoutaris (n 1) 167-168.

Unfortunately, politics once again dominates the scene; a proposal that would handle the Cyprus problem under the CFSP umbrella would be vetoed by the RoC in the Council. The reason for this is because the RoC's policy to 'Europeanise' the Cyprus conflict would be devalued by such an initiative. Moreover, the political advantages of EU membership would also be jeopardised. The Union has also agreed to such a policy; hence the reason matters pertaining to the Cyprus problem are handled within the Council by an *ad hoc* working party since the Council conclusions on Cyprus of 26 April 2004. Nonetheless, such an initiative would be more to the detriment of the Turkish Cypriot political interests than the Greek Cypriot interests. Since Greece and the RoC are EU Member States, they would have manipulative power over the decisions taken under the CFSP. Furthermore, according to the Turkish Cypriot authorities, since the membership of the RoC, the EU can no longer be an impartial mediator as it has become a party to the conflict.¹²²

The adoption of such a decision would also be confronted with legal obstacles. The ordinary meaning given to the terms of the TEU, following the rule of Article 31(1) of the Vienna Convention, would prevent the use of a CFSP device for a region that is part of the EU and for the arbitration of two ethno-religious groups that are Union citizens despite the suspension of the *acquis* north of the island. Furthermore, it should be reminded that legislating on matters regarding the Cyprus problem is not deemed to be foreign policy making; for this reason, the legal bases for the legislative acts pertaining to this unprecedented case have only been Protocol No 10 and ex Article 308 TEC (Article 352 TFEU) until now.

Even if the TEU is not interpreted in accordance with the ordinary meaning to be given to its terms and the political obstacles are eradicated, the conflict parties, as mentioned before, tend to utilise every possible avenue to launch their political views and recommence yet another polemic to keep the Cyprus problem alive.¹²³ Hence, the Union's mediation role may be challenged at the Court of Justice. But can the Court judicially review a CFSP decision which permits the Union to engage in principal mediation on the Cyprus issue? The answer is quite unfathomable. Despite the ratification of the Treaty of Lisbon, the Court still does not have jurisdiction with

¹²² Kudret Ozersay and Ayla Gurel, 'The Cyprus Problem at the European Court of Human Rights' in Thomas Diez and Nathalie Tocci (eds), *Cyprus: A Conflict at the Crossroads* (Manchester University Press 2009).

¹²³ *Ibid* 273.

respect to the CFSP provisions or acts adopted on the foundation of those provisions. Nonetheless, according to Article 275 TFEU, it does have jurisdiction to monitor a decision's compliance with Article 40 TEU; this latter Article reads:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

The ratification of the Treaty of Lisbon brought with it the codification of earlier case law of the ECJ. The codified case law implies that judicial review of CFSP decisions is probable. It is important to visit the *Airport Transit Visas* case¹²⁴; here the Commission challenged a Council Joint Action¹²⁵ concerning visas that had been adopted under the then third pillar, on the basis of then Article K.3. EU. According to the Commission, an act harmonising Member States' policies as regards the requirement of an airport transit visa with the aim of developing control of the air route, should have been adopted on the basis of then Article 100c EC.¹²⁶ Therefore, albeit the case was about the segregation of competences between the first and third pillar, there exists no valid reason for why the Court's analysis cannot also be used for distinguishing between what used to be the first from the second pillar.¹²⁷ Subsequently, ten years later, this was confirmed in the *Small Arms and Light Weapons*¹²⁸ case. In sum, the Court held that it was its duty to guarantee that acts which, according to the Council, fell within the ambit of Article K.3 did not interfere with the powers conferred on the Community by the EC Treaty. So, despite the fact that the Council did not believe that the ECJ had jurisdiction to decide the case, the Court was permitted to review the content of a Joint Action 'adopted on the basis of

¹²⁴ Case C-1-70/96 *Commission v Council (Airport Transit Visas)* [1998] ECR I-2763.

¹²⁵ Council Joint Action 96/197 of 4 March 1996 adopted by the Council on the basis of Article K3 of the Treaty on European Union on airport transit arrangements [1996] OJ L63/8.

¹²⁶ Concerning the determination of the third countries whose citizens need to have a visa to cross the external borders of the Member States.

¹²⁷ S Peers, 'Common Foreign and Security Policy 1998' (1998) 28 *Yearbook of European Law* 661.

¹²⁸ Case C-91/05 *Commission v Council (Small Arms and Light Weapons)* [2008] ECR I-3651.

Here, the ECJ 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 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.' Para 32.

the then Article K.3 TEU, in light of (then) Article 100c 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.’¹²⁹ Overall, the case law that has now been codified by the Treaty of Lisbon proves that the Court can judicially review a CFSP decision that would permit the Union to take over the role of principal mediator for the Cyprus issue from the UN, as long as it can be argued that such an act prevents or limits the exercise by the Union of its competences under Articles 3-6 TFEU.¹³⁰ The question is; does such an act fall under the ambit of Articles 3-6 TFEU?

From all of the above, it could be strongly contested that the adoption of a CFSP decision by the Council in order to allow the EU to assume the role of the intercessor in the Cyprus problem, is irrational. Firstly, a CFSP device cannot be utilised for an area that is in the EU and for ascribing the role of principal mediator in negotiations between two communities, the members of which are Union citizens. Secondly, even if a broader, non-literal, interpretation is given to the scope of the CFSP, so that it encompasses the relations of the RoC with Turkey, it would still not eradicate the Greek Cypriot argument regarding the recognition of the TRNC and the Turkish Cypriot representation. However, in the unlikely event that the political concerns of the conflict parties are alleviated and the EU adopts a decision to that aim, the ECJ would almost certainly not find that such a decision affects the exercise of other competences of the EU.¹³¹

Nonetheless, an organisation that habitually cannot agree within its institutions on how to go about foreign policy matters, should not act as a principal mediator for a political conflict; in order for the EU to be able to convince the two equally patriotic and stubborn Cypriot parties to agree on the fate of the island, it needs to be able to approach the problem in a solidified manner. It does not come as a surprise that international dispute resolution is not mentioned in Title I of the TFEU- which refers to the categories and areas of EU competence. Furthermore, the principle of conferral- which states that all of the Union's competences are voluntarily conferred on it by its Member States and therefore any areas which are not explicitly

¹²⁹ Skoutaris (n 1)169-170. See *Commission v Council (Airport Transit Visas)* (n 124) paras 13-17.

¹³⁰ *Ibid* 171.

¹³¹ *Ibid*.

mentioned in Treaties by all Member States remain in the domain of those States-governs the limits of EU competences according to Article 5 TEU. Consequently, it could be contended that until proven otherwise, the TFEU cannot provide any legal bases for the EU to authorise itself to play the role of the honest broker in the Cyprus conflict. However, the unprecedented gap in the legal order of the Union and the incomplete operation of the common market in the 'Areas' caused by the division of the island, needs to be fixed and the only way to achieve this is to ensure that the Cyprus problem is settled one way or another. This means that the EU is obliged to act, especially since the people of Cyprus are Union citizens; thus, Article 352 TFEU-which provides a flexibility clause with regard to the Union's areas of competence-can potentially provide the legal basis for this action and authorise the EU to become the principal mediator, 'since within the framework of the Union policies, such an authorisation proved necessary to attain one of its objectives set out in the Treaties.'¹³²

The famous *Kadi*¹³³ case has restated that the only way the Union can rely on this provision is if the said action concerns the operation of the internal market¹³⁴ and is intended to achieve 'one of the objectives of the Community'.¹³⁵ However, Article 352 TFEU cannot be used as a legal basis unless the action envisaged is 'necessary to attain, in the context of the policies defined by the Treaties (with the exception of the Common Foreign and Security Policy), one of the Union's objectives'.¹³⁶ So, if the Union adopts a depoliticised interpretation of Article 352 TFEU, then it would be concluded that an act which would label the EU as the principal mediator for the Cyprus problem, even though the entire island is technically part of the Union, would be tantamount to serving CFSP aims. Furthermore, the Council of the EU would need to unanimously approve such a decision and thus, in hindsight; it is improbable that Greece and the RoC would allow it to happen, as it would eventually upgrade the status of the Turkish Cypriot community.

¹³² Ibid 172.

¹³³ Joined Cases 402/05 P and 415/05 P *Yassin Abdullah Kadi and Al Barakaat v Council of the European Union* [2008] ECR I-6351.

¹³⁴ Ex Article 308 EC has been changed considerably by the Treaty of Lisbon. The common market is no longer a caveat, thus Article 352 TFEU has much broader a scope now.

¹³⁵ *Kadi and Al Barakaat v Council of the European Union* (n 133) para 200.

¹³⁶ Article 352 (4) TFEU; see *Kadi and Al Barakaat v Council of the European Union* (n 133) para 201.

The legality of such a decision would also be questioned;¹³⁷ in *2/94 Opinion*, the ECJ claimed that ex Article 308 TEC [now Article 352 TFEU] could not serve as a basis for expanding the ambit of Community powers beyond the framework established by the Treaty provisions and by those that identified the tasks and activities of the EC.¹³⁸ Here, the Council had asked the Court for its Opinion 'as regards the competence, under the EC Treaty, for the Community to accede to the ECHR and the compatibility of such an accession with substantive provisions and principles of EC law.'¹³⁹ Thus, Article 352 TFEU would not be a suitable legal basis to authorise the Union to play the role of a neutral intermediary in future negotiations for a settlement of the Cyprus problem because its effect would be to amend the Treaty by widening the ambit of the Union's competences *sans* following the procedure provided for that purpose.¹⁴⁰ Nevertheless, it could be argued that the Union's accession to the ECHR would in fact have been a Treaty amendment without taking the necessary steps provided for by the Treaty. So, surely, in terms of constitutional importance, extending the EU competences under the TFEU to encompass dispute resolution is a lot less inconsequential than the accession of the Union to the ECHR. Overall, it seems as though the competences appointed to the Union, the confinement of Article 352 TFEU by the Treaty of Lisbon, the *Kadi* ruling and finally, the ECJ's reasoning in its *2/94 Opinion*, will not allow Article 352 TFEU to provide a legal basis authorising the EU to acquire the role of principal mediator in Cyprus.¹⁴¹

Even if it could be argued that in this context, Article 352 TFEU would be used in order to enable the completion of the common market and not directly for the aim of conflict resolution, such a legislative act would still supposedly intrude on CFSP competences as the genuine objective and substance of the act would be conflict resolution.¹⁴² However, the ECJ clarified in its *Small Arms and Light Weapons* ruling that an EU legislative instrument can include two components- one falling within the Community's competences and the other within the CFSP- as long as the

¹³⁷ Opinion 2/94 *Accession to the ECHR* [1996] ECR I-1759. This opinion had been requested following a long academic and political discussion; see Brid Moriarty, 'EC Accession to the ECHR', (2001) *Hibernian Law Journal* 13.

¹³⁸ *Ibid* paras 27-30.

¹³⁹ Skoutaris (n 1) 172.

¹⁴⁰ Opinion 2/94 (n 137) paras 27-30.

¹⁴¹ Skoutaris (n 1) 173.

¹⁴² *Commission v Council (Small Arms and Light Weapons)*(n 128) para 78.

two components are not concomitant.¹⁴³ It should be noted however, in order to withdraw the suspension of the *acquis* to lead to the operation of the internal market in the 'Areas', the provision provided for by Article 1(2) Protocol No 10 needs to be followed; *ipso facto*, it would be extremely difficult to use Article 352 TFEU even if all the above mentioned problems were somehow sidestepped.

5.5.C. The Turkish Route

As briefly mentioned earlier, the EU could potentially become the principal negotiator for a solution to the Cyprus problem via Turkey's accession negotiations. According to the Negotiating Framework, Turkey's progress in preparing for eventual membership will be measured contra certain requirements; for the purposes of this research, the relevant requirement 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.¹⁴⁴

This requirement is re-emphasised in the Turkey-EU Accession Partnership of 2008.¹⁴⁵ It should be noted that Turkey's current EU pre-accession strategy is based on the development of the bilateral relations between the Union and Turkey under the Ankara Agreement.¹⁴⁶ Therefore, it is the Association Council which keeps an eye on how Turkey is responding to the obligations correlated to the Cyprus problem that are mentioned in the Negotiating Framework and repeated in the Accession Partnership. Hence, it is part of Turkey's accession conditionality to support the negotiations in Cyprus and 'to contribute in concrete terms to the comprehensive settlement of the Cyprus issue... based on the principles on which the EU is founded.'¹⁴⁷ The European Parliament went even further in its Resolution of 10

¹⁴³ Ibid para 108.

¹⁴⁴ Council of the European Union, Turkey Negotiation Framework, REV 1 ANNEX II, 12 October 2005 12823/1/05, Article 6
<http://www.abgs.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/NegotiatingFrameowrk/Negotiating_Framework_Full.pdf> accessed 17 July 2015.

¹⁴⁵ 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.

¹⁴⁶ Agreement Establishing an Association between the European Economic Community and Republic of Turkey [1964] OJ L1217.

¹⁴⁷ European Parliament Resolution of 10 February 2010 on Turkey's Progress Report 2009 para 37.

February 2010 on Turkey's Progress Report by requesting Turkey to enable '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 [Varosha]...to its lawful inhabitants'.¹⁴⁸ Hence, this may be the route that the Union needs to take in order to become the arbitrator to the conflict. In fact, the Association Council seems to be powerful enough to authorise the Union to that effect.

The Cyprus issue plays a rather dominant role in Turkey's accession negotiations. The Negotiating Framework and the Accession Partnership have emphasised the need for Turkey to further respect human rights and fundamental freedoms.¹⁴⁹ The Negotiating Framework has also stipulated that in order for Turkey to accede she needs to carry out the obligations which are set out in the Association Agreement and its Additional Protocol; hence, extend the Association Agreement to all the new EU Member States.¹⁵⁰ However, even though Turkey has signed the Additional Protocol on 29 July 2005, a declaration was issued stipulating that any form of recognition of the RoC mentioned in the Protocol will not take place as a result of the signature, ratification and implementation of the Protocol.¹⁵¹ A Counter-declaration of 21 September 2005 has made it evident that Turkey's declaration does not have any effect on the substance of the Protocol and thus Turkey's obligations under the Protocol still need to be carried out.¹⁵²

Paragraph 7 of the Negotiating Framework puts even more weight on the shoulders of Turkey.¹⁵³ Turkey has exercised its veto to prevent the RoC from joining certain organisations to which she belongs and where entry is by unanimity;¹⁵⁴ Paragraph 7

¹⁴⁸ Ibid 37.

¹⁴⁹ Council Decision (n 145) para 4.

¹⁵⁰ Ibid para 6 hyphen 4.

¹⁵¹ 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.

¹⁵² S Talmon, 'The European Union-Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations' (2006) 5 Chinese Journal of International Law 579.

¹⁵³ Turkey needs 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' Negotiation Framework (n 144).

¹⁵⁴ European Council of Ministers of Transport, Wassenaar Agreement, European Centre for Medium Weather Forecast, EU-NATO Cooperation ('Berlin plus' arrangements), European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), Organisation for Security and Co-operation in Europe, Open Skies Agreement, Missile Technology Control Regime, and Organisation of the Black Sea Economic Cooperation. The Republic of Cyprus has also claimed

indirectly asks her to cease from blocking Cyprus' entry into these organisations if it wants to join the EU. Thus, it can be argued that the Cyprus problem does in fact hinder the functioning of international politics on a larger scale; Greece and Turkey have been at odds for hundreds of years and today the only *forum* they have to maintain this history of colliding is via the Cyprus problem.¹⁵⁵ Ironically, the Cyprus problem highly affects the EU-Turkish relations; however, the Cyprus problem near enough did not even play a role in the Cyprus-EU relations before 2004. Thus, Turkey is currently being punished just because her army remains on the island in order to protect the Turkish Cypriot community, whilst the reason why Turkey initially resorted to such a drastic measure, was ignored by the EU during the pre-accession period of the RoC. For instance, Turkey's failure to implement the obligations under the Additional Protocol to the Ankara Agreement, such as lifting the ban against entering ports in Turkey imposed on vessels registered in the RoC and opening its airports to Greek Cypriot traffic, has caused the Union to freeze opening eight of the thirty five negotiating chapters with Turkey.¹⁵⁶ The fact that various features of the Cyprus problem are mentioned in Turkey's accession process means that the Union technically could become the mediator to the Cyprus problem via the EU-Turkey Association Council.

Just like all of the aforementioned routes, this option is also confronted with political obstacles. The only *environment* where the two Cypriot parties negotiate as communities is the UN; so, the issue regarding the representation of the Turkish Cypriots in this *environment* will most probably prevent the Association Council from becoming the *locus* for future negotiations for a settlement. Moreover, Turkey's stubborn stance as regards to not recognising the RoC will also thwart the realisation of such a scenario.

that Turkey has taken action to prevent Cyprus from joining the Organisation for Economic Co-operation and Development (OECD). HC Select Committee on Foreign Affairs Minutes of Evidence, Supplementary Written Evidence Submitted by the Foreign and Commonwealth Office, 22 February 2005 <<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmfaaff/113/4111615.htm>> accessed 16 July 2015.

¹⁵⁵ Robert Stephens, *Cyprus: A Place of Arms* (Praeger 1966) chapter 6.

¹⁵⁶ Cyprus-conflict.net <<http://www.cyprus-conflict.net/turkey-greece%20history.html>> accessed 16 July 2015.

5.5.D. A Short Summary

Unsurprisingly, the legal constraints in the Union's institutional framework will prevent the EU from assuming the role of honest broker in the Cyprus problem. In other words, it is the seemingly depoliticised, excessively technical approach of the Union to this political conflict that stops the Union from playing a more constructive role in Cyprus and negatively affects the political lives of the RoC, Greece and Turkey. Even though the EU does not have the competence to act as an arbitrator 'between parties in intra-State conflicts within the territories of its own Member States',¹⁵⁷ it should be reminded that the Union can in actual fact adopt a more pragmatic and supple approach than one would assume. As argued by Skoutaris, 'the scope of the CFSP over the years has been defined widely and the role of the European Council has been construed broadly.' Therefore, the unwillingness of the Union institutions and the leaders of the two Cypriot parties to have the EU as the principal *locus* in any possible future initiative for a settlement is the predominant obstacle preventing the Union from assuming such a role; indeed, there is no straightforward legal basis to base such a proposal, yet it would not be too difficult to find a loophole in the legalistic arguments mentioned above. So, realistically, every legal constraint mentioned, is in fact political in disguise.¹⁵⁸ This raises the question; how much does the Union actually want a comprehensive solution on the island?

If the two Cypriot parties directly ask the Union to become their main mediator, then it will be quite hard for the Union to refuse such a demand, especially if one takes into account the recent plan of former Enlargement Commissioner, Rehn, with regards to acting as an informal mediator in the Slovenia-Croatia dispute¹⁵⁹ upon the demand of the authorities of these two States. The EU currently has nine Special Representatives in different countries and areas which aim to advance the Union's policies and values in troubled areas and try to promote peace, stability and the rule of law.¹⁶⁰ For instance, Mr Lars-Gunnar Wigemark was appointed Special Representative in Bosnia and Herzegovina on 1 March 2015 with the aim of

¹⁵⁷ Skoutaris (n 1) 178.

¹⁵⁸ Skoutaris (n 1) 178.

¹⁵⁹ E Vucheva, 'Croatia Accepts EU Mediation in Border Dispute with Slovenia' EU Observer (Brussels 9 March 2009) <<https://euobserver.com/enlargement/27737>> accessed 16 July 2015.

¹⁶⁰ European Union External Action, EU Special Representatives <http://eeas.europa.eu/background/eu-special-representatives/index_en.htm> accessed 16 July 2015.

ensuring that the atmosphere is peaceful, stable and united in Bosnia and Herzegovina and that it is cooperating peacefully with its neighbours.¹⁶¹ Hence, the role that the EU can play in Cyprus in the quest for the settlement of the conflict is not as limited as it reads above; the Member States could potentially draft and sign a special international treaty that would allow the Commission to assume such a role, or the Council could appoint a Special Representative to Cyprus. Moreover, Skoutaris has stipulated that the legal basis problem could be resolved by handling the Cyprus problem within the framework of the Association Council, or at the very least via the adoption of a CFSP decision, despite that it would be an *ultra vires*¹⁶² act.¹⁶³

For the time being, the Union needs to help the UN with achieving a solution that it will be able to accommodate within its legal order. As it stands, the only thing the EU is able to do is bring the two conflicting communities together via economic measures, such as the Green Line Regulation¹⁶⁴ and the Financial Aid Regulation,¹⁶⁵ which will be examined in chapter 8. In the pre-accession phase of the RoC, the cooperation between the EU and the UN was minimal; they only really started to work together for Cyprus towards the end of the process.¹⁶⁶ In the post-accession era there is still no official cooperation between the two organisations; yet the combined effort of the two is a prerequisite in the process of finding a viable solution to the

¹⁶¹ Ibid.

¹⁶² (Beyond the powers.)

¹⁶³ The Court could not judicially review such a CFSP decision. Skoutaris (n 1) 179.

¹⁶⁴ Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession [2004] OJ L 161/128 as last amended by Council Regulation (EU) 685/2013 [2013] OJ L 196/1.

The aim of the Regulation was to fill the gap in the legal order of the Union created by the Cyprus anomaly and terminate the isolation of the Turkish Cypriot community. The Regulation, as argued by Skoutaris, tries to 'square the circle' by providing for rules that apply to Union citizens and to third country nationals so that they can cross over to the south and from there have access to the rest of the Member States and to the north of the border. Furthermore, the Regulation enables the Turkish Cypriot Chamber of Commerce to issue accompanying documents so that the goods originating in the north can cross the 'line' and reach the Union's market as EU goods. Although it can be argued that in practice, the 'Green Line' regime has provided for a feasible structure for the development of bilateral trade relations between the conflicting parties, hence, it has 'brought the two ethno-religious segments closer', it is definitely not an efficient or sufficient enough tool to enable the goods originating in northern Cyprus to penetrate the EU market.

See Nikos 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.

¹⁶⁵ Council Regulation (EC) 389/2006 of 2 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 L 65/5 (Regulation 389/2006).

¹⁶⁶ Skoutaris (n 1) 178.

Cyprus problem that will most likely include derogations from the *acquis* to be accommodated within the EU legal order. Nonetheless, the EU's stance towards the Cyprus problem has been heavily influenced by the policy objective of the UN-with regards to the non-recognition of the TRNC- and this will not change in the foreseeable future. For instance, the UN Secretary General, after the Annan Plan referendum, articulated his hope that the restrictions and embargoes that have isolated the Turkish Cypriot community will be lifted with the help of the UN Security Council Members;¹⁶⁷ this was followed by the adoption of the Green Line Regulation and the Financial Aid Regulation and the Commission's proposal of the direct trade regulation.¹⁶⁸ This simply proves that the EU's actions remain within the limits set by the UN-hence none of these instruments recognise another authority on the island other than the RoC. But, it should be underlined that the Union's framework is 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...'¹⁶⁹ and therefore it should take advantage of its power by stepping outside the limits set by the UN.

5.6. Independence in the EU

As mentioned before, the EU membership of Greece and the RoC make the Turkish Cypriots extremely disinclined to accept the replacement of the UN by the EU as the principal mediator in the future negotiations since the terms of the membership will be shaped by the two Member States. So, what if the agreed parameters of the settlement are changed? It has already been established that the Union can accommodate a settlement to the Cyprus problem that would contain derogations from the *acquis*; both Protocol No 10 and the EU practice of welcoming territorial exceptions to the application of the *acquis*, verify this. But, as argued by Mr Alexander Downer- the former Special Adviser of the UN Secretary-General on Cyprus- a federal solution in Cyprus which leads to bi-zonality, is in itself a

¹⁶⁷ Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437 para 93.

¹⁶⁸ European Commission, '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' COM (2004) 466, Article 4(1).

¹⁶⁹ Skoutaris (n 1) 198.

derogation from the *acquis*.¹⁷⁰ Thus, does a Cyprus settlement have to be based on the UN Security Council Resolution 1251?¹⁷¹ This Resolution states that:

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.

According to Recital (4) of Protocol No 10, a *comprehensive settlement* is not necessitated for the withdrawal of the suspension of the *acquis*. *Ipsa facto*, a *solution* to the Cyprus problem is enough. Although, the difference between a 'settlement' and a 'solution' is not huge, Uebe believes that a 'solution' to the Cyprus problem will be something less than a 'comprehensive settlement' such as the Annan Plan.¹⁷² Thus, can the 'solution' not be the recognition of the TRNC? Any community within a Member State has the right to pursue its democratic right of self-determination and retain its membership of the EU.

Article 2 TEU states 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The location of this provision in the Treaty indicates the significance of these abovementioned core values. Thus, the Union, by law, is obliged to respect its Member States' democratic decisions, such as the right to vote for independence. The need to stray away from the literal interpretation of Treaties has gained even more significance since territories of the Union, such as Scotland, Catalonia and Flanders are considering -to different degrees- the prospect of independence from their mainlands. Just as the Turkish Cypriots, the citizens of these territories, who are minorities, have their very own unique cultures, languages and traditions. The Union is required to acknowledge and respect these peoples' rights and this also includes

¹⁷⁰ Vincent L Morelli, 'Cyprus: Reunification Proving Elusive' (Congressional Research Service 2015) <<https://fas.org/sgp/crs/row/R41136.pdf>> accessed 17 July 2015.

¹⁷¹ 1999, reaffirmed by UN Security Council Resolution 1898 (14 December 2009) S/RES/1898, para 5.

¹⁷² Uebe (n 37) 386.

their right to self-determination.¹⁷³ Alternatively, not only would the EU be in breach of Article 2 TEU, but it would also discriminate against these minorities.

Albeit, the aim of the Union is to abolish borders and unite Europe, with the case of Kosovo, the EU has openly supported its independence. Currently, twenty three of the Member States¹⁷⁴ have recognised Kosovo and the European Parliament has also shown its support for this cause; even though the EU cannot officially recognise the State, Kosovo has the 'largest concentration of EU officials outside Brussels.'¹⁷⁵ Moreover, a Stability Tracking Mechanism, which is designed by the Union to improve governance, infrastructure and the internal market in Kosovo, drives the Kosovan policy.¹⁷⁶ With the amount of EU assistance and involvement in an unrecognised State that does not belong to the European family (Kosovo), it would be utterly specious for the Union to treat the northern Cyprus any differently. Indeed the Union has socially and economically provided assistance to the north of the island, yet, it steers clear from the prospect of recognising, even indirectly, the authorities in the 'Areas'. The EU has also shown its support for the secession of Eastern European countries during the break-up of the Soviet Union; furthermore, it has recognised the independence of Croatia and Slovenia as early as 1992.¹⁷⁷ Can the Union not adopt Beran's theory and show the same respect to a territory that is within its own internal borders?¹⁷⁸

Today, the Union clearly opposes the idea of secession; the lack of support it had for Scotland's independence referendum proves this.¹⁷⁹ Furthermore, some would argue that the Schengen zone is evidence that the Union wants to remove the idea of

¹⁷³ Iain McLean, Jim Gallagher and Guy Lodge, *Scotland's Choices: The Referendum and What Happens Afterwards* (Edinburgh University Press 2014) 37.

¹⁷⁴ Greece, Cyprus, Romania, Slovakia and Spain do not recognise the country.

¹⁷⁵ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Enlargement Strategy and Main Challenges 2014-15' COM (2014) 700 final; see Pim De Kuijer, 'The 28th Member State' *EU Observer* (Brussels 18 February 2008) <<https://euobserver.com/opinion/25680>> accessed 16 July 2015.

¹⁷⁶ European Commission, European Neighbourhood Policy and Enlargement Negotiations, Kosovo <http://ec.europa.eu/enlargement/countries/detailed-country-information/kosovo/index_en.htm> accessed 16 July 2015.

¹⁷⁷ M Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *American Journal of International Law* 569.

¹⁷⁸ R Tarvet, 'The Accession of Scotland to the European Union: Is "Independence in Europe" Achievable?' (Academia.edu) 14 <http://www.academia.edu/9183943/The_Accession_of_Scotland_to_the_European_Union_Is_Independence_in_Europe_achievable> accessed 21 June 2015.

¹⁷⁹ McLean, Gallagher & Lodge (n 173) 38.

internal borders in Europe as much as it can; however, it could be argued that exclusion from the Schengen Area is nothing other than a creation of a new border which promotes social exclusion and limits the opportunities available to extraterritorial immigrants.¹⁸⁰ The external border policing and the Schengen Information System, whose sole aim is to keep immigrants outside, represent exclusive communitarian ideology. From an ethical standpoint, the Schengen *acquis*¹⁸¹ encompasses limitations that are explicitly condemned by liberal egalitarianism, natural law and Marxism as it rigorously tries to keep non-EU citizens out of the Schengen Area, whilst simultaneously protecting 'the economic and cultural wealth signatory countries have acquired over many years.'¹⁸² It should also be noted that a few countries- especially Denmark-do not agree with the concept of shared and unrestricted borders.¹⁸³

There cannot be inconsistency in the EU's policy as regards secession; the Union either needs to obey its Member States and leave the matter for the European Parliament and Council to handle or it needs to act as a supranational organisation that has bestowed upon itself the power of the right to its own institutional opinion without being authorised to do so by any legal basis in the European Treaties.¹⁸⁴

Although Article 4 TEU emphasises the fact that the EU needs to respect the equality of Member States, their national identities and most importantly in this context, have respect for territorial integrity and the role of the regional governments, the Commission is far less flexible with 'special cases' today than it used to be in the past. Albeit the definition of the word 'respect' is not elucidated, this Article should technically provide a robust basis for the Union to give northern Cyprus the opportunity to conduct negotiations with the Member States and the Council in a democratic and diplomatic fashion in order to explain its political position.¹⁸⁵

¹⁸⁰ Paige A Isaacson, 'European Supranationalization: An Immigrant's Nightmare or 'Business as Usual?' (Spring 2014) *International Affairs Review* <http://www.usfca.edu/International_Studies/international_affairs_review/spring2014/articles/Immigrants_Nightmare_or_Business_as_Usual/>accessed 16 July 2015.

¹⁸¹ Schengen *acquis*: Agreement 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, 13-18.

¹⁸² Isaacson (n 180).

¹⁸³ *Ibid.*

¹⁸⁴ Tarvet (n 178) 16.

¹⁸⁵ *Ibid* 7.

Hypothetically, even if the Union did agree to the secession of northern Cyprus, the question would be: what would happen to its EU membership? Would northern Cyprus have to reapply as it would become a 'new State' upon independence? One way to approach this question is to claim that a 'new State' will not be created by the secession of northern Cyprus as the TRNC has been a country since 1983, despite not being recognised, as 'the existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness...'¹⁸⁶ Furthermore, the TRNC fulfils the majority of the criteria set out in Article 1 of the Montevideo Convention, which classifies a State as a '...person of international law [with] a permanent population, a defined territory, government and [the] capacity to enter into relations with other states.' Thus, even though Jose Manuel Barroso, the former President of the Commission, distorts the principle of continuity by arguing that a '...new independent state would, by the fact of its independence, become a third country with respect to the EU...'¹⁸⁷ in the East Germany accession process, Delors made it clear that the principle of continuity will apply to the minority, hence, the disadvantaged acceding State.¹⁸⁸ Accordingly, the role of the Commission's President is to 'provide forward movement of the European Union';¹⁸⁹ hence, the President cannot use political threats in order to renounce northern Cyprus' EU membership upon secession. Not only would this provide a backward movement of the EU, but it would also extend beyond the competencies of the Commission, despite the fact that the role of the President has been strengthened by the Treaties of Nice and Amsterdam.¹⁹⁰

Indeed, the accession or continuity of northern Cyprus' membership will have to be negotiated in order to ensure that the State meets the Copenhagen criteria; however, East Germany's accession process indicates that with the help of the Union, any State is capable of gradually meeting the standards required for membership.

¹⁸⁶ Foreign Minister Eban of Israel arguing against a request for an advisory opinion of the International Court on the status of Palestine on 27 July 1948 in James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 29-30.

¹⁸⁷ It should be noted that there is no clear-cut legal basis for his argument. Jose Manuel Barroso, Letter to Lord Tugendhat regarding Scottish Independence and the EU, quoted in Tarvet (n 178) 6 fn 10.

¹⁸⁸ European Commission, 'The Community and German Unification' COM (90) 400 final, Vol 1 Pt 2. 1. 1.

¹⁸⁹ Jose Manuel Barroso, 'My Job' The European Commission, The Commissioners 2010-2014 <http://ec.europa.eu/archives/commission_2010-2014/president/about/role/index_en.htm>.

¹⁹⁰ Tarvet (n 178) 7.

Furthermore, it could be argued that a Treaty change¹⁹¹ will also not be necessary with such an accession, as no geographical enlargement of the Union would be taking place *per se*; the population and the size of the Union would remain the same as Turkish Cypriots are already EU citizens and the north is already part of the Union. This would also be in concert with the proceedings undertaken during East Germany's accession since it involves the other Member States.¹⁹²

Thus, since the EU is an organisation created by the Member States, the TRNC's recognition and membership is simply a matter of Member State political authorisation. For the Commission to renounce the membership of northern Cyprus and take a political stance against its own citizens, which are already in a disadvantaged position due to suspension of the *acquis*, the Commission would be abandoning its legal duties and in fact acting *ultra vires*. The Commission's literal interpretation whilst interpreting the Treaties in order to act in favour of the Member States on matters such as independence, has changed the people's perception of the EU. A recent Eurobarometer study¹⁹³ shows that people no longer classify the Union as being an organisation based on peace and democracy and consider it to be more of a geographical area that promotes free movement and has a single currency. Consequently, the Union needs to reconsider its own objectives and if it intends on being more than a Union based on economic relations with its members, then its institutions need to interpret the Treaties in a more flexible way.

It is improbable that the independence and continuation of northern Cyprus' membership will result in 'any quantitative negative spill-over, other than providing political momentum for other regions such as Catalonia or Flanders to follow, suit.'¹⁹⁴ The issue that the Union needs to consider is whether or not such a development would be negative; as argued by Roland Vaubel, 'secession may on balance have positive or negative consequences.'¹⁹⁵ Secession would not necessarily mean that the EU would be confronted with changes or segregation; those areas within the Member States which opt for independence will most probably want to remain part of the family. As a result, independence should be a matter for the

¹⁹¹ Article 48 TEU.

¹⁹² Tarvet (n 178) 7.

¹⁹³ European Commission, Eurobarometer 73, *Public Opinion in the European Union*, August 2010, 41.

¹⁹⁴ Tarvet (n 178) 22.

¹⁹⁵ Roland Vaubel, 'Secession in the European Union' (2013) 33(3) *Economic Affairs* 288.

citizens of the territory to decide, whilst, EU cooperation with the breakaway State should be a matter for the Member States to decide amongst themselves. Thence, in the unlikely situation that the TRNC is recognised as a State by the Union's Member States, the Commission should respect this and try to assume a more productive role-similar to that taken by Delors in the case of East Germany. It should also be noted that, the recognition of the TRNC will prevent permanent restrictions to the free movement of persons and capital in Cyprus. These derogations are solely needed for the particular national identity of a united bi-zonal, bi-communal Cyprus to be protected and to respect the sensitivities of the respective populations. So, the Four Freedoms will be better practiced via the recognition and the EU membership of the TRNC.

5.7. Conclusion

It could be argued that the EU has unintentionally demonstrated ignorance of basic history in Cyprus and disregarded the welfare of the Turkish Cypriot community with the accession of the entire island into the Union and via Protocol No 10 of the Act of Accession. The EU and its Member States chose political dogma over its own principles and dropped the prospect of conflict transformation in Cyprus. History will not judge the Union kindly and the reason for this will be explained in the following chapters. Indeed, the Union owes no duty to the Turkish Cypriots *per se* and it needs to limit the liability and responsibility of its own Member State, the RoC; however, the gap in the legal order of the Union created by the suspension of the *acquis* in the north, is going to be difficult to fill as it utterly depends on the achievement of a solution on the island. The following chapter will examine the Annan Plan and discuss how difficult it is for the two Cypriot parties to cooperate and terminate the Cyprus problem. Subsequently, the rest of the thesis will assess the technical and depoliticised approach the Union has adopted whilst handling issues that arise from the Cyprus problem and how this approach has affected the lives of the

Turkish
Cypriots.

6. The Infamous *Orams* Ruling

The Cyprus problem will be eternal if jurisprudence continues to be a means of politics. Although the problem is a political one, the legal side of it is far more imperative as it has caused the most damage to the relationship between the two conflicting parties. This is because the Greek Cypriot leaders have dominated the legal arena in order to be able to carry out their own political moves legitimately. As a result of the judicialisation of EU politics, the Cyprus problem has become a ‘Gordian knot’ that is impossible to disentangle.¹ The *Anastasiou* saga² which

¹ Mehmet Hasgüler and Murat F Özkaleli, ‘Analyzing Cyprus Accurately: Legal Aspects of a Political Matter’ (translated from Turkish by E Metin) (2010) Ankara Bar Review 57.

²This case concerned the implementation of the non-discrimination principle of the 1972 Association Agreement to the ‘whole of Cyprus’ and questioned whether under the Additional Protocol, which refers to goods originating in Cyprus, Member States were entitled to accept certificates issued by authorities from the TRNC. Association Agreement Signed 19 December 1972 and annexed to Council Regulation (EEC) No 1246/73 of 14 May 1973 on the conclusion of an Agreement establishing an Association between the European Economic Community and the Republic of Cyprus [1973] OJ L 133.

In May 1992, an action was instigated by SP Anastasiou (Pissouri) Ltd and twelve Greek Cypriot producers and exporters of citrus fruit contra the U.K. Ministry of Agriculture Fisheries and Food in the High Court of Justice, for exporting citrus fruit and potatoes from the TRNC. Thus, the High Court was asked to judicially review the practice of the U.K. authorities of welcoming imports of these goods originating in northern Cyprus when the goods were not accompanied by movement and phytosanitary certificates issued by the authorities of the RoC as demanded by EU law. Under Article then 234 EC (now 263 TFEU) the High Court of Justice referred questions to the ECJ based on the interpretation of the Association Agreement and Council Directive 77/93/EEC. The Court asked whether the U.K. authorities, in light of the abovementioned provisions, could legally allow the importation of products accompanied by movement and phytosanitary certificates issued by the Turkish Cypriot authorities. The Association Agreement governed trade relating to fruits and potatoes; Article 7 of the Agreement stipulated that the regulations of origin were to be found in Article 6(1) of the 1977 Protocol. This Article proclaimed that the proof of the origin of a product is evidenced in a movement certificate that needs to be issued by the ‘customs authorities of the exporting State.’ In correlation to this, Directive 77/93/EEC governed matters concerning phytosanitary certificates within the Community; Article 12(1)(b) of the Directive necessitated certificates to be granted in accordance with the laws of a non-contracting state. The U.K., with the support of the Commission in its observation, argued that instead of insisting on the fulfilment of the technical requirements of the legislation, a political interpretation of the provisions was required in this case, which took into account the situation on the island. Thus, the relevant certificates issued by the authorities in northern Cyprus should be accepted. They also referred to the non-discrimination clause set out in Article 5 of the Agreement, in order to contend that by rendering the movement certificates issued by the authorities in northern Cyprus as invalid, the Community would be depriving the Turkish Cypriots from the benefits of the Agreement which was concluded to apply to the whole territory of the Republic. The ECJ rejected these arguments; it emphasised that the Association Agreement and the 1977 Protocol were both directly effective and mutually binding in the EC legal system according to Article 300(7) EC. The ECJ held that a departure from the clear, precise, unconditional and directly effective provisions of the 1977 Additional Protocol, despite the fact there were problems with the application of the Association Agreement because of the political situation on the island, was not acceptable. The Court then went on to declare that, where the

restricted the right of trade of the Turkish Cypriot Community and the *Apostolides v Orams* case (*Orams*)³ which interfered with the sales of property in the TRNC and prevented the Turkish Cypriots from exercising the right to self governance, are prime examples of how legal matters have political side effects. Thus, it is safe to assert that the political stances adopted by the Greek and Turkish Cypriots are highly shaped by the outcomes at the legal front of the problem. Even though the ECJ was not governed by the imperative of hurting the Turkish Cypriot community, with these abovementioned judgments-which were political victories for the Greek Cypriot community in the legal front of the problem- it further encouraged the Greek Cypriot non-cooperative strategy aimed at unilateral victory rather than a compromise.⁴ This chapter will focus on the *Orams* ruling⁵ and analyse the ECJ's literalistic interpretation of Regulation 44/2001.⁶ Subsequently, it will be concluded

movement of the certificates were classified as evidence between the relevant authorities, there needed to be '...mutual reliance and cooperation between the competent authorities of the exporting and importing States'. Thus, as a result of the non-recognition of the TRNC by the EC and its Member States, mutual reliance and resort to administrative cooperation between the authorities of north Cyprus and those of the Member States, at the level required by the Additional Protocol, was not possible. Therefore, according to the Court, 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, 'denial of the very object and purpose of the system' created by the Additional Protocol.

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

³ Case C-420/07 *Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571.

⁴ Hasgüler & Özkaleli (n 1) 58.

⁵ *Apostolides v Orams* (n 3).

⁶ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012/1 (Regulation 44/2001 or Regulation); Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1 (Regulation 1215/2012):

Article 80 This Regulation shall repeal Regulation (EC) No 44/2001. References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III.

Article 81 This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

The Brussels Regulation governs jurisdiction and the recognition and enforcement of judgments in EU Member States. It provides a harmonised approach to determining which EU Member State court should have jurisdiction over a dispute and how judgments from courts in one EU Member State should be recognised and enforced in other EU Member States.

that the ECJ's attitude has cast a shadow over the EU's conflict resolution abilities *vis-à-vis* Cyprus.

EU wide recognition of judgments on property issues could be seen as further jeopardizing diplomatic efforts to bring about reconciliation and a negotiated settlement. That could undermine the common commitment of EU Member States under recital 1 of Protocol 10 to support the UN efforts to bring about a comprehensive settlement of the Cyprus problem and the wish expressed in recital 7 of Protocol 10 that EU Accession would promote civil peace and reconciliation on the island.⁷

6.1. Political Equality: *Just A Dream*

The Cyprus problem has become a real irritation for many diplomats and politicians across the world. The international players are bored of talking about this problem, yet, it will continue to occupy space on the hectic agenda of the international community.⁸ As a result of their judicial decisions-which have generally been in favour of the Greek Cypriot community-the UN, the EU and the ECtHR have become indirect parties to the Cyprus conflict. It could be argued that the 'international code of politics'⁹ drives the organisations to side with the Greek Cypriots and therefore the judicial aim of doing justice becomes correspondingly lopsided; for instance, the international players are obliged to keep an eye on Turkey's power and influence.¹⁰ The ECJ has also been involved in this political dispute via a preliminary ruling and this involvement has not helped the property issue on the island.

One of the most difficult problems in Cyprus is the property issue. The conflict on the island ran between December 1963 and August 1974, and the consequent population exchange, agreed in 1975 by the leaders of both sides, left one third of Greek Cypriots and half of all Turkish Cypriots homeless. Inevitably, homes and lands left by the refugees were taken over by each territory's government. These

See also Philip Clifford and Oliver Browne, 'Reform of the Brussels Regulation: Latest Developments and the "Arbitration Exception"' (Latham & Watkins, In Practice: The London Disputes Newsletter, April 2013) <<http://www.lexology.com/library/detail.aspx?g=f325f419-44e1-46a9-9324-3552b18b5b86>> accessed 10 July 2015.

⁷ The EU Commission stated this in its submissions to the ECJ. The UN Secretary General and the EU Commission were sincerely worried that the ECJ's decision in the *Orams* case would have serious consequences and they were right. European Commission Submissions to the European Court of Justice JURM 2007 0058, 21 December 2007, para 108.

⁸ Ahmet Sözen, 'Heading Towards the Defining Moment in Cyprus' (52nd Annual Convention of the International Studies Association, Montreal, Quebec, 16-19 March 2011).

⁹ Tayyar Ari, *Uluslararası İlişkiler ve Dış Politika* (Alfa Yayınları 2004) 140-141.

¹⁰ *Ibid.*

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lands and properties have been utilised to re-house the refugees or build community and infrastructure projects. According to the Turkish Cypriots authorities, this exchange is permanent, whereas the Greek Cypriot authorities argue that this is a temporary bargain. Nevertheless, the refugees on both sides of the island have been demanding closure and legal certainty about their property rights.¹¹ The *Orams* case is a perfect example of this property dilemma in Cyprus. The background of this case was as follows:

Mr. Apostolides, a Greek Cypriot citizen, had brought a claim in the District Court of Nicosia in 2004 against a British couple-the Orams- who had constructed a holiday home onto his property in the northern part of Cyprus that he was forced to flee in 1974 as a result of the Turkish intervention. The District Court ruled that the Orams were trespassing onto Mr. Apostolides land and ordered them to destroy the villa and fencing which they had built on claimant's land, surrender vacant possession to the claimant, pay the claimant various sums by way of special damages and monthly rental charges (including interest) until the judgment was complied with and pay various sums in respect of the costs and expenses of the proceedings (with interest on those sums).¹² Since Cyprus is a divided island, the ruling of a court in the RoC is unenforceable in the TRNC. Pursuant to Regulation 44/2001, the judgments of the civil courts of the RoC can be enforced in any of the Member States of the EU contra the assets of the defendants in that state. Mr. Apostolides thus sought to have the ruling registered and applied against the defendant's property in the U.K.¹³ The Orams were represented by Cherie Blair in the English courts; this aroused a lot of anger in the Greek side and the Greek Cypriot President, Papadopoulos, unscrupulously remarked that: 'It's a provocative action as it is difficult to separate her professional capacity from being the wife of the British prime minister.'¹⁴ On 6 September 2006, a Judge of the Queen's Bench Division of the High Court of Justice in the U.K. allowed the Orams' appeal against registration

¹¹ James Ker-Lindsay, *The Cyprus Problem: What Everyone Needs to Know* (OUP 2011) 56.

¹² The disputed land is situated at Lapithos in the district of Kyrenia, which is in northern Cyprus. It belonged to Mr Apostolides' family, who occupied it before the 1974 Turkish intervention. See Geert De Baere, 'Case C-420/07 Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams (2009) ECR I-3571' (2010) 47 *Common Market Law Review* 1123 (note), 1127.

¹³ Helena Smith, 'Cherie Booth's Role in Cyprus Land Dispute Angers President' *The Guardian* (London, 19 December 2005) <<http://www.guardian.co.uk/uk/2005/dec/19/world.cyprus>> accessed 15 June 2014.

¹⁴ BBC News, 'Cypriot Anger at Cherie Land Case' (17 December 2005) <<http://news.bbc.co.uk/1/hi/uk/4538960.stm>> accessed 16 June 2014.

and enforcement in Britain of the Cypriot judgment on the grounds that the application of the *acquis communautaire* was suspended in the occupied area.¹⁵ Subsequently, the claimant appealed the decision at the Court of Appeal of England and Wales, which in turn instigated a preliminary reference procedure under Article 267 TFEU¹⁶ in relation to the recognition and enforcement of a judgment of the District Court of Nicosia concerning land in the area not under the effective control of the Government of the RoC, where the application of the *acquis* is suspended. The ECJ was asked whether ‘a judgment rendered by a court in the south of Cyprus but pertaining to real property in the north in which no effective enforcement is possible, nonetheless enforceable in another Member State’?¹⁷ The most important question was, ‘what is the effect of the suspension of the *acquis communautaire* in the north of Cyprus on the application of Regulation 44/2001’? It was further asked ‘whether the recognition or enforcement of a default judgment may be refused, on account of the fact that the document instituting proceedings was not served on the defendant in sufficient time and in such a way as to enable him to arrange for his defence, where the defendant was able to bring an appeal against that judgment’?¹⁸ The ECJ

¹⁵ Article 1 Protocol 10 Act of Accession 2003 [2003] OJ L 236/955

¹⁶ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/164

Article 267 TFEU:

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

See also De Baere (n 12) 1127.

¹⁷ Ibid 1123.

‘Whether the fact that a judgment given by the courts of a Member State concerning land situated in an area of that State over which its Government does not exercise effective control, cannot, as a practical matter, be enforced where the land is situated constitutes a ground for refusal of recognition or enforcement under Article 34(1) of Regulation No 44/2001.’ Ibid 1128.

¹⁸ Court of Justice: ‘A judgment of a court in the Republic of Cyprus must be recognised and enforced by the other Member States even if it concerns land situated in the northern part of the island’, European Commission Press Release No 39/09 (28 April 2009), Judgment of the Court of Justice in Case C-420/07 *Meletis Apostolides v David Charles Orams & Linda Elizabeth Orams* <http://europa.eu/rapid/press-release_CJE-09-39_en.htm> accessed 18 June 2014.

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confirmed on 28 April 2009 that a judgment of a court in the RoC must be recognised and enforced by the other Member States, even if it concerns land situated in the north of Cyprus over which the government of the RoC does not at present exercise effective control.¹⁹ Moreover, it proclaimed that the fact that the judgment cannot, as a practical matter, be enforced where the land is situated, does not constitute a ground for refusal of recognition or enforcement under Article 34(1) of the Regulation²⁰ and it does not mean that such a judgment is unenforceable for the purposes of Article 38(1) of that Regulation.²¹ Resultantly, the Court of Appeal unanimously accepted and followed the ECJ's preliminary ruling, claiming that the Orams had to implement the decision of the RoC court.

This ruling simply confirms the jurisdiction of the RoC courts over the entire territory of Cyprus and reinforces the property rights of the displaced persons. Thus, a displaced person can effectively seek a remedy contra someone unlawfully using his or her property, turning against his or her assets in any Member State. In other words, the ECJ has completely bypassed the fact that Cyprus is a divided Member State and that both of the Cypriot communities have the right to self-governance. Undoubtedly, this was an insensitive ruling.

At this point it is advantageous to mention the 'Political Questions Doctrine' which was initially introduced in the U.S.A. This doctrine stipulates that a court of law is permitted to refuse to hear a case if one of three situations prevail: firstly, the court can refuse to hear a case if the issue presented to it has been textually committed to another branch of government;²² secondly the court can refuse to hear a case if the standards which are to be implemented by it would be ineffective and the thirdly the court can refuse to hear a case if it believes that it is in its best interest to not

¹⁹ *Apostolides v Orams* (n 3) paras 35, 37-39.

²⁰ Regulation 44/2001 (n 6), Article 34(1):

A judgment shall not be recognised:

1 if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

²¹ *Apostolides v Orams* (n 3) paras 59-62, 71.

Article 38(1) Regulation 44/2001 (n 6):

1 A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

²² Thus, in the EU context, the Commission, the Council or the Parliament would take the decision instead of the ECJ.

intervene.²³ Since this doctrine has been established in order to ensure the correct implementation of the doctrine of the separation of powers in the U.S.A., it can be argued that it does not apply to the Cyprus problem, which is an international issue. Moreover, the ECJ has mentioned many times that there is a presumption of admissibility. Thus, unlike the U.S. Supreme Court -which is notoriously fastidious about the cases it chooses to hear in its review of state court judgments role - the ECJ can only refuse to hear a case if a reference from a national court does not fall into its jurisdiction;²⁴ if it does, then it is obliged to answer, even if the questions submitted by the national courts have already been answered. Nonetheless, due to the involvement of the ECJ and the ECtHR in the highly politicised Cyprus problem, this doctrine should still be taken into consideration.

Although the ECJ is duty bound in its preliminary reference role to help with the administration of justice in the Member States,²⁵ the Court should have been more empathetic towards the ongoing political conflict in Cyprus whilst rendering its *Orams* judgment; its ruling, despite being uncontaminated by politics, threatens to deny Turkish Cypriot authority and jurisdiction as a politically equal party in Cyprus. Thus, the Court's decision undermines the UN endorsed principles of bi-communality, political equality and bi-zonality in reaching a negotiated settlement for Cyprus. Irrefutably, peace and stability depend on acknowledging and respecting the divergent identity and integrity of the two peoples of Cyprus; their relationship is one of political equality and not of majority and minority, and therefore neither side

²³ Oliver P Field, 'The Doctrine of Political Questions in the Federal Courts' (1924) 58 American Law Review 711.

²⁴ A reference will not fall into the ECJ's jurisdiction: where there is no genuine dispute between the parties (*Foglia*), Case C-244/80 *Foglia v Novello* (No 2) [1981] ECR 3045; where the questions referred are irrelevant or hypothetical (*Meilicke*), Case C-292/04 *Wienand Meilicke and Others v Finanzamt Bonn-Innenstadt* [2007] ECR I-1835; and where the national court has failed to provide sufficient legal or factual information (*Telemarsicabruzzo*), Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

²⁵ Jeffrey J Cohen, 'The European Preliminary Reference and US Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44(3) The American Journal of Comparative Law 421:

'For the vast majority of cases, there is no right to be heard in front of the US Supreme Court. Although there is no hard and fast rule about how the Court chooses cases, they are typically cases that:

- Will resolve conflicts of law,
- Are politically or socially important,
- Reinforce Supreme Court precedent, and/or
- Fall within a Justice's favourite area of law.'

Brett Snider, 'How Does the US Supreme Court Work?' (*Find Law*, 7 October 2013)

<http://blogs.findlaw.com/law_and_life/2013/10/how-does-the-us-supreme-court-work.html>
accessed 5 July 2014.

is permitted to claim authority or jurisdiction over the other. The ECJ has nonetheless disregarded this relationship based on political equality by ignoring the right to self-governance of the Turkish Cypriots.²⁶ The judgments of the ECJ and the ECtHR²⁷ have indisputably affected the peace negotiations on the island; for instance, the negotiation strategy of the Greek Cypriot side is to prolong the official talks in order to wait for new court decisions which will be to the detriment of Turkey and the Turkish Cypriots. Unfortunately, the Greek Cypriots now have a political advantage as a result of the decisions of the Courts. Undeniably, had these judgment not existed, the conflicting parties would have kept their political views to themselves whilst energetically searching for a plausible settlement.²⁸

6.2. Killing the TRNC Softly? *Apostolides v Orams*

This section will thoroughly analyse the landmark *Orams* judgment and argue that it was an unfair and short-sighted strategic error. As a reminder, the essence of the case deals with land purchased by an EU national in the TRNC; if that land once belonged to a Greek Cypriot, he is entitled to sue the purchaser in a RoC court. If however the ruling of the Greek Cypriot court is ignored, then the Greek Cypriot can implement the judgment in the purchaser's country of origin.²⁹ This case predominantly dealt with the interpretation of Regulation 44/2001, but it also highlighted the consequences of allowing a divided island into the Union.³⁰

When delivering an answer to the questions asked by the Court of Appeal, the Grand Chamber of the ECJ was cautious to stick to a literal interpretation of all that required clarification.³¹ Some would argue that the Court restricted itself to merely interpreting Union law and its previous jurisprudence- which, evidently, refers to common circumstances of the recognition and enforcement of judgments between Member States that do exercise full control over their entire territory- so that it

²⁶ Hasgüler & Özkaleli (n 1) 63.

²⁷ *Xenides-Arestis v Turkey* (Merits and Just Satisfaction) App No 46347/99 (ECtHR, 22 December 2005); *Demades v Turkey* (Merits and Just Satisfaction) App No 16219/90 (ECtHR, 31 July 2003); *Loizidou v Turkey* (1997) 23 EHRR 513.

²⁸ Hasgüler & Özkaleli (n 1) 64. These cases were Greek Cypriot cases against Turkey, aiming to secure the return of Greek Cypriot property in the north through arbitration rather than negotiation. The Turkish Cypriot side instead moved towards greater de facto integration of northern Cyprus into Turkey.

²⁹ Top Properties, 'How Safe is it to Buy Property in Occupied Northern Cyprus' (2009) <http://www.topproperties.com/oneadmin/newspublish/How_safe_is_it_to_buy_property_in_occupied_Northern_Cyprus/28/0/2/2/Y/M.html> accessed 14 May 2013.

³⁰ Baere (n 12) 1123.

³¹ Baere (n 12) 1132.

would avoid interfering with politically loaded issues. Others would argue that the ECJ's interpretations of the Regulation have been consistently literalistic; hence, it has always been unwilling to take practical considerations into account.³² If a specific power is not overtly preserved by the Regulation, then the Court will almost inexorably stipulate that the power is prohibited by the Regulation.³³ Yet, the *Orams* ruling is not a simple black and white issue. It should be noted that the Court can adopt a teleological approach of the law if it deems it to be necessary; for instance, Regulation 44/2001 is a very good example of the judicial activism of the ECJ. The Court's role in the field was extremely important prior to the adoption of the Regulation; it sometimes even ruled *praeter legem*.³⁴ 'That is the case, for example, of individual contracts of employment, for which the actual provisions of the Regulation can be considered as a consolidated version of the case law of the Court.'³⁵ However, it seems as though it has become a common habit for the ECJ to maintain a literal interpretation of this Regulation and EU law in general.³⁶ So, there seems to be no definite answer as to why the ECJ adopted a literal interpretation of the Regulation in the *Orams* case. However, there is also another theory; in order to be able to carry out the EU's political programme³⁷ the Court was obliged to adopt an apolitical approach whilst rendering the *Orams* judgment.

Nonetheless, the overall point to note is that with the adoption of this depoliticised approach, the ECJ actually entered the political field of the Cyprus problem; 'the Cyprus question is being fought in the Court at the expense of and over the backs of individuals who happen to have been caught between the two parties, whilst relying on *de facto* situations that had seemed stable over a long period of time and were

³² Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-14693, [2005] 1 QB 1; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, [2005] 1 AC 101; Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383, [2005] 2 WLR 942; Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard* [2008] ECR I-4323.

³³ Jonathan Harris, 'The Brussels I Regulation and the Re-Emergence of the English Common Law' (2008) 4 *The European Legal Forum* 181 <<http://www.simons-law.com/library/pdf/e/888.pdf>> accessed 1 September 2014.

³⁴ (Outside of the law.)

³⁵ Ferdinando Lajolo di Cossano, 'How the European Court of Justice Shaped the Brussels I Regulation: Individual Contracts of Employment' (2008) Sant' Anna School of Advanced Studies Research Paper 8/2008 <http://www.stals.sssup.it/files/stals_Lajolo.pdf> accessed 1 September 2014; see also Case 266/85 *Shenavai v Kreisler* [1987] ECR 239; Case 133/81 *Roger Ivenel v Helmut Schwab* [1982] ECR 1891.

³⁶ Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289; see also Inge Govaere, Reinhard Quick and Marco Bronckers (eds), *Trade and Competition Law in the EU and Beyond* (Edward Elgar Publishing 2011) 275.

³⁷ This political programme will be discussed in detail further on.

relying on actions of the authorities both in Cyprus and in the Union of the authorities which seemed to enhance this stability.³⁸

The Court commenced its interpretation by referring to the general gist of an Act of Accession which stipulates that EU *acquis* applies ‘*ab initio* and *in toto*.³⁹ Therefore, even though Protocol No 10 of the Act of Accession 2003⁴⁰ provides for a transitional derogation from this principle, it has to be interpreted restrictively and restricted to what is utterly necessary in order to achieve its aim.⁴¹ The ECJ insisted that the suspension provided for in Protocol No 10 only concerns the application of *acquis* in the north whilst the relative judgments were delivered in a court in the government controlled region of Cyprus.⁴² The fact that the judgment concerns the land in the north of Cyprus does not rule out that interpretation as it does not nullify the obligation to apply the Regulation in the RoC and moreover, it does not mean that the Regulation needs to be applied in the northern territory. Thus, the ECJ concluded that the suspension of *acquis* in the north does not prevent the application of the Regulation to a decision which is given by a Greek Cypriot court sitting in the south, but refers to land situated in the north.⁴³ It followed on with a constricted interpretation of what is meant by applying a Regulation in a certain region; although the judgment rendered in the south concerned land in the north, it does not require the Regulation to be applied in the latter.⁴⁴ Clearly, the ECJ’s reasoning was intentionally plain.⁴⁵ Advocate General (AG) Kokott’s thoughts based on the difference between the territorial scope of the Regulation and the reference area of judgments of which the Regulation refers to was slightly more persuasive. She mentioned Article 299 EC⁴⁶ which infers that the territorial ambit of Union law matches up with the territory of the Member States; hence, it includes the U.K. and Cyprus, subject to Protocol No 10.⁴⁷ She then stipulated that, the reference area is the region to which judgments of a court of a Member State could relate and this also

³⁸ Govaere et al (n 36); see chapter 7 where this issue will be discussed in more detail.

³⁹ Case 258/81 *Metallurgiki Halyps v Commission* [1982] ECR 4261, para 8.

⁴⁰ Protocol 10 (n 15).

⁴¹ Case C-233/97 *Kappahl* [1998] ECR I-8069 para 15, Opinion of AG Cosmas, para 37.

⁴² *Apostolides v Orams* (n 3) paras 33-37.

⁴³ European Commission (n 18).

⁴⁴ *Owusu v Jackson* (n 32) para 31.

⁴⁵ Baere (n 12) 1133.

⁴⁶ Now, after being amended by The Treaty of Lisbon, Article 52 TEU, Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C 115/13, and Articles 349 & 355 TFEU (n 16).

⁴⁷ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 25.

covers non-member states.⁴⁸ Thus, she confirmed that the postponement of the application of *acquis* in the north merely constrains the territorial scope of the Regulation, meaning that the recognition in the TRNC of a judgment coming from a Member State should not be based on the Regulation.⁴⁹ Furthermore, she differentiated between ‘formal’ and ‘factual’ enforceability; albeit there may be factual problems in the enforceability of a judgment which was issued in the south and concerns the northern territory, the formal enforceability is not affected.⁵⁰ From the wording of Article 1 (1) of Protocol No 10, AG Kokott drew that EU *acquis* was to be suspended *in* the north and not *in relation to* the north.⁵¹ She concluded by firmly stating that the exceptions provided for in the Regulation,⁵² such as public policy, will not lead to another conclusion.⁵³ This interpretation is sustained by the ‘*ratio legis*’⁵⁴ of the derogation, namely the desire to allow the RoC to accede even without the conclusion of a settlement.⁵⁵ Pragmatically, the ECJ followed her reasoning and conclusions;⁵⁶ it adopted this interpretation in order to camouflage the

⁴⁸ Ibid, para 28 et seq.

⁴⁹ Baere (n 12) 1134; see also Nikos Lavranos, ‘The ECJ and Cyprus: Keeping the Pandora Box Firmly Closed’ (2009) European University Institute Working Paper 4/2009 <<http://dx.doi.org/10.2139/ssrn.1460639>> accessed 10 July 2014.

⁵⁰ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 97 et seq.

⁵¹ Lavranos (n 49).

⁵² Council Regulation 44/2001 (n 6) Article 34:

judgment shall not be recognised:

1 if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2 where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3 if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4 if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

⁵³ Lavranos (n 49).

⁵⁴ (‘Reason for the Law’).

⁵⁵ Baere (n 12) 1135.

⁵⁶ *Apostolides v Orams* (n 3) paras 36-38:

36 In the case in the main proceedings, the derogation provided for by Protocol No 10 cannot be interpreted as meaning that it precludes the application of Regulation No 44/2001 to the judgments concerned given by the Cypriot court.

37 It follows from a literal interpretation of Article 1(1) of Protocol No 10 that the suspension for which it provides is limited to the application of the *acquis communautaire* in the northern area. However, in the case in the main proceedings, the judgments concerned, the recognition of which is sought by Mr Apostolides, were given by a court sitting in the Government-controlled area.

38 The fact that those judgments concern land situated in the northern area does not preclude the interpretation referred to in the preceding paragraph since, first, it does not nullify the obligation to apply Regulation No 44/2001 in the Government-controlled area and, second, it does not mean that

fact that uniform application of EU *acquis* would be impossible in Cyprus as a result of this unjust membership, and thus avoid a situation in which Cyprus would be in regular breach of its membership responsibilities by failing to uniformly apply EU law across its land.⁵⁷ The purpose of the Protocol is to only defer the *acquis* which the government of the RoC cannot ‘guarantee in the north.’⁵⁸ Hence, not all EU provisions are to be held back from the TRNC;⁵⁹ this position can be criticised on legal certainty grounds as the Protocol does not guarantee the stability in regards to decisions made by an individual living in the north concerning his or her everyday life.⁶⁰ The ECJ decided that:

[T]he suspension of the application of Community law in the areas where the Government of the Republic of Cyprus does not exercise effective control and the fact that the judgment cannot, as a practical matter, be

that regulation must thereby be applied in the northern area (see, by analogy, Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 31) and paras 60-62:

‘60 In that connection, the court of the State in which enforcement is sought cannot, without undermining the aim of Regulation No 44/2001, refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or Community law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 234 EC, affords a sufficient guarantee to individuals (see *Renault*, paragraph 33). The public-policy clause would apply in such cases only where that error of law means that the recognition or enforcement of the judgment in the State in which enforcement is sought would be regarded as a manifest breach of an essential rule of law in the legal order of that Member State (see, to that effect, *Renault*, paragraph 34).

61 In the case in the main proceedings, as Mr Apostolides and the Cypriot and Greek Governments have observed, the referring court has not referred to any fundamental principle within the legal order of the United Kingdom which the recognition or enforcement of the judgments in question would be liable to infringe.

62 Accordingly, in the absence of a fundamental principle in the legal order of the United Kingdom which the recognition or enforcement of the judgments concerned would be liable to infringe, no refusal to recognise them, under Article 34(1) of Regulation No 44/2001, would be justified on the ground that a judgment given by the courts of a Member State concerning land situated in an area of that State over which its Government does not exercise effective control, cannot, as a practical matter, be enforced where the land is situated. Similarly, there can be no refusal of enforcement on the basis of that provision, in accordance with Article 45(1) of that regulation.’

⁵⁷ *Baere* (n 12) 1135.

⁵⁸ This is reiterated in Article 3(1) of Protocol No 10 (n 15): ‘Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the [north]’.

⁵⁹ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 40:

‘As the Commission in particular points out, however, it was not the intention to exclude the application of all provisions of Community law with a bearing on areas under the control of the Turkish Cypriot community. Accordingly, Article 3(1) of the Protocol provides that the suspension of the *acquis communautaire* is not to preclude measures with a view to promoting the economic development of the areas referred to. In addition, on the basis of Article 2 of the Protocol, rules for the movement of goods and persons between the different areas were laid down by Council Regulation (EC) No 866/2004.’

⁶⁰ Prior to this ruling, the individuals in the north were unaware of such consequences and they now have to pay the price for legal uncertainty. Jeffrey Barnes, ‘Sources of Doubt and the Quest for Legal Certainty’ (2008) 2(2) *Legisprudence* 120.

enforced where the land is situated do not preclude its recognition and enforcement in another Member State.⁶¹

Moreover, AG Kokott contends that ‘the recognition and enforcement of the judgments of the District Court of Nicosia in the United Kingdom 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. On the contrary, only the courts in the United Kingdom are required to act.’⁶² Now that the RoC has become a Member State, the Cypriot Courts have gained extra power in relation to seizing property in the U.K.⁶³

6.3. Enforceability of Foreign Judgments & The Responsibility That Comes With It

According to Article 41 of the Regulation, at the primary stage of recognising and enforcing foreign judgments,⁶⁴ there is no hearing of the debtor or examination of the grounds for refusal. *Ipsa facto*, the Member State that is to enforce the judgment is automatically issued with a decision on enforceability by the same Article. Paradoxically, according to Article 38 (1), it is a necessity to guarantee that the judgment is enforceable in the Member State of origin prior to issuing a declaration on enforceability; the same principle was also set out in the ECJ’s ruling of *Coursier*.⁶⁵ The ECJ initially validated this argument by stating that a judgment once applied, should not be granted rights that it does not have in the Member State of origin.⁶⁶ It goes without saying that the U.K. should have initially checked whether or

⁶¹ European Commission (n 18).

⁶² *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 42.

⁶³ ‘The judgment provides that the earlier Cyprus Court judgments, against whom the Orams appealed in the British Courts, and the European Court of Justice judgements in Luxembourg, (1) be registered and enforced in the UK. In particular, the Cyprus Court had ordered that the Orams should: Cease trespassing on the land belonging to Mr. Apostolides; Deliver up possession of the land to Mr. Apostolides; Pay ‘mesne profits’ (effectively, rent) to Mr. Apostolides in respect of the period of their occupation; Knock down the villa and fencing they had built on the land. The Orams are compelled to execute the ruling within 14 days or be held in contempt... If they do not comply, however, the British court could order the sale of their home in Britain to pay compensation to Mr. Apostolides, whose costs are estimated at €1 million.’ Michael Youlton, ‘The Significance of the *Apostolides v Orams* Case for Greek-Cypriots’ (2010) 1(2) Irish Left Review <<http://www.irishleftreview.org/2010/01/23/significance-apostolides-orms-case-greekypriots/#sthash.wkAr1eYP.dpuf>> accessed 17 July 2014.

⁶⁴ This is known as ‘*exequatur*’.

⁶⁵ Case C-267/97 *Coursier v Fortis Bank* [1999] ECR I-2543, para 23.

⁶⁶ The Court cited the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Paul Jenard, ‘Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Signed at Brussels 27 September 1968’ [1979] OJ C 59/1; see also Baere (n 12) 1146.

not the judgment was enforceable in Cyprus in order to ensure that the instrument did not have a more far-reaching effect in the U.K. than it would have in Cyprus.⁶⁷

It is an essential requirement of the instrument whose enforcement is sought that it should be enforceable in the State in which it originates; by all means, a state has no power by itself to give effect to its judgments outside its boundaries, it is necessary, if a judgment is to have international effect in this sense, for it to be recognized and enforced by the courts of the state in which it is sought to be made effective.⁶⁸

As Niboyet points out, ‘there is no reason for granting to a foreign judgment rights which it does not have in the country in which it was given.’⁶⁹ If however this instrument is not enforceable in the Member State in which it originates, then the Member State where enforcement is sought can possibly face state liability for failure to fulfil an obligation as a result of issuing a declaration on enforceability on such a judgment. It would thus be illegal to enforce this judgment in the U.K. Nevertheless, AG Kokott quite clearly stipulated in her Opinion that the declaration of enforceability was final and therefore could not be disputed by the Orams couple in their appeal under Article 34 of the Regulation.⁷⁰ Consequently, an appeal under Article 34(1) of the Regulation is classified as being superfluous. Equally, the defendant’s right to a fair hearing is also restrained as the defendant could possibly face contempt of court ‘for not being able to do the impossible.’⁷¹ In other words, the Orams were in a ‘lose-lose’ situation as they could have faced criminal punishment in northern Cyprus for enforcing the judgment and equally could have faced contempt in the U.K. for not enforcing the judgment.⁷²

Simultaneously, this scenario creates two very serious problems for Member States. The first, which has already been mentioned above, was also highlighted by AG Kokott: the claimant who received the declaration of enforceability for a judgment that is impossible to implement, may bring an action contra the Member State who

⁶⁷ Jenard (n 66) 47.

⁶⁸ Emine Erk, ‘Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001 on

Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’ (Turkish Cypriot Human Rights Foundation, 29 June 2009) 7 <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/turkish_cypriot_human_rights_foundation_en.pdf> accessed 12 July 2014.

⁶⁹ Jean-Paulin Niboyet, *Traite de Droit International privé français*, Vol 6 (Sirey 1938).

⁷⁰ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 100.

⁷¹ Erk (n 68) 3.

⁷² Ibid.

has issued the declaration of enforceability.⁷³ The second is that the Greek Cypriot courts would not be able to reciprocate enforcement of judgments entered by English courts concerning the northern part of Cyprus;⁷⁴ this is an utter violation of the principle of reciprocity. It goes without saying that reciprocity is the substratum of Regulation 44/2001. Therefore, Article 22 of the Regulation⁷⁵ should simply mean ‘actual’ jurisdiction and not relate to ‘theoretical’ jurisdiction.⁷⁶ In order to avoid the abovementioned problems, the Commission could review the Regulation and modify the final phrase of Article 38(1)⁷⁷ which reads ‘it has been declared enforceable there’, by adding ‘in practice or effectively in full in the State of origin’, for the judgment to be recognised.⁷⁸

Unrightfully, the ECJ in the *Orams* ruling proclaimed that it would be unreasonable to contend that the relative judgments were completely unenforceable in Cyprus since the Regulation simply standardises the procedure for acquiring an ‘order for the enforcement of foreign enforceable instruments and does not deal with the

⁷³ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 52.

⁷⁴ *Ibid*, para 42.

⁷⁵ Regulation 44/2001 (n 6), Article 22:

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;

2 in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3 in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4 in proceedings concerned with the registration or validity of patents, trade-marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973,

the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5 in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

⁷⁶ *Erk* (n 68) Annex 1.

⁷⁷ Regulation 44/2001 (n 6), Article 38:

1 A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

⁷⁸ *Erk* (n 68) 4.

execution itself.. The fact that claimants might encounter difficulties in having judgments enforced in the northern area cannot deprive them of their enforceability.⁷⁹ The use of the term ‘*might encounter difficulties*’ confirms that the ECJ was utterly unaware of the reality of the case and the damage this ruling would cause.⁸⁰ It is in fact commonly believed that the land is situated in the territory of the RoC and, thus the Greek Cypriot court had the jurisdiction to decide the case as the relevant provision of the Regulation relates to the international jurisdiction of the Member States and not to their domestic jurisdiction.⁸¹

6.4. Regulation 44/2001 in the International Legal Order

In order for a court to have jurisdiction in a case which has some sort of a foreign factor, three elements need to be fulfilled: ‘(a) the claimant is a person at whose instance it is prepared to exercise jurisdiction (b) the defendant is a person over whom it is able or is prepared to exercise jurisdiction and (c) the subject matter of proceedings.’⁸²

Since Regulation 44/2001 did not identify how courts were to exercise jurisdiction internally, when it allocated jurisdiction to these courts, the U.K. as well as other Member States, pioneered their own rules. The U.K.’s rules highly resembled the ‘Brussels-Lugano regime’; hence, jurisdiction would either depend on the subject matter of the proceedings or on the defendant’s abode, if not on both. Accordingly, if Article 22 of the Regulation encompasses the subject matter of the proceedings, then the area within the U.K. which has the closest bond with that subject matter will exclusively acquire its jurisdiction. The fact that international jurisdiction was allocated in the *Orams* case triggered many unwarranted issues, especially since there was no identification of which court had jurisdiction; ‘the Greek Cypriot court of Nicosia assumed jurisdiction over an area where its administration does not exercise effective control by way of an amendment to its domestic law.’⁸³ As a result, it is plausible to assume that some, if not all, Member States do not homogeneously apply the ‘closest connection with the subject matter’ rule, which is a

⁷⁹ Execution of the judgement is governed by the domestic law of the UK in this case; *Apostolides v Orams* (n 3) para 70.

⁸⁰ Baere (n 12) 1147.

⁸¹ European Commission (n 18).

⁸² Erk (n 68) 4.

⁸³ Ibid 5.

well-founded conflict of law rule, prior to establishing their own domestic jurisdiction. Correspondingly, the importance of courts asserting national jurisdiction solely when ‘close connection factors’ with the subject matter have been established, cannot be underestimated. Ergo, the Greek Cypriot courts should not assert jurisdiction over the north of Cyprus as the Greek Cypriot government does not exercise effective control over that area. In general, matters pertaining to rights *in rem* in immovable property should be handled by the courts of the State where the immovable property is located;⁸⁴ this is especially the case if the law of the State where the property is situated differs from the law of the court which is issuing the judgment. AG Kokott did not fail to stress the importance of assigning exclusive jurisdiction to the court of the State where the property is situated for reasons of proximity, in her *Orams* Opinion;⁸⁵ she claimed that justice will be rightly administered as a result of such an assignment.⁸⁶ According to academic interpretation, Article 22(1) creates an ‘*effet-reflexe*’⁸⁷ which is in favour of third States.⁸⁸ This ‘*effet-reflexe*’ should equally be applied to the areas where the Member State cannot exercise effective control and thus, the enforcing court should be permitted to reassess jurisdiction in this manner.⁸⁹ It therefore goes without saying that Member States need to harmonise their domestic rules ‘for the purposes of international jurisdiction under the Regulation’ in order for ‘... equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the Community.’⁹⁰ Alternatively, this aforementioned statement, which was mentioned in the Commission’s Green Paper,⁹¹ is nothing but a waste of *paper* space.

So, the court of a Member State will only have jurisdiction if the third country defendant has been correctly made subject to the court’s jurisdiction and if he or she

⁸⁴ The Jenard Report mirrors this view. Jenard (n 66) 35. See also with regard to the Brussels Convention, Case 73/77 *Sanders v Van der Putte* [1977] ECR 2383, paras 10-11; Case C-115/88 *Reichert and Kockler* [1990] ECR I-27, para 10; Case C-73/04 *Klein v Rhodos Management Ltd* [2005] ECR I-8667, para 16; Case C-343/04 *Land Oberösterreich v ČEZ* [2006] ECR I-4557, para 28.

⁸⁵ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 83.

⁸⁶ *Land Oberösterreich v ČEZ* (n 84) para 29.

⁸⁷ (‘reflex effect’.)

⁸⁸ With regard to the state of the debate, see also Alexander Layton and Hugh Mercer, *European Civil Practice, Vol 2* (Thomson/Sweet & Maxwell 2004) para 19.010.

⁸⁹ *Erk* (n 68) 5.

⁹⁰ *Ibid.*

⁹¹ European Commission, ‘Green Paper on the Review of Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’ COM (2009) 0175 final.

has a residential connection with the Member State in question. The Green Paper addressed the possibility of whether third State defendants could be subject to the special jurisdiction rules of the Regulation. Furthermore, the Commission questioned how the Regulation would handle exclusive jurisdiction of third States' courts and proceedings brought before the courts of these States.⁹² The scenario below pithily demonstrates the dilemma at hand;

This situation is hardly according with the principle of establishing an area of freedom, justice and security as described by Art. 61 EC Treaty. A comparison with the situation in the U.S. may illustrate this: Whereas it is possible for a New York Company to sue a European defendant in California under the American transient rule, it is impossible for an English company to sue an American company in France under Art. 14 French Code Civil even if the latter company has considerable assets in France so that France is a convenient forum for the enforcement of such a judgment.⁹³

Even though this is a very exasperating scenario, the proposals which were set out in the Green Paper in 2009 and which have been approved and published in the Official Journal of the EU on 20 December 2012,⁹⁴ will not solve the problem in a smooth way. There is still a risk of breaching the sovereignty, including breach of sovereign jurisdiction, of the other state even with these changes enacted. Layton and Mercer have stipulated in their major work on the law and practice of civil litigation in European countries, that sovereignty may be violated by the service of documents, the taking of evidence and the carrying out of police or tax investigations.⁹⁵ Member States will only accept to participate in such activities if they take place on a reciprocal basis and are set out in a Treaty, as this is the best way to avoid discrimination contra domiciliaries of third States; yet, no Member State will give a foreign court the opportunity to demand the performance of an act which is either deemed to be unlawful in that Member State or which impedes on the established rights of non-parties found within that Member State. The RoC courts demanded the performance of an act in the TRNC which is regarded as being unlawful in the latter.

⁹² Erk (n 68) 6.

⁹³ Ibid.

⁹⁴ Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351; see also Clifford and Browne (n 6) 2.

⁹⁵ Layton and Mercer (n 88).

The Infamous Orams Ruling

Understandably, Member States are required to partially transfer their sovereignty in certain areas, such as, in the field of justice and home affairs; nonetheless, third parties like the TRNC, do not need surrender and should not be asked to do so if they are not signatories alongside the EU, to any international conventions. The point to be made in this second argument is that, even though the north of Cyprus may *theoretically* be part of the EU, it *legally* remains outside of the club and has its own recognised legal system and therefore the enforcement of a Greek Cypriot court's judgment in the north is out of the question until the suspension of the application of EU *acquis* in the north is removed. Regulation 44/2001 is a piece of secondary legislation and it needs to be read in light of relevant primary law, including Treaty provisions such as Protocol No 10. The suspension of the *acquis* in the north, which should also technically include Regulation 44/2001, clearly indicates that there are two very separate regions in Cyprus and that the northern territory has its own divergent and efficient legal system. The English case of *Emin v Yeltag*⁹⁶ proves that the acts of the Turkish Cypriot authorities in relation to private rights are respected by other courts despite the non-recognition of the TRNC; the case concerned the acknowledgment of a marriage documentation which was issued by the Turkish Cypriot administration for the simple fact that there are two separate legal systems in Cyprus. States in which EU *acquis* is inapplicable are, territorially speaking, regarded as third States. Furthermore, taxes, such as Value Added Tax,⁹⁷ do not apply in northern Cyprus and such purposes- in the part of Cyprus which is not under the effective control of the government of the RoC- are handled by the TRNC administration and thus like Gibraltar, northern Cyprus is treated as a third State. Moreover, most EU exports to north Cyprus are eligible for an export refund and thus the north, according to the Green Line Regulation, is 'temporarily outside the customs and fiscal territory of the Community and outside the area of freedom, justice and security.'⁹⁸ Additionally, if the northern part was not classified as a third

⁹⁶*Emin v Yeltag* [2002] 1 FLR 956.

⁹⁷ See also Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1 'In accordance with the Treaty, VAT does not apply in Gibraltar or the part of Cyprus which is not under the effective control of the government of the Republic of Cyprus. They are treated as third territories.'

⁹⁸ Turkish Republic of Northern Cyprus Prime Minister's Office European Union Coordination Centre, EUCC Response to the Commission's Green Paper: The Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

territory, then the EU officials would not recognise the status of the Turkish Cypriot community and would definitely not collaborate with the Turkish Cypriot administration to bring into line the laws of the northern territory with EU *acquis*.⁹⁹ AG Kokott's Opinion¹⁰⁰ clearly indicates that she acknowledged that the Greek Cypriot government does not exercise 'sovereign jurisdiction' over the north of Cyprus; *ipso facto*, the TRNC exercises such sovereign jurisdiction and does not need to surrender for the sake of the Union. Nonetheless, even if it is not regarded as a third State, the Turkish Cypriot courts should still not be expected to give a foreign court the chance to demand the performance of an act which is classified as being illegal in the north of Cyprus. For all of these reasons, the Greek Cypriot courts breached the sovereign jurisdiction of the TRNC by asserting domestic jurisdiction over the northern territory;¹⁰¹ however, it is commonly believed otherwise.

AG Kokott confirmed that Article 22(1)¹⁰² of the Regulation would be breached for the purpose of Article 35(1)¹⁰³ of the Regulation if the ruling of the Greek Cypriot court concerned land in another Member State and not 'in the state of origin.' The AG remarked that regardless of the international definition of the TRNC, it is not a Member State distinct from the RoC;¹⁰⁴ in fact, it is part of the acceding territory of the RoC once analysed in relation to the suspension of *acquis* under the Protocol. This also means that the TRNC is not a non-member state despite that it was labelled as one in *Anastasiou*.¹⁰⁵ Does this not distort legal certainty? According to previous case law, the TRNC was a third country; this naturally gives the defendants the right to argue that Article 22(1) does not give jurisdiction to the courts of the RoC for actions in relation to the land in the north because in the absence of effective control over that land, the Greek Cypriots do not have the benefit of proximity which is a

<http://ec.europa.eu/justice/news/consulting_public/0002/contributions/other_governments/turkish_public_of_northern_cyprus_en.pdf> accessed 13 July 2014.

⁹⁹ *Ibid.*

¹⁰⁰ *Apostolides v Orams* (n 3) Opinion of AG Kokott, paras 2 and 5.

¹⁰¹ *Erk* (n 68) 7. The ruling effectively nullifies the 1975 Turkish Cypriot absentee property law which deprives the Greek Cypriots of their properties in the north and permits foreigners to purchase their land/ homes.

¹⁰² Regulation 44/2001 Article 22 'contains a mandatory and exhaustive list of the grounds of exclusive international jurisdiction of the Member States. That article merely designates the Member State whose courts have jurisdiction *ratione materiae*', *Apostolides v Orams* (n 3) para 48.

¹⁰³ Regulation 44/2001, Article 35(1) does not authorise the court of a Member State to refuse recognition or 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. *Apostolides v Orams* (n 3) para 2. See also *Baere* (n 12) 1131.

¹⁰⁴ *Baere* (n 12) 1143.

¹⁰⁵ *Anastasiou* [1994] (n 2).

prerequisite for the exclusive jurisdiction of the courts of the state where the property is to be found.¹⁰⁶ Nevertheless, the ECJ ruled that since the TRNC is not a third country it does not have exclusive jurisdiction over the matter; hence, it has completely bypassed the fact that it has accepted that there are two separate legal systems in Cyprus. Furthermore, the fact that the land concerned is in the north, does not affect the objectives of the Regulation even though it can probably have an effect on the domestic jurisdiction of the Greek Cypriot courts.¹⁰⁷ The corollary of this is that a Member State cannot reject enforcement or recognition of a judgment pursuant to Article 35(1) delivered by the courts of another Member State in relation to land based in a region of the latter 'over which its Government does not have effective control.'¹⁰⁸

Overall, it is rather perceptible that the RoC does not have the requisite connecting factors and should definitely not be permitted to assert jurisdiction over the northern territory of Cyprus. Furthermore, since its laws are inapplicable in the north, the RoC authorities cannot carry out on-the-spot investigations to determine the facts and cannot execute any court orders there. In order for justice to genuinely prevail, jurisdiction, such as under Article 22(1), for cases concerning the northern territory need to be handled by the authorities in the north.¹⁰⁹ Alternatively, as defined by Thrasymachus, justice would be nothing but the advantage of the stronger.¹¹⁰

6.5. The Public Policy Problem & The Final Verdict

It is not difficult to identify the public policy issue involved in the *Orams* ruling; it is contrary to public policy to recognise a judgment which would not be valid in the

¹⁰⁶ ČEZ (n 84) para 28.

¹⁰⁷ Baere (n 12) 1143.

¹⁰⁸ Ibid.

¹⁰⁹ European Union Coordination Centre (n 98) 2.

¹¹⁰ Kimon Lycos, *Plato on Justice and Power: Reading Book I of Plato's Republic* (SUNY Press 1987) 44.

Overall, Member States courts 'should decline jurisdiction in favour of other courts when:

a. There is an exclusive choice of court agreement in favour of a third State or relating to areas where the member state courts do not exercise effective control; b. When the dispute otherwise falls under the exclusive jurisdiction of third State courts or where the cause of action relates to property which is located outside the effective control of the Government where the court of that member state is situated. In this respect, forum non conveniens could be a guiding principle where member state courts could exercise discretion in deciding whether or not to stay proceedings by checking whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice; c. When parallel proceedings have already been brought in a third State or in the courts other than the courts of a member state located in an area where the member state government does not exercise effective control.' Erk (n 68) 8.

country where the events causing the judgment occurred. Prior to recognising a judgment relating to the TRNC, despite its non-recognition as a State, the practical realities of the daily activities and existing private rights of individuals, as well as the law of that territory, needs to be taken into consideration; even more so if the laws of the Turkish Cypriot administration do not give rise to such a cause of action.¹¹¹ A defendant from northern Cyprus cannot comply with an order made by a court of the RoC as this would contravene the laws of the Turkish Cypriot administration. As dictated by the fundamental principle governing the making of court orders, the defendant should not be placed in a position of 'immediate and unavoidable disobedience to the order.'¹¹²The recognition of such a judgment by the U.K. has placed the Orams couple in a position of having to choose between complying with the order which goes against the TRNC laws and not complying with the order, which means disobeying the laws of the recognising State. Consequently, this is not a fair hearing as required by Article 6 ECHR; it should be noted that one of the fundamental aspects of the rule of law is the principle of legal certainty.¹¹³ The enforcement of judgments which are made by Greek Cypriot courts but relate to the north of Cyprus would 'open new fronts for litigation' and augment bitterness between the two Cypriot communities, which will subsequently undermine negotiations for a comprehensive settlement and thus be openly contrary to international public policy.¹¹⁴

It should not be forgotten that the Protocol's objective is to encourage a future settlement in Cyprus; the recognition and enforcement of the Greek Cypriot court's judgment which aims to hinder the property sales in northern Cyprus rather than find a solution for the property issues on the island, damages this objective. Where the RoC issues court orders concerning the areas beyond its effective control, they should most definitely not be recognised or enforced by other Member States in the absence of a solution to the Cyprus problem referred to in Protocol No 10; alternatively, reconciliation is an unattainable dream. The subject matter of the comprehensive negotiations will be pre-judged if the Greek Cypriot courts are

¹¹¹ European Union Coordination Centre (n 98) 3.

¹¹² Ibid.

¹¹³ *Ryabykh v Russia* ECHR 2003-IX

¹¹⁴ This was stated in both the Report of the Secretary-General on the United Nations Operation in Cyprus (S/2005/353, 27 May 2005) and by the European Commission in its submissions to the European Court of Justice (n 7) para 108); see also European Union Coordination Centre (n 98) 3.

allowed to apply Greek Cypriot law to northern Cyprus. Therefore, these public policy issues, concerning the sensitive political situation in Cyprus, should be considered in relation to Article 34 of the Regulation- which provides for exceptions.¹¹⁵ The Commission argued that the recognition and enforcement of the District Court of Nicosia's judgment could breach 'international public policy' by weakening the efforts to find a solution to the Cyprus problem.¹¹⁶ Predictably, AG Kokott swiftly counterattacked; she emphasised that the interpretation of the concept of public policy in Article 34(1) 'is a matter for the Member States to determine according to their own conception what public policy requires.'¹¹⁷ Thus, since the U.K. kept silent on the matter throughout these proceedings, the ECJ did not have any reliable information as to whether the reasons put forward by the Commission could actually be classified as public policy in the U.K.¹¹⁸ AG Kokott subsequently realised that her counterattack was flawed as the Commission was in fact relying on *international* public policy and not on public policy in the U.K. in its argument.¹¹⁹ Thus, she made a reference to *Krombach*¹²⁰ in order show that she accepted that the Court took it upon itself to 'review the limits within which the courts of a contracting State to the Brussels Convention, which is the predecessor of Regulation 44/2001, may have recourse to the concept of public policy for the purpose of refusing recognition of a judgment emanating from a court in another contracting State.'¹²¹ As fundamental rights are at the heart of the general principles of law, the ECJ decided that a court of a Member State can refuse recognition of a foreign judgment which was arrived at in obvious violation of fundamental rights. As a result, AG Kokott realised that the Court had in fact created a bond between the fundamental rights protected by the ECHR at international level and national public policy. So, where the requirements of national public policy are utilised as a means of compensating a violation of the fundamental rights listed in the ECHR, the refusal of

¹¹⁵ European Union Coordination Centre (n 98) 4; see also Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc and CIBC Mellon Trust Company* [2006] ECR I-1145. Public policy has successfully been invoked in this case to prevent recognition. It concerned the right of the defendant to be heard.

¹¹⁶ Lavranos (n 49) 8.

¹¹⁷ *Ibid* 7.

¹¹⁸ *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 103.

¹¹⁹ Article 34(1) only takes into account public policy in the Member State in which recognition of the judgment is sought.

¹²⁰ Case C-7/98 *Krombach v Bamberški* [2000] ECR I-1935.

¹²¹ Lavranos (n 49) 8.

recognition of a judgment will consequently fulfil the demands of Article 34(1).¹²² Nevertheless, according to AG Kokott, there was no such bond in the *Orams* case:

The preservation of peace and the restoration of the territorial integrity of Cyprus are certainly noble causes. However, whether those goals can 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 is extremely doubtful.¹²³

AG Jacobs¹²⁴ had previously argued that the dispute on whether or not the recognition of the judgment would jeopardise a final agreement requires political appreciation.¹²⁵ He believes that in cases as such, courts are not properly equipped to pass a judgment and there are no legal standards to review such cases; in fact, no institution is trained well enough to reach a decision on a case as sensitive as *Orams* or *Commission v Greece*.¹²⁶ Ideally, the application of a Regulation should not be measured against political assessments as this would clash with the principle of legal certainty¹²⁷ and if there are standardised legal objectives that need to be applied, the evaluation of political consequences should only be dealt with by political actors. However, where no objective legal standards exist as in *Orams* or *Anastasiou*, the ECJ should not get involved; alternatively, it will not be a ruling based on law- despite the Court’s literal approach- but purely on biased politics.¹²⁸ The duty of the judiciary should not be to fill in political loopholes. Nonetheless, this is in an ideal world, and the truth remains that from the landmark *Van Gend en Loos*¹²⁹ decision

¹²² Ibid; see also *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 107.

¹²³ Ibid, para 110.

¹²⁴ Case C-120/94 *Commission v Greece* [1996] ECR I-1513. In this case, the Commission contested that the embargoes created by Greece against the Former Yugoslav Republic of Macedonia would augment instead of decrease the tension between the two nations.

¹²⁵ AG Kokott however claimed that: ‘It is certainly true that the Security Council has repeatedly called for the preservation of peace in Cyprus and of the country’s territorial integrity. In that context, the international community has also made calls to refrain from any action which might exacerbate the conflict. However, it is not possible to infer from those rather general appeals any obligation to refrain from recognising judgments of Greek Cypriot courts which relate to claims to ownership of land in the Turkish Cypriot area. Moreover, it is by no means clear that, taken overall, the application of the regulation exacerbates the Cyprus conflict. It may equally well have the opposite effect and promote the normalisation of economic relations.’ *Apostolides v Orams* (n 3) Opinion of AG Kokott, paras 45-46. Moreover, she said: ‘The application of the regulation cannot be made dependent on such complex political assessments. That would be contrary to the principle of legal certainty, respect for which is one of the objects of the regulation.’ Ibid, para 48.

¹²⁶ Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP 2012) 371.

¹²⁷ Ibid

¹²⁸ Baere (n 12) 1137.

¹²⁹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

onwards, the judgments rendered by the ECJ have been political as well as legal. Mrs. Orams proclaimed that they had inadvertently become involved in an intricate political situation between the two Cypriot communities; she added, 'We don't think it is personal, it is political. The rulings will be a source of concern to many other property owners in Cyprus'.¹³⁰

In connection, the enforcement of such judgments would mean that the role of the 'Immovable Property Commission' (IPC) established in 2005,¹³¹ will be undermined.¹³² The resolution for the property issues that have come about in Cyprus as a result of the conflict is not a civil matter but a public one; hence, they should be handled politically by the leaders of the two Cypriot communities in the negotiations¹³³ and not by private persons or courts.¹³⁴ For instance, the IPC provides a workable mechanism to resolve such issues;¹³⁵ however, the Greek Cypriot side has not constructed a mutual arrangement to resolve the violations contra the Turkish Cypriots' properties in the south. The Turkish Cypriots cannot claim for remedies for their properties located in the south via the courts of the RoC until a settlement of the Cyprus problem has been reached.¹³⁶

The bias of the Court was even further emphasised by the fact the ECJ's President, Judge Skouris, had received the highest order of honour from the former president of the RoC, whilst receiving delegations from the southern part of the island during the time span of this case.¹³⁷ Two Members of Parliament of the TRNC believed that the

¹³⁰BBC News, 'Northern Cyprus Villa Judge "Bias" Claim Rejected' (19 January 2010) <<http://news.bbc.co.uk/1/hi/8467478.stm>> accessed 15 July 2014.

¹³¹ Under TRNC No 67/2005 of 22 December 2005 for the Compensation, Exchange and Restitution of Immovable Properties. The IPC was set up in accordance with the rulings of the ECtHR in the case of *Xenides-Arestis v Turkey* App No 46347/99 (ECtHR, 22 December 2005). The aim of this measure was to create an effective domestic remedy for claims relating to abandoned properties in North Cyprus.

¹³² This Commission provides remedies of compensation, restitution or exchange of property, as appropriate, and was approved in principle by the ECtHR as the appropriate and effective domestic mechanism to resolve property claims in North Cyprus.

¹³³ There is a specific chapter in the negotiations dealing with property issues and both of the leaders of Cyprus have declared this matter to be a matter which requires political resolution in place of individual legal actions.

¹³⁴ European Union Coordination Centre (n 98) 4.

¹³⁵ See chapter 7 where this issue will be discussed in more detail.

¹³⁶ European Union Coordination Centre (n 98) 4.

¹³⁷ Top Properties (n 29).

'Skouris, president of the ECJ, had been decorated by the late Greek Cypriot leader Tassos Papadopoulos with the Grand Collar of the Order of Makarios III of the Republic of Cyprus for his "sincere and strong feelings for Cyprus and its people." The Grand Collar of the Order of Makarios III is the highest honor awarded in the southern part of Cyprus. Skouris received the award in November

honour conferred on Skouris proved that the Court's ruling was predetermined.¹³⁸ Pill LJ dismissed the probability of the appearance of bias by claiming that the President would not have been influenced by the honour he acquired and thus the judgment of the ECJ was applicable.¹³⁹

Next, the Court stated that a court of a Member State will be undermining the objective of the Regulation if it refuses to recognise a judgment coming from another Member State simply because it believes that national or EU law was misapplied. As mentioned earlier, the only time a court of a Member State can refuse recognition is when the error of law means that the recognition or enforcement of the judgment is considered to be a grave breach of an indispensable rule of law in the legal order of the Member State concerned. In the main proceedings in the *Orams* case, there was no mention of a fundamental principle within the legal order of the U.K. by the Court of Appeal, which would be breached as a result of the recognition or the enforcement of the judgments.¹⁴⁰

The final statement of the ECJ was that the recognition and enforcement of a default judgment could not be refused if the defendant was able to start proceedings in order to dispute the default judgment and if those proceedings permitted him to contest that he had not 'been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.'¹⁴¹ Since the Orams couple brought such proceedings, the recognition and enforcement of the judgments of the Greek Cypriot court could not be refused in the U.K. on that ground.

2006, fully one year after the Orams case had started, NTV news channel reports, noting that it has also emerged that Skouris visited the southern part of the island only months before the release of the ruling. During his visit to the island in February, Skouris had talks with senior Greek Cypriot officials, including GC leader Christofias.' Today's Zaman, 'Doubts Cast over Neutrality of ECJ Judge in Orams Case' (26 June 2009) <http://www.todayszaman.com/newsDetail_openPrintPage.action?newsId=179113> accessed 16 July 2014.

¹³⁸ Email from Member of Parliament of the TRNC Hasan Tacoy and Member of Parliament of the TRNC Zorlu Tore to the author (10 July 2014).

¹³⁹ Baere (n 12) 1156. Paradoxically, whilst the Greek Cypriots were adamantly arguing against the fact that Cherie Blair represented the Orams couple and claiming that the UK was indirectly defending Turkish Cypriot rights, the Greek Cypriot authorities were in some way bribing the Greek President of the ECJ in order for him to rule in their favour.

¹⁴⁰ European Commission (n 18).

¹⁴¹ *Ibid.*

Inescapably, the Court of Appeal ruled in favour of the claimant in 2010; this case has now set a precedent and is binding across the EU.¹⁴² Notwithstanding the ECJ's apolitical stance whilst concluding the judgment, the decision has caused shockwaves which benefitted the Greek Cypriot community. The Court has confirmed that a legal remedy is available to the Greek Cypriots which owned property in the north prior to the partition, and has been purchased by nationals domiciled in another Member State; this will trigger a vast amount of litigation as there are approximately twenty-two thousand foreigners who own real estate in the TRNC.¹⁴³ Accordingly, this will further damage the possibility of finding a final settlement in Cyprus since 'property rights' are one of the most sensitive subjects in the recent negotiation talks.¹⁴⁴ Unsurprisingly, the *Orams* case had an immediate negative impact on the talks between Christofias¹⁴⁵ and Talat;¹⁴⁶ the unsolved problem 'dragged on in interethnic relations'.¹⁴⁷ Despite the fact that the Commission warned the RoC not to turn the *Orams* case into a political battle,¹⁴⁸ prior to the final verdict of the ECJ, on 5 February 2009, Christofias delivered his most uncompromising statement; he said that, 'It's not possible for Turkey to be accepted as a member of the [European] Union while continuing the occupation of Cyprus.'¹⁴⁹ As soon as the desired verdict surfaced, Christofias changed his tune; he stated that Turkey's EU membership would catalyse a solution to the Cyprus problem.¹⁵⁰ Talat was right when he insisted in 2009 that the EU leaders should stop getting involved in the Cyprus negotiations as they failed to remain impartial and constantly gave into Greek demands.¹⁵¹

Nonetheless, the possible side-effects of the verdict were not really of interest to the ECJ or to AG Kokott;¹⁵² the Court approached the interpretation of the Regulation as

¹⁴² *Orams and Another v Apostolides* [2010] EWCA Civ 9, [2010] All ER (D) 105 (Jan) Court of Appeal final verdict 19 January 2010.

¹⁴³ Ibrahim H Salih, *Reshaping of Cyprus: A Two-State Solution* (Xlibris Corporation 2013) 123.

¹⁴⁴ Email from Member of Parliament of the TRNC Hasan Tacoy to the author (11 July 2014).

¹⁴⁵ President of the RoC from February 2008 until February 2013.

¹⁴⁶ President of the TRNC from April 2005 until April 2010.

¹⁴⁷ Salih (n 143) 123.

¹⁴⁸ Mail Foreign Service, 'Don't Make this Political, Europe Warns Cyprus as up to 5,000 Brits Face Losing Property after Landmark Ruling' (*Daily Mail* 29 April 2009) <<http://www.dailymail.co.uk/news/article-1174510/Dont-make-political-Europe-warns-Cyprus-5-000-Brits-face-losing-property-landmark-ruling.html>> accessed 16 July 2014.

¹⁴⁹ Salih (n 143) 123.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Apostolides v Orams* (n 3) Opinion of AG Kokott, para 111:

literally as possible in order to block the use of judicial discretion, *contextualised* juristocracy and reasonableness in the ‘exercise of jurisdiction.’¹⁵³ Opposing, the ECtHR declared that, even though the ECJ is a court of law and not of facts, the ECJ’s interpretation should not have been ‘blind to concrete factual circumstances’ – hence, the fact that there is still an ongoing political conflict on the island¹⁵⁴ if its ruling was to be momentous.¹⁵⁵ Overall, this case has demonstrated how the ECJ’s involvement has further damaged the Cyprus peace process by causing even more historical and political complexity; therefore, in the absence of a political settlement, the RoC should have been kept outside of the EU.¹⁵⁶

The British Government has repeatedly failed to fulfil its obligation to the Turkish Cypriots as a Guarantor, and now the British justice system follows suit. The ruling, which deftly avoided any mention of the island’s troubles during the 1960s, smacks of political bias and an attempt to cover up ongoing mistakes by the European Union in its handling of Cyprus. It admitted a divided island in 2004 and now only recognises Greek Cypriots and South Cyprus, while wantonly discriminating against Turkish Cypriots and other residents in North Cyprus.¹⁵⁷

The Commission however, believes that the final verdict re-emphasises the importance of reaching a comprehensive settlement of the Cyprus problem via negotiations between the leaders of the two Cypriot communities; alternatively, it would not be possible to solve the property issue comprehensively.¹⁵⁸ It is fair to assert that being unfair to others eventually comes back to knock on your door; the

111 As already observed, however, the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus. Apart from that, 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 and whether it is even necessary for the protection of the fundamental rights of Mr Apostolides.

Ibid, para 48:

48 It is not necessary here to determine definitively what effect the suspension of the application of the regulation to cases involving elements with a bearing on northern Cyprus has on the political process for resolving the conflict. The application of the regulation cannot be made dependent on such complex political assessments. That would be contrary to the principle of legal certainty, respect for which is one of the objectives of the regulation.

¹⁵³ Baere (n 12) 1158.

¹⁵⁴ See chapter 7, for a comparison between the ECJ’s ruling and the ECtHR’s ruling.

¹⁵⁵ See *Demopoulos v Turkey* (2010) 50 EHRR SE14.

¹⁵⁶ Baere (n 12) 1159.

¹⁵⁷ Fevzi Hussein, ‘Orams Ruling Delivers “the Killer Blow” for Cyprus and British Justice’ (*North Cyprus Free Press* 19 January 2010) <<http://northcyprusfreepress.com/law/cyprus-problem/orams-ruling-delivers-%E2%80%9Cthe-killer-blow%E2%80%9D-for-cyprus-and-british-justice/>> accessed 13 July 2014.

¹⁵⁸ Mail Foreign Service (n 148).

EU will now sincerely struggle to find an agreed solution on the property issue as it has discouraged mutual cooperation by failing to offer a strategy that provides mutual reward. The challenge for the club will be to move the two Cypriot parties away from deadlock and engage them in an iterated bargaining framework.¹⁵⁹ If the parties eventually ‘play cooperation’ then perhaps *Paerto*¹⁶⁰ improvements will be possible. As it stands, it seems as though the EU has used justice as a tool to make the weak, which is the Turkish Cypriot administration, work for the benefit of the strong, which is the Greek Cypriot administration. Perhaps the solution to this issue is what Beran has suggested; the exercise of no-fault secession is subject to just division of assets and debts of the existing State-private as well as public.

6.6. Attacking the Messenger...

Controversial rulings as such threaten to erode the credibility of an institution founded on noble principles. The depoliticised stance of the ECJ is not as pure as it seems; the institution is driven by Europeanised legal politics and not legal rationality, as it is highly reliant on issues that lie outside the application of the law.¹⁶¹ Sophocles once famously said that ‘No one loves the messenger who brings bad news,’¹⁶² indeed the ECJ is not a messenger, but it would be foolish to deny that its rulings are only as ‘good as the legal provisions on which they are based.’¹⁶³ It has been argued that political stalemates tend to be the cause of preliminary rulings by the ECJ,¹⁶⁴ however, in the *Orams* case, the ruling has led to an impasse and a probable polarisation between the two communities which will serve to the continuance of the deadlock on the island. President Christofias of the RoC stated that the British Appellant Court’s decision carried very noteworthy legal and political inferences; he believed that this decision taught the Turkish Cypriots -who had been trying to deny Greek Cypriots their right to their property-a good

¹⁵⁹ Birol A Yesilada and Ahmet Sözen, ‘Negotiating a Resolution to the Cyprus Problem: Is Potential European Union Membership a Blessing or a Curse?’ (2002) 7 *International Negotiation* 261, 278 <<http://academos.ro/sites/default/files/biblio-docs/837/game.pdf>> accessed 13 July 2014.

¹⁶⁰ *Ibid.* The Pareto principle states that, for many events, roughly 80% of the effects come from 20% of the causes.

¹⁶¹ Koen Lenaerts, ‘How the ECJ Thinks: A Study on Judicial Legitimacy’ (2013) 36(5) *Fordham International Law Journal* 1302.

¹⁶² JE Thomas (tr), Sophocles, *Antigone* (Prestwick House Inc 2005).

¹⁶³ Andreas Grimm, ‘The European Court of Justice’s Growing Role in the Domain of Fundamental Rights is not a Sign of Judicial Activism, but Political Insufficiencies’ (LSE European Politics and Policy, 16 August 2013) <<http://bit.ly/13D1Je8>> accessed 12 July 2014.

¹⁶⁴ *Ibid.*

lesson.¹⁶⁵ The Greek Cypriot community has been habitually arguing that the owners of the properties/land are those who possess their title deeds and therefore only those who have these deeds can have the final say as to the future of the property/land. On the other side of the same coin, the Turkish Cypriot community on the whole, has been trying to highlight the rights of those who have taken control over and exploited these properties post-war. Not only has this decision affected the relations between the two Cypriot communities, it has also gravely affected those who have purchased the troubled land/property in the recent past¹⁶⁶ and damaged the EU-Turkish and Greek-Turkish relations.¹⁶⁷ Alongside the Turkish Cypriot administration, the Turkish government was also infuriated by the final outcome of the case;

The Turkish foreign ministry said: ‘this judgement contradicted the parameters of the negotiation process and the nature of the new partnership to be established, constituting a clear example of the Greek Cypriot Administration’s misuse of its unjustly acquired membership to the European Union.’¹⁶⁸

In the *Orams* case, it can be contested that the ECJ balanced between different objectives and preferred to ignore the political stalemate in Cyprus whilst rendering its judgment; it valued private rights and ‘allocative efficiency’ and used Europeanised legal politics to pursue a neo-liberal notion of economic justice.¹⁶⁹ The ECJ’s jurisprudence has shown an undue respect for pre-existing patterns of property ownership in Cyprus. It has completely overlooked the sensitive political situation on the island by acting as a guarantor of the existing possessions of an individual and by providing corrective justice via restitution; hence, the Court has asserted that ‘it is not right to be put in possession of things one does not already have’ despite the political conflict on the island.¹⁷⁰ Thus, the ECJ ‘eschews “a general-right based”

¹⁶⁵ Youlton (n 63).

¹⁶⁶ Ibid. There are around five thousand UK citizens who have purchased such land/property in the north.

¹⁶⁷ The Turkish Ministry of Foreign Affairs in Ankara made the comment that the British Appellant Court judgement had arrived ‘at a very inopportune time ... and it could have [a] very negative implication for the Greek-Turkish negotiations’ Youlton (n 63).

¹⁶⁸ Sarah Fenwick, ‘Politicians React to Orams Ruling’ (Cyprus News Report, 20 January 2010) <<http://www.cypusnewsreport.com/?q=node/569>> accessed 12 July 2014.

¹⁶⁹ Michelle Everson, ‘Is the European Court of Justice a Legal or Political Institution now?’ (*The Guardian*, London 10 August 2010) <<http://www.theguardian.com/law/2010/aug/10/european-court-justice-legal-political>> accessed 13 July 2014.

¹⁷⁰ Danny Nicol, *The Constitutional Protection of Capitalism* (Hart Publishing 2010) 137.

conception of property ownership in favour of a “special-right” based one.’¹⁷¹ The corollary of this is that the Court will not look behind the formal status of property owners to inspect the legality of ownership and will therefore be unresponsive to any form of political or social dilemma involved in the case it is dealing with.

The ECJ’s ruling has much wider consequences than the dispute over the legal ownership of a single villa, as it spells disaster for the expatriate owners of similarly disputed homes across the TRNC.¹⁷² Furthermore, the judgment is being used to spread the word among overseas property buyers that north Cyprus’ property sales are completely unsafe.¹⁷³ Unsurprisingly, following the final verdict, Apostolides’ lawyer, Constantis Candounas, claimed that he was considering similar lawsuits contra foreign tourists staying in hotels in the TRNC that were once legally owned by Greek Cypriots.¹⁷⁴ This would be a completely understandable move, as the ECJ will, highly likely, rule in favour of the original owners of the land and thus further increase the power imbalance on the island. The *Orams* case was not just a legal matter, it was also a political issue; the ruling has had additional implications for the legitimacy of the TRNC as a whole. Also, through this case, the RoC has destructed the up and coming construction market of northern Cyprus.¹⁷⁵ The Greek Cypriot politicians have used the opportunity to exploit the EU legal system for their political ends. Ultimately, uncontaminated law has promoted injustice. Consequently, after its landmark ruling, the level of mistrust amongst Turkish Cypriots towards the EU decreased to thirty five percent.¹⁷⁶

Professor Michelle Everson’s description of the current ECJ is heartbreaking:

[A] cadre of European judges drawn from experienced national judiciaries was once, for all its pro-European activity, always very careful to limit the impacts of European law upon the cores of national life (the welfare state), today a younger and, more ruthlessly European ECJ – trained carelessly, as

¹⁷¹ Ibid. See also *The Former King of Greece and Others v Greece* ECHR 2000-XII.

¹⁷² Aphrodite Sun Properties, ‘North Cyprus Property Sales Are Still Hotly Disputed’ <<http://www.cyprus-property-sales-resales.com/north-cyprus/north-cyprus-property.html>> accessed 1 September 2014.

¹⁷³ Ibid. Both the British High Commission in Cyprus and the Foreign and Commonwealth Office have issued warnings regarding the purchase of property in the TRNC.

¹⁷⁴ Cyprus Expat, ‘Cyprus Property: The Orams Legal Case’ <<http://www.cyprusexpat.co.uk/article/id:35/cyprus-property--the-orms-legal-case>> accessed 1 September 2014.

¹⁷⁵ Hasgüler & Özkaleli (n 1) 63.

¹⁷⁶ James Ker-Lindsay, Hubert Faustmann and Fiona Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (IB Tauris 2011) 147.

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I was, in the supremacy of European law – seems far happier to emphasise the lowest common denominator of European legal integration: the assertion of market over social rights...¹⁷⁷

There has been a move towards juristocracy in the EU, where the Union's law and the ECJ are looked to increasingly as protectors of individual rights, engines of social change and indirect participants in the policy making process.¹⁷⁸ The new generation of ECJ judges tend to render judgments which fulfil the Union's neo-liberal political desires and for this reason the Court is habitually attacked. Furthermore, the ECJ is generally expected to fill in the gaps of EU decisions that are purposely left politically ambiguous. For instance, there is a growing engagement of the ECJ in the field of fundamental rights¹⁷⁹ because of the lack of consensus between the EU institutions over the objectives of the Union. The constant involvement of the ECJ indicates that the EU is failing to be a complete and independent legal order due to the persistence of legal uncertainties; since these underlying issues have not been solved via political revenues and thus have evolved into being legal uncertainties, they will eventually become subject to legal proceedings as they will be raised in national law cases and subsequently sent to the ECJ in preliminary ruling procedures.¹⁸⁰ The Court will consequently go beyond the field of fundamental freedoms whilst dealing with these issues;¹⁸¹ this was the case in the highly disputed legal matters on the link between market freedoms and social

¹⁷⁷ Everson (n 169).

¹⁷⁸ Kermit L Hall and Kevin T McGuire (eds), *The Judicial Branch* (OUP 2005) 142.

¹⁷⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 (*Kadi I*); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission, Council of the European Union and United Kingdom v Yassin Abdullah Kadi* [2013] ECR I-0000 (*Kadi II*); Case C-515/08 *Santos Palhota* [2010] ECR I-9133; Case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365; Case C-34/10 *Brüstle v Greenpeace* [2011] ECR I-9821; Case C-236/09 *Test-Achats v Conseil des Ministres* [2011] ECR I-00773; Joined Cases T-246/08 and T-332/08 *Melli Bank v Council* [2009] ECR II-2629, which was upheld in Case C-380/09 P *Melli Bank v Council* [2012] ECLI:EU:C:2012:137.520; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105; and most recently, the two joined cases Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238 on the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJL 105/54 (Data Retention Directive) in light of Articles 7, 8 and 11 of the Charter of Fundamental Rights, represent just the most famous examples.

¹⁸⁰ Grimmel (n 163).

¹⁸¹ *Ibid.*

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rights, such as, *Viking*,¹⁸² *Laval*,¹⁸³ *Rueffert*¹⁸⁴ or *Santos Palhota*.¹⁸⁵ Indubitably, these underlying issues are too sensitive and too imperative to be dealt with by a Court as such on a case-by-case basis;¹⁸⁶ they need to be thoroughly considered in the other institutions of the Union. As a result, the overall nature of EU decision-making is flawed and not just the Court's rulings;¹⁸⁷ the flaws could be a result of the neo-liberal programme which entrenches the Treaties and the secondary legislation of the Union.¹⁸⁸ This means that, the Union has weak theories of politics as it discounts politics when it attempts to mediate conflicts and solve social problems. As Professor Martti Koskenniemi has explained in his writing of international regimes, the system will always favour 'some outcomes or choices to other outcomes or choices'. Hence, the ECJ's *Orams* ruling was covertly pre-decided by the Union and the only way to achieve this predestined result was for the Court to adopt a literal interpretation of the law:

[E]ven if it is possible to justify many kinds of practices through the use of impeccable professional argument, there is a structural bias in the relevant legal institutions that makes them serve typical, deeply embedded preferences...In any institutional context there is always such a structural bias, a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied. That itself is not a scandal...But when the bias works in favour of those who are privileged, against the disenfranchised, at that point the bias itself becomes 'part of the problem'. That is when the demonstration of the contingency of the mainstream position can be used as a prologue to a political critique of its being an apology of the dominant forces.¹⁸⁹

¹⁸² Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2007] ECR I-10779.

¹⁸³ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

¹⁸⁴ Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

¹⁸⁵ *Santos Palhota* (n 179).

¹⁸⁶ *Grimmel* (n 163).

¹⁸⁷ *Ibid.*

¹⁸⁸ *Nicol* (n 170) 83; see also *Apostolides v Orams* (n 3) paras 45-46:

45 In the case in the main proceedings, the action is between individuals, and its object is to obtain damages for unlawfully taking possession of land, the delivery up of that land, its restoration to its original state and the cessation of any other unlawful intervention. That action is brought not against

conduct or procedures which involve an exercise of public powers by one of the parties to the case, but

against acts carried out by individuals.

46 Consequently, the case at issue in the main proceedings must be regarded as concerning 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001.

¹⁸⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

The Infamous Orams Ruling

The *Orams* ruling is yet another example of how the Cyprus conflict has been judicialised in the hands of the EU- even though the ECJ did not have a choice with regards to dealing with this case, as it fell into its jurisdiction. Albeit the Court simply interpreted the law, it should have taken other factors into consideration whilst doing so in order to avoid further damaging the relations between the two Cypriot communities. The reason why the judicialisation of the Cyprus conflict is worsening the situation on the island is because the EU Treaties and laws are based on a neo-liberal programme which disregards politics and favours a combination of market mechanisms and technocratic solutions to solve social problems. So, by judicialising a purely political conflict, the EU institutions have de-humanised the Cypriots within this problem.

Indeed the judicialisation of politics has increasingly come to be known as an element of modern political development,¹⁹⁰ yet, there is no room for it in a problem which does not involve any standardised legal objectives. The judicialisation of politics in the EU is nothing but a reaffirmation of the infamously common practice of the ‘politicised judiciaries’;¹⁹¹ whereby political decisions in the Union habitually become legal ones. An ECJ judge has spoken about the way in which politics has been judicialised and the description quite fittingly reaffirms the fate of the *Orams* ruling:

[T]he Union legislator is on occasions vague in what it has done. The legislation may lack precision such that the provisions of law may be very unclear. This may result from the fact that the decision reached at the political level is a compromise and no one wants to be too prescriptive in regard to how the legislation should be understood. Those negotiating may agree on the basic statement of law, but they may not wish to commit themselves further and hope that the judges one day or another will come down in one direction or another to support their own views in interpreting the legal text that results from the political decision.¹⁹²

This chapter therefore contends that there is no ambiguity in the ECJ’s rulings as it generally adopts a literal interpretation of EU law with regards to matters concerning

¹⁹⁰ Pilar Domingo, ‘Judicialisation of Politics: The Changing Political and Social Role of the Judiciary in Mexico’ (Judicialisation of Politics Conference, ILAS-University of London, 17-19 March 2004)
<http://campus.usal.es/~dpublico/areacp/Doctorado0304/Seminario_Investigacion03/Domingo04.PDF> accessed 15 July 2014.

¹⁹¹ Ibid.

¹⁹² Grimm (n 163).

The Infamous Orams Ruling

the Cyprus problem, which fulfils the EU's political demands.¹⁹³ Public policy and the greater issues involving the Cyprus conflict were pushed to second place by the ECJ and the British court with the infamous *Orams* ruling. It will have unjust and wide-ranging negative consequences for thousands of property and land owners in the U.K. and elsewhere across the Union; it will also deepen the division between the two communities on the island and the crises of confidence. Most importantly, it has simply overruled the claim that the British, European and Greek Cypriot authorities want to see a resolution of the Cyprus problem as they have willingly permitted a piecemeal approach to the property issue to dominate, where individual rights have overtaken the overall prerequisites of the Mediterranean island. The EU should not consider the *Orams* case as a simple law suit filed by the previous Greek Cypriot owner of a property located in northern Cyprus contra an English couple who own the property today; the Union should acknowledge that the ECJ has in fact rendered a judgment about proprietorship in Cyprus and thus further damaged the peace process on the island. The only way the Union can prevent such cases from reaching the ECJ in the future is either by promoting the recognition of the TRNC or by encouraging the Greek Cypriots to use the IPC. It should be noted that the right to self-determination/secession according to Beran is a liberty right and not a claim right. Entities such as the EU have an obligation not to interfere with its exercise, even though they are not obliged to assist; hence, had the Union adopted this theory, then such a ruling would not have surfaced.

¹⁹³ See Nicol (n 170) 84.

7. Turkish Cypriots, The Ghosts of Europe No Longer: A Human Rights Approach

The non-application of *acquis* in the ‘Areas’ and the two rival claims of legitimate rule in Cyprus limit on the one hand, the access of the residents of north Cyprus to EU citizenship rights and on the other, the exercise of the rights connected with the ‘fundamental status of nationals of Member States’¹ by all EU citizens in the north. As a result, the ECJ is not the only international court which has interfered in matters concerning the Cyprus problem; the ECtHR has also been involved in the Cyprus problem.

Article 2 TEU proclaims that the EU is founded ‘on 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.’² So, how extensively are the fundamental rights of Union citizens protected in the north of Cyprus, where the *acquis* is suspended pending a settlement? The human rights dimension, whose focal point is the return of or compensation for property/land lost in the Turkish intervention in 1974, carries more weight since these issues are principles which are supported by the Union.³ The ECtHR has validated this as far as property is concerned.

The case law of the ECtHR re-confirms that northern Cyprus is a unique case within the EU legal order. The reason for this is that, even though northern Cyprus is part of the RoC, the protection of the fundamental rights of the EU citizens in the north falls within the jurisdiction of Turkey-a candidate Member State- and thus not within the government of the Member State.⁴ This is a consequence of the continued presence

¹ Case C-184/99 *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve(CPAS)* [2001] para 31.

² Article 2 TEU, Consolidated Version of the Treaty on European Union [2012] OJ C 326.

³ H Faustmann, ‘The Cyprus Issue after Accession’ in J Ker-Lindsay, H Faustmann and F Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (IB Tauris 2011) 172.

⁴ Nikos Skoutaris, *The Cyprus Issue: The Four Freedoms in a Member State under Siege* (Hart Publishing 2011) 56.

of Turkey in northern Cyprus since the 1974 intervention. The chapter will argue that even though the territorial character of the suspension of EU law allows, in principle, the rights attached to EU citizenship that are not correlated to the territory as such, to be enjoyed by the Turkish Cypriot residents in the north, there are limits for the exercise of these rights. Subsequently, it reviews the case law of the ECtHR with regards to the human rights situation north of the ‘Green Line’.

Interestingly, the ECtHR’s recent involvement, in the groundbreaking *Demopoulos and others v Turkey* case, pleased the Turkish Cypriots and angered the Greek Cypriots.⁵ The decisions of international courts are habitually portrayed as rendering one party to the Cyprus conflict triumphant against the other. This is purely because the legal arguments of both of the Cypriot parties are always connected to their own distinguished national interests and the political aims of the two Cypriot leaders. Consequently, international proceedings connected to Cyprus have become antagonistic and have generally caused more harm than good to the Cyprus Peace Process.⁶ The ECtHR has played a role in the UN sponsored Cyprus negotiations since 1995; it has mainly rendered decisions concerning Greek Cypriot property claims that have come about as a result of the island’s *de facto* division in 1974. The Court believes that its decisions have established limits ‘in accordance with the European Convention on Human Rights (the Convention) – that should inform any viable resolution of the Cyprus property issue.’⁷ Undeniably, the Court has not and cannot provide a solution to the Cypriot problem, yet the importance of law in international relations in the 20th Century, cannot be underestimated.

The judgments it has rendered do not aim to solve the property dilemma in its entirety; nevertheless, these judgments successfully outline a set of objective legal norms which must be addressed by an eventual solution. Taken as a whole, the solution needs to be made up of a set of compromises which satisfies the political objectives of the two Cypriot leaders and the wider Cypriot public, as will be examined in chapter 8.⁸ Since the two leaders have divergent expectations from the negotiations, the reconciliation of the two opposing visions will not be an easy task.

⁵ *Demopoulos and Others v Turkey* (2010) 50 EHRR SE14.

⁶ RC Williams and A Gürel, ‘The European Court of Human Rights and the Cyprus Property Issue: Charting a Way Forward’ (2011) PRIO Report, PCC Paper 1/2011, 1.

⁷ *Ibid.*

⁸ *Ibid.*

The Greek Cypriot leadership is solely interested in reunification in line with the 1960 Constitution, whilst the Turkish Cypriot leadership focuses solely on the concept of confederation. When these objectives are considered in the light of the property problem, the Greek Cypriots stress the ‘right to full reinstatement’ and the Turkish Cypriots want to ‘appeal for regulation of the exercise of property rights based on more restrictive criteria’.⁹ As mentioned above, the rulings of the Court simply identify the outer strictures within which the conflicting sides have a certain amount of political space to reach a compromised solution. These strictures can only be appreciated if the actors involved in the conflict clearly understand that the Court’s most recent pragmatic rulings simply reject the extreme features of the proposals put forward by the conflicting parties.¹⁰

This chapter will be predominantly stipulating that, for the first time, an international court has rendered a decision that has actually benefitted the Turkish Cypriot Community which has always been haphazardly condemned. Thus, the Court’s *Demopoulos* decision has softened the on-going tension by levelling the playing field; at least in the eyes of the Turkish and Turkish Cypriot community. This ruling has been highly criticised by many as it was genuinely unexpected, and to an extent unwelcomed as it suggests an ‘upgrade’ of the status to the TRNC. It is fascinating to see how the ECtHR has authorised the creation of 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.’¹¹

The chapter will first discuss the approach adopted by the ECtHR *vis-à-vis* the property issue in Cyprus in the important case of *Loizidou v Turkey*.¹² It will follow on by discussing the EU citizenship rights of Turkish Cypriot residents in the north. Prior to this however, the chapter will briefly examine other human rights violations that have taken place in northern Cyprus over the years. It will then return back to discussing the judicialisation of the sensitive property issue; the groundbreaking *Demopoulos* decision will be thoroughly analysed throughout the rest of the chapter. The decision seems to represent ‘a conscious effort by the ECtHR to strike a balance between heretofore irreconcilable Greek and Turkish Cypriot negotiating

⁹ Williams & Gürel (n 6) 1.

¹⁰ Ibid.

¹¹ Skoutaris (n 4) 91.

¹² *Loizidou v Turkey (Merits and Just Satisfaction)* ECHR 1996-VI .

positions.¹³ Thus, this chapter reinforces the increasing worth of supra-national, quasi-constitutional regimes in dealing with international political controversial issues.

7.1. The Eventual Change in the Storyline...

Statistics show that from 1963-74 it was mainly the Turkish Cypriots who were displaced in Cyprus;¹⁴ however, following the 1974 war, approximately thirty percent of Cyprus' population was relocated. Approximately 200,000 Greek Cypriots fled from the north to the south and around 65,000 Turkish Cypriots from the south to the north of Cyprus. As a result, there has been a significant amount of case law regarding affected property rights of Cypriot citizens.

Interestingly, the initial EEC Treaty did not contain a system of fundamental rights protection. As a result, the ECJ refused to accept that it and the other Community institutions were responsible for safeguarding these fundamental rights. In light of that, national courts were left to judicially review whether Union law was in line with fundamental rights enshrined in their Constitutions and the ECHR. Eventually, the ECJ was left with no other option but to affirm that the respect of fundamental rights was in fact an essential part of the general principles of Community law, as the Member State jurisdictions began to challenge the supremacy of Community law where Community legislation was infringing the rights guarded under national law.¹⁵ The ECJ ruled in *Nold*¹⁶ 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.' However, it was not until the *Rutili*¹⁷ ruling that the ECJ officially referred to the ECHR and fundamental freedoms. Since this judgment, the ECJ has claimed that this treaty has a certain rank as a source of law.¹⁸

Subsequently, the importance of the ECHR has been highlighted in Article 6(3) TEU, which states that:

¹³ Rhodri C Williams, 'Introductory Note to the European Court of Human Rights: Demopoulos v Turkey' (2010) 49(3) *International Legal Materials* 816.

¹⁴ According to UN estimates, there are around 25,000 displaced Turkish Cypriots.

¹⁵ See Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratstelle fur Getreide und Futtermittel* [1970] ECR 1125.

¹⁶ Case C-4/73 *Nold v Commission* [1974] ECR 491.

¹⁷ Case C-36/75 *Rutili v Ministre de l'Interieur* [1975] ECR 1219.

¹⁸ Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.

[F]undamental 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.

Article 6(1) takes it a step further by declaring that the Charter of Fundamental Rights, which was approved in December 2000 in Nice,¹⁹ constitutes primary EU law as it became legally binding on 1 December 2009.²⁰ For the purposes of this research, the overt reference to the system of the ECHR in the TEU is of paramount importance as the decisions of the ECtHR concerning the property issue in the Cyprus problem have dramatically changed the political and legal environment of the conflict.²¹ It should be noted that the ECJ in *Hauer v Land Rheinland-Pfalz*²² recognised the right to property, protected in Article 1 of Protocol No 1 of the Convention, as a fundamental right within the EU legal order. Similarly, the fact that Article 17 of the Charter of Fundamental Rights is based on Article 1 of Protocol No 1 of the ECHR, confirms that the right to property is a fundamental right.²³

In 1996 a landmark decision was rendered by the ECtHR, namely the case of *Loizidou v Turkey* which concerned a displaced Greek Cypriot's claim to her property.²⁴ After the ECtHR's ruling in this case and in several subsequent applications brought contra Turkey by the Greek Cypriots and the RoC, the stances adopted by the conflicting parties and the UN mediators towards the property dilemma in Cyprus, were highly shaped by the Court.²⁵ Unsurprisingly, for years on end, the ECtHR stood firmly against helping the TRNC and the Turkish Cypriot community. The rulings of the Court until recently all pointed in the same direction;

- Greek Cypriots displaced from Turkish- and Turkish Cypriot-controlled northern Cyprus are recognized as the legal owners of properties they left behind.

¹⁹ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

²⁰ Article 6(1) TEU (n 2): '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ..., which shall have the same legal value as the Treaties'.

²¹ See Skoutaris (n 4) 75.

²² Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 14.

²³ It should be noted that the Charter of Fundamental Rights only applies when EU Member States implement Union Law. 'The requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law' (para 21); Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

²⁴ This will be analysed in detail below.

²⁵ Williams & Gürel (n 6) 3.

- Turkey is held to be responsible for violations of the right to property as well as the right to respect for the home, arising from the arbitrary denial of access to such property.²⁶
- Because neither the Turkish nor the Turkish Cypriot authorities had established a credible remedy for these violations, compensation has been ordered by the Court in favour of affected individual applicants for loss of use of their property.²⁷

Arguably, the ECtHR was ‘blind to factual circumstances’,²⁸ and in order to rationalise its decisions, it adopted a depoliticised, ECJ type of approach, whilst dealing with the Cypriot property issue, despite the fact that both are teleological courts. However, further litigation changed the flow of the tide; the first step in solving any problem is recognising that there is one and this is exactly what the ECtHR has done.

7.2. The Differing Views

Prior to examining ECtHR decisions, it is important to bring to light the differing views in Cyprus regarding the property issue. The legal approach of each party to the conflict in the interim is very dissimilar. The Greek Cypriot community, regarding Greek Cypriot property in the north, believes that the pre-1974 title holder is the only one with a legal right to the property and thus is entitled to demand restitution. Furthermore, they insist that an intervening act of any sort on the property by the TRNC or by an individual is effectively null and void and in fact criminal. Correspondingly, they claim that they are the ‘guardians’ of Turkish Cypriot property in the south of the island.²⁹ After 1974, the RoC put all Turkish Cypriot properties under the guardianship on the Interior Minister, who prohibits their sale, exchange and transfer as a result of the state of emergency; *ipso facto*, the RoC administration has taken over all ownership rights of the Turkish Cypriot properties in the south until a negotiated settlement is achieved. This consequently means that the Turkish Cypriots are deprived of their property rights indefinitely if there is no settlement on the island. Legal experts have claimed that this ‘guardianship law’ put together to deal with Turkish Cypriot properties in the south, is full of ‘holes’ that

²⁶ Under the European Convention on Human Rights, the right to property and the right to respect for the home are protected under Article 1 of Protocol 1 to the Convention (protection of property) and Article 8 of the Convention (right to respect for privacy, including in the home), respectively.

²⁷ Williams & Gürel (n 6) 3.

²⁸ See *Demopoulos and Others v Turkey* (n 5).

²⁹ Alexandros Lordos, Nathalie Tocci and Erol Kaymak, *A People's Peace in Cyprus* (CEPS 2009) 51.

could be attacked if ever examined closely by the ECtHR.³⁰ For example, the ‘guardian’ of the Turkish Cypriot land in southern Cyprus is the sole authority allowed to return land to the Turkish Cypriots who claim it back under the courts of the RoC; however, in order to be able to make a claim, the Turkish Cypriot claimant is obliged to have resided in the south for a minimum period of six months.³¹

On the other side of the same coin, the TRNC acquired all Greek Cypriot properties in the north through their own Constitution and redistributed the properties in line with the laws founded on the logic of eventful ‘global exchange’. The TRNC is a supporter of the ‘equal-value’ ideology³² and therefore it compensated its citizens who were forced to abandon their properties in the south by giving them titles to pre-74 Greek Cypriot properties of equivalent value in the north. Simultaneously, the TRNC waived all claims to property in the south in order to resolve the property dilemma once and for all. Did this solve the problem? Obviously not, as unjust and corrupt distribution took place; those who did not own property in the south were given ‘equal-value’ property whilst those who genuinely lost property were given nothing.³³ This is an interesting contrast with the RoC; however, it should be noted that such a solution would most probably not have worked in the south as the RoC would not have had sufficient ‘spare’ property to distribute.

Overall, it is not very difficult to foresee the flaws in the legal approaches adopted by the two conflicting sides; these approaches have consequently given way to various types of legal claims. The initial decisions rendered by the ECtHR regarding the Cyprus property issue -which will be referred to as the *Loizidou* line of decisions- have mainly responded to the Greek Cypriot demands. Hence, the ECtHR habitually insisted that the displaced persons on both sides of the island should be permitted to

³⁰ Stefanos Evripidou, ‘Government Approves First Ever Land Swap Deal’ (*Cyprus Property News*, 10 July 2012 <<http://www.news.cyprus-property-buyers.com/2012/07/10/first-ever-land-swap-deal-approved/id=0012112>> accessed 21 July 2015).

³¹ Ata Atun, ‘Property Exchange Nightmare in Southern Cyprus’ (*Prof Dr Ata Atun Yazıları, Makaleleri, Araştırmaları*) <<http://www.ataatun.org/property-exchange-nightmare-in-southern-cyprus.html>> accessed 21 July 2015.

³² ‘*Es-deger*’ in Turkish.

³³ E Erk, ‘Understanding the Property Conundrum’ Turkish Cypriot Human Rights Foundation, PowerPoint Slides, Slides 3-5 <http://webcache.googleusercontent.com/search?q=cache:6s6Ux-oWockJ:www.embargoed.org/downloads/Emine_Erk-Understanding_the_Cyprus_Property_Conundrum_March2010.ppt+&cd=1&hl=en&ct=clnk&gl=uk> accessed 21 July 2015.

return to their original properties and have them reinstated.³⁴ It is absolutely certain that the Court's earlier decisions ruled out the proposals coming from the north; namely, the idea of 'global exchange' of property which would in turn prevent return and put into place a type of 'bi-zonality' based on permanent physical separation of the two Cypriot communities.³⁵ In the *Loizidou* case the Court argued that since the TRNC is not an internationally recognised sovereign State, it can therefore not take over Greek Cypriot property in accordance with the idea of 'global exchange.'³⁶

7.3. The *Loizidou* Line of Decisions

The ECHR was applied even before the *Loizidou* case for matters concerning interference with property rights belonging to individuals in the TRNC- which is classified as an occupied illegal regime; however, the judgment of the Court in *Loizidou* was the predominant significant decision which altered the status quo *ante* of the Cyprus conflict. It was the first time that 'an international court recognised that Turkey has overall effective control of northern Cyprus.'³⁷ Furthermore, it gave thousands of Greek Cypriots the right to claim damages from the Turkish government for their properties that have been affected by the conflict.

The earlier cases were the three inter-state cases of *Cyprus v Turkey*³⁸. The fourth inter-state case³⁹ then quickly followed and eventually individual applications were made; namely, the abovementioned *Loizidou v Turkey*⁴⁰, *Demades v Turkey*⁴¹ and *Eugenia Michaelidou Developments Ltd. and Michael Tymvios v Turkey*.⁴² All of these claims were made by either Greek Cypriot owners of immovable property in the north of Cyprus or on behalf of Greek Cypriot owners of immovable property in the north, on the grounds that they were prevented from accessing, using, controlling or enjoying their properties by Turkey. The first three inter-state cases resulted with

³⁴ See K Ozersay and A Gürel, 'The Cyprus Problem at the European Court of Human Rights' in Diez T & Tocci N (eds), *Cyprus: A Conflict at the Crossroads* (Manchester University Press 2009) 273-291 and Ayla Gürel and Kudret Ozersay, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle' (2008) 44(2) Middle Eastern Studies 291.

³⁵ Williams & Gürel (n 6) 4.

³⁶ This will be explained in more detail below.

³⁷ Skoutaris (n 4) 76.

³⁸ *Cyprus v Turkey* App nos 6780/74, 6950/75, 8007/77. The first and second applications were joined by the Commission, *Cyprus v Turkey* App nos 6780/74, 6950/75 2 DR 125 (1975); third application *Cyprus v Turkey* App no 8007/77, 13 DR 85 (1978).

³⁹ *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

⁴⁰ *Loizidou v Turkey (Preliminary Objections)* (1995) Series A no 310.

⁴¹ *Demades v Turkey* App no 16219/90 (ECtHR, 31 July 2003).

⁴² *Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey* (2004) 39 EHRR 36.

reports adopted by the European Commission of Human Rights in 1976 and 1983, finding Turkey responsible for continuing violations of the right to property in the form of depriving Greek Cypriots of their possessions without it being justified by any of the objectives set out in Article 1 of Protocol No 1.⁴³ Nonetheless, since the Turkish government had not recognised the jurisdiction of the Court at the time of these inter-state cases, the proceedings simply ended in politically driven and unproductive Resolutions of the Committee of Ministers of the Council of Europe.⁴⁴ The fourth inter-state case alongside the three abovementioned individual cases, represent a greater legal significance, since they were all decided after 1989 -which was the year that Turkey recognised the jurisdiction of the Court.⁴⁵

The *Loizidou* case was by far the most momentous as it allowed the ECtHR to rule out Turkey's contention that the Greek Cypriots had permanently lost out on their rights to their property in the north as a result of the adoption of the TRNC Constitution of 7 May 1985.⁴⁶ The points made in the decision stipulated that since Turkey illegally occupied the north of Cyprus with its military forces, where the immovable property of the claimant is located, Turkey is considered as exercising *de facto* jurisdiction over the north of Cyprus; thus, according to Article 1 of Protocol No 1, Turkey is liable for any violations of any rights safeguarded thereby in respect of the north of Cyprus.⁴⁷ Hence, the reason the Greek Cypriots cannot access their properties in the north is due to the fact that the Turkish army exercises effective control over that part of the island and that such control necessitates Turkey's responsibility for the decisions and actions of the unrecognised TRNC.⁴⁸

Therefore, the TRNC is overtly classified as the subordinate administration of Turkey. Turkey however, tried to rely on Article 159 of the TRNC Constitution,

⁴³ GL Loucaides, *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff Publishers 2007) 131.

⁴⁴ Council of Europe, Committee of Ministers, Resolution DH (79)1 on *Cyprus v Turkey*, Human Rights Applications Nos 6780/74 and 6950/75 (adopted by the Committee of Ministers on 20 January 1979 at the 298th Meeting of the Ministers' Deputies); Council of Europe, Committee of Ministers, Resolution DH(92)12 on *Cyprus v Turkey*, Human Rights Application No 8007/77 (adopted by the Committee of Ministers on 2 April 1992 at the 473rd meeting of the Ministers' Deputies).

⁴⁵ Even though Turkey ratified the Convention in 1954, it first recognised the compulsory jurisdiction of the ECtHR in a declaration of 22 January 1990, which applied only to alleged violations that occurred subsequent to this date. Loucaides (n 43) 131.

⁴⁶ Five years before Turkey submitted itself to the Court's jurisdiction. *Loizidou v Turkey* (n 12) para 35.

⁴⁷ *Loizidou v Turkey* (n 40) para 63; *Loizidou v Turkey* (n 12).

⁴⁸ *Loizidou v Turkey* (n 12) paras 56-57.

which states that ‘all immovable properties, buildings and installations’ abandoned upon the declaration of the Turkish Federated State of Cyprus on 13 February 1975 or ‘which were considered by law as abandoned or ownerless’ or were within the area of military installations in northern Cyprus on 15 November 1983, should be the property of the TRNC.⁴⁹ The ECtHR responded by claiming that it would not attribute legal validity to an Article of a Constitution belonging to a State which is legally invalid in international law;⁵⁰ meaning that, the deprivation of the applicant’s property via the TRNC Constitution is of no legal effect and thus the applicant has not lost title of her property.⁵¹

Nonetheless, the Court did state in *Foka v Turkey*⁵² that it acknowledges the validity of some basic acts of the TRNC in accordance with the ‘Namibia’ rule. This rule provides an exception to the principle that the acts, policies, laws and decisions of an internationally unrecognised State, are of no effect.⁵³

[I]nternational 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.’⁵⁴

Albeit this latter jurisprudence concerns the application and interpretation of the Convention,⁵⁵ it is founded on principles common also to the universal conventions on human rights, such as a State’s duty to ensure and respect human rights.⁵⁶ It has been contested that since the jurisprudence provides a broad exceptional validity under the ‘Namibia’ rule, not much remains of the requirement of non-recognition

⁴⁹ Ibid para 35.

⁵⁰ Ibid para 44.

⁵¹ Ibid, paras 46-47

⁵² *Foka v Turkey* App no 28940/95 (ECtHR, 24 June 2008).

⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 56, para 125.

⁵⁴ *Loizidou* (n 12) para 45.

⁵⁵ The claimant in *Foka v Turkey* was a Greek Cypriot who was staying in the TRNC at the time of events alleged in the application. She was returning from the RoC to the TRNC when she was subject to a short period of detention. The question was whether or not the detention was a legitimate interference with the right to liberty of the claimant. According to Article 5 ECHR, the interference must be ‘prescribed by law’ (referring to domestic law). The claimant and the RoC contended that since the TRNC was invalid and unrecognised, no interference imposed by its authorities could be lawful. The ECtHR rejected this argument.

⁵⁶ See *International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976: Article 2(1) ‘to respect and ensure’; ECHR Article 1 ‘to secure’; see also Y Ronen, Transition from Illegal Regimes under International Law* (CUP 2011) 92.

inasmuch as internal acts are concerned.⁵⁷ In this latter case, the Court claimed that when the TRNC authorities act in compliance with the laws of the TRNC, those acts should be seen as having a legal basis in national law for the aims of the Convention.⁵⁸ Thence, the Court acknowledged the validity of certain TRNC basic acts simply because it benefited the Turkish Cypriot population at large; the recognised basic acts constituted ‘an element in the discharge by the TRNC (or Turkey) of its human rights obligations towards that population.’⁵⁹ The question thus remains; how does the Court select the basic acts it will choose to recognise?

It has been argued that the Court’s recognition of the legal effect of specific TRNC legislation benefited the purported sovereign existence of the illegal regime and not the population at large; furthermore, it has been insisted that if the Court’s approach is adopted internationally, then non-recognition can solely be implemented at the inter-state level.⁶⁰ The counterargument provided by the Court is that this did not equate to the recognition of the TRNC and nor did it negate the fact that the government of the RoC is the sole legitimate government of Cyprus.

Neither the fact that the property rights were the subject of inter-communal talks, nor the need to re-house displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974, could justify the total and continuing denial of access and purported expropriation without compensation in this case.⁶¹

Thus, the ‘Namibia’ exception did not cover the actions of the Turkish government in the *Loizidou* case. So the Greek Cypriot applicant could not be deemed to have lost her property as a result of Article 159 of the TRNC Constitution.⁶²

In the fourth inter-state case and in the individual applications of *Demades* and *Michaelides*, which were based on the same complaint as the *Loizidou* case, the Court’s response resembled the *Loizidou* ruling. Nevertheless, it should be noted that the fourth inter-state case was based on the complaint of two hundred thousand

⁵⁷ Ronen (n 56).

⁵⁸ The ECtHR ruled that in the light of Turkey’s accountability for violations of the Convention in the TRNC: ‘it would not be consistent if the adoption by the authorities of the “TRNC” of civil, administrative or criminal law measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no “lawful” basis in terms of the Convention’. *Foka v Turkey* (n 52) paras 80, 81, 83.

⁵⁹ Ronen (n 56) 92.

⁶⁰ *Ibid* 95.

⁶¹ *Loucaides* (n 43) 132; *Loizidou v Turkey* (Merits) (n 12) paras 63, 64 and 66.

⁶² *Ibid*, paras 46- 47.

Greek Cypriots and it set a precedent regarding Turkey's accountability for the implementation of the Convention.⁶³ The ruling in *Loizidou* goes against the Court's more common approach to property complaints in 'transitional justice' cases where the alleged violations have taken place before the entry into force of the Convention, such as the acceptance of the Court's jurisdiction, in the country involved.⁶⁴ For example, previously the Court stipulated that it has no jurisdiction over claims which date back to 'Cold War' era property nationalisations, since these nationalisations were 'instantaneous' acts that took place prior to the local entry into force of the Convention; thus, they are not 'continuing violations' that are still taking place today.⁶⁵ The *Loizidou* decision clearly highlights the fact that the claimant was suffering from 'continuing violations'⁶⁶ in relation to the use of her property in northern Cyprus.

However, the Court did not stray too far from its common approach, which is to avoid, where possible, taking a position in highly politicised transitional property issues; it ensured that the remedies it demanded would not focus on remedies for loss of the property's ownership but solely on compensation for loss of its use.⁶⁷ Wherefore, the ECtHR was not obliged to rule on the issue of whether or not the Convention defended the 'maximalist Greek Cypriot position';⁶⁸ hence, the demand for physical restitution. The Greek Cypriots were not satisfied with the Court's decision as they believed that monetary compensation should only be the remedy to such a case if it was personally demanded by the claimant or if restitution was materially impossible, for example, as a result of the destruction of the property.⁶⁹

Events indicate that the Court genuinely does not enjoy intervening in matters that partially or utterly pre-date the entry into force of the Convention and the recognition of the jurisdiction of the Court by the country in question. The Court has often

⁶³ Loucaides, (n.43) 132.

⁶⁴ T Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2006) 3 Columbia Journal of European Law. As the TRNC is regarded as a subordinate administration of Turkey, in this case it would be Turkey's acceptance of the Court's jurisdiction.

⁶⁵ Williams & Gürel (n 6) 4.

⁶⁶ *Loizidou v Turkey* (Merits) (n 12) paras 44-46.

⁶⁷ Williams & Gürel (n 6) 4. The Court awarded 300,000 CY pounds for pecuniary damage, 20,000 CY pounds for non-pecuniary damage such as frustration and anger which the claimant must have felt over the years as a result of not being able to use her property, 137 CY pounds for the cost and expenses and interest at an annual rate of 8% on the amounts in question. *Loizidou v Turkey* (Just Satisfaction) (1998) 26 EHRR CD5.

⁶⁸ Williams & Gürel (n 6) 4.

⁶⁹ *Ibid.*

brought to light its ‘admissibility’ rules in order to evade taking decisions on property claims arising from ‘transitional’ settings even if such claims would be admissible in non-transitional circumstances.⁷⁰ Although this propensity has mostly been voiced in cases concerning the political transition from communism to democracy in Eastern Europe, it has also been pronounced in recent cases regarding the conflict in the Western Balkans. For example, in Croatia, the urban apartments of the minority Serbs were confiscated during the war and the Court refused jurisdiction on the grounds that the confiscation had occurred ‘instantaneously’ before Croatia’s ratification of the Convention and its protocols.⁷¹ *Ipsa facto*, the *Loizidou* line of decisions can definitely be considered as an irregularity in the history of the Court’s jurisprudence and/or arbitrary discrimination.⁷²

Consequently, many believed that the Court would ultimately force a resolution of the property problem which would be for the benefit of the Greek Cypriot community, irrespective of inter-state negotiations, by demanding restitution for cases following *Loizidou*. The President of the RoC at the time, Papadopoulos, was so confident that the Court would force full restitution, he implied it in his public speech of April 2004; some would say that this speech resulted in Greek Cypriot rejection of the Annan Plan which advocated compensation in place of restitution.⁷³ This proves that there is a relationship between political negotiation and jurisprudence; and in the case of Cyprus, this correlation has proven to have a negative effect on the relations between the conflicting parties. For instance, the interactions between the two Cypriot sides further deteriorated when the ECtHR

⁷⁰ Allen (n 64) 14.

⁷¹ *Blecic v Croatia* (Merits) App no 59532/00 (ECtHR 29 July 2006). It was noted that the fact that Serbs were targeted for the appropriation of apartments gave rise to overt parallels with *Loizidou*, with apparently the sole difference being the fact that Croatia was a recognized state and the TRNC is not. See also Allen (n 64) 14-15.

⁷² Williams & Gürel (n 6) 16.

⁷³ Rebecca Bryant, ‘A Dangerous Trend in Cyprus’ (2005) 35 Middle East Research and Information Project <<http://www.merip.org/mer/mer235/dangerous-trend-cyprus>> accessed 23 July 2015.

The Annan Plan property provisions: Reinstatement of property to dispossessed owners is accorded under limited circumstances, otherwise compensation or exchange for comparably valued Turkish Cypriot property in the south is considered the norm.

K Annan, ‘The Annan Plan for Cyprus’, official United Nations website of the Secretary-General’s comprehensive peace plan for Cyprus: the ‘Annan Plan’ (2004) <<http://www.hri.org/docs/annan>> accessed 5 July 2013. See also Cyprus News Agency, ‘Address to Cypriots by President Papadopoulos’ (Hellenic Resources Network 4 April 2004) <<http://www.hri.org/news/cyprus/cna/2004/04-04-08.cna.html#01>> accessed 29 May 2013.

delivered some judgments concerning human rights issues in northern Cyprus which are not related to the property issue of the conflict.

7.4. Other Human Rights Violations in Northern Cyprus

In the three cases which will be mentioned below, the ECtHR adopted a legally justifiable similar approach which nevertheless, further damaged the relations between the two Cypriot parties.

In *Panayi v Turkey*,⁷⁴ a Greek Cypriot unarmed National Guard soldier was shot and killed inside the UN buffer zone in Nicosia in 1996. It has been proven that a Turkish Cypriot soldier fired the lethal round; he had entered the buffer zone with his rifle and the UNFICYP soldiers were 'prevented from reaching the National Guard Soldier by Turkish-Cypriot soldiers who had fired shots in the direction of the UNFICYP soldiers each time the latter tried to move forward.'⁷⁵ Two months after this horrific event, Tassos Isaak, a Greek Cypriot, took part in a demonstration organised by the Cyprus Motorcycle Federation that was held at several points of the 'Green Line' dividing the island. Isaak left his motorcycle and tried to enter the UN buffer zone; subsequently, he was attacked and beaten to death by a group of counter-demonstrators and unfortunately, members of the TRNC police just watched.⁷⁶ On 14 August 1996, Solomos Solomou, after having attended Isaak's funeral, along with some other Greek Cypriots, entered the UN buffer zone. He crossed the barbed wire at the Turkish ceasefire line and entered the TRNC's territory. Subsequently, after breaking free from the UNFICYP officer, he tried to climb up a pole where a Turkish flag was flying. This was his tragic end; two Turkish soldiers aimed their weapons at him and fired whilst he was climbing the pole.⁷⁷

The ECtHR held, in all three of these sad cases, that killings of the victims were violations of the right to life that were not justifiable.⁷⁸ Furthermore, the fact that Turkey had failed to produce evidence proving that an investigation had been carried out regarding the circumstances of the death of these three Greek Cypriots,

⁷⁴ *Kallis and Androulla Panayi v Turkey* App no 45388/99 (ECtHR 27 October 2009).

⁷⁵ *Ibid*, para, 11 citing the Report of the UN Secretary-General dated 7 June 1996.

⁷⁶ *Isaak v Turkey* App no 44587/98 (ECtHR 28 September 2006) para 111.

⁷⁷ *Solomou and Others v Turkey* App no 36832/97 (ECtHR 24 June 2008) para 71.

⁷⁸ These killings did not fall under the exceptions mentioned in paragraph 2 of Article 2 ECHR. See *Isaak v Turkey* (n 76) paras 117-118 and 120; *Solomou and Others v Turkey* (n 77) paras 71 and 78-79; *Kallis & Panayi v Turkey* (n 74) para 63.

confirmed that Article 2 had been violated.⁷⁹ Interestingly, these cases which are based on violations of Article 2 ‘still represent a rather small category in the “Cyprus problem” jurisprudence of the Strasbourg Court.’⁸⁰ The majority of the cases pending before the Court concern the property issue in Cyprus. Nevertheless, the conflict parties will closely watch and see how the Court approaches these sensitive cases if and when they are brought before it.

7.5. Union Citizenship for the Turkish Cypriot Community... *A Fallacy*

In *Grzelczyk*,⁸¹ the ECJ confirmed that ‘Union citizenship is destined to be the fundamental status of nationals of Member States...’⁸² linked with the principle of non-discrimination. So, the question is: are Turkish Cypriots really EU citizens? Article 198 of the Constitution of the RoC states that ‘any matter relating to citizenship shall be governed by the provisions of Annex D to the Treaty of Establishment’.⁸³ The predominant rule for acquiring Cypriot citizenship is set out in Section 2 of Annex D of the Treaty of Establishment; according to this Section:

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 1960.⁸⁴

For the purposes of this research, it should be noted that by virtue of section 4 of the RoC’s Citizenship Law of 1967, a person will become the citizen of the RoC via birth if one of his/her parents was a citizen at the time of his/her birth or if he/she is married to a citizen of the RoC and the two have cohabited for at least two years in

⁷⁹ See *Isaak v Turkey* (n 76) para 124; *Solomou and Others v Turkey* (n 77) para 83 and *Kallis & Panayi v Turkey* (n 74) para 73.

⁸⁰ *Skoutaris* (n 4) 84.

⁸¹ *Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve* (n 1).

⁸² *Ibid*, para 23

⁸³ Article 198(1) Constitution of the RoC: ‘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 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.’ <<http://www.kypros.org/Constitution/English/>> accessed 11 July 2015.

⁸⁴ *Skoutaris* (n 4) 65.

accordance with section 5(2).⁸⁵ Thus, according to the Citizenship Law of 1967 and the provisions of Annex D of the Treaty of Establishment, Cypriots of either Greek or Turkish origin can claim the nationality of Cyprus and consequently, they have access to Union citizenship. So, in accordance with the legal status quo, the RoC still recognises the citizenship and the right to citizenship of Turkish Cypriot residents living in northern Cyprus, who would fall under the ambit of *ratione personae* of Annex D or the Citizenship Law of Cyprus.⁸⁶ As a result, Turkish Cypriots indirectly possess EU citizenship; they need to activate this citizenship by applying and providing the RoC authorities with documentation. This situation is by no means unique in the EU; the citizens of the Democratic Republic of Germany, prior to the fall of the ‘Berlin wall’, were regarded as Germans for Community purposes.⁸⁷ *Ipsso facto*, Turkish Cypriots, the ghosts of Europe, can enjoy EU membership as individuals, but not as a community. As long as the rights are not linked to the territory of the ‘Areas’ as such, the Union citizens can enjoy the relevant rights.⁸⁸ Thus, the Union citizens residing in the north or south of Cyprus cannot invoke any rights coming from primary or secondary EU law contra the TRNC.

Nonetheless, problems exist with regards to the exercise of Union citizenship rights by the Turkish Cypriots. In view of the fact that the majority of the Turkish Cypriots do not participate in the constitutional life of the RoC since 1963 and that the Cypriot Law 72/79 does not provide for any separate electoral list for the Turkish Cypriots as a result of the post-1974 state of affairs, the Turkish Cypriot community have not been able elect their own representatives in the European Parliament, pursuant to Article 14 TEU.⁸⁹ It should be noted however, that the political rights of the Turkish Cypriot community, arising from Cypriot citizenship and EU citizenship, have been safeguarded since the ECtHR’s ruling in *Aziz v Cyprus*⁹⁰. Here, the Court found that the RoC violated Article 3 of Protocol No 1 of the Convention, which provides that States need to ‘hold free elections at reasonable intervals by secret

⁸⁵ Republic of Cyprus Citizenship Law, Law No 43 of 1967 <<http://www.coe.int/t/dghl/standardsetting/nationality/National%20legislation/Cyprus-The%20Republic%20of%20Cyprus%20Citizenship%20Law%201967.pdf>> accessed 25 July 2015.

⁸⁶ Skoutaris (n 4) 65.

⁸⁷ German Nationality Act, Law No 3 of 1957.

⁸⁸ M Uebe, ‘Cyprus in the European Union’ (2004) 46 German Yearbook of International Law 375.

⁸⁹ F Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006).

⁹⁰ *Aziz v Turkey* ECHR 2004-V.

ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’ The reason being, the Cypriot Ministry of Interior refused to enrol a Turkish Cypriot applicant on the electoral roll who wanted to exercise his voting rights in the Parliamentary elections of 2001.⁹¹ The corollary of this is that, now the Turkish Cypriots living in southern Cyprus can be included in the Greek Cypriot electoral system and the Turkish Cypriots living in the ‘Areas’ can cross over and vote if they are registered there.

Even though the situation is not perfect, the Court’s judgment made a huge difference; firstly, the Court overtly demonstrated that it will protect the bi-communal nature of the RoC and secondly, it covertly improved the exercise of EU citizenship rights regarding the election of representatives to the European Parliament. Therefore, it could be argued that the Court’s literal and depoliticised approach in this case actually helped the Turkish Cypriot community and did not undermine the dispute settlement process in any way. In fact, it enhanced the cooperation between the two Cypriot parties as it permitted the Turkish Cypriot ethno-religious segment to take part in the Union’s political life without undermining the RoC’s authority over the entire island. It should be underlined that the RoC does not have to hold European Parliament elections in an area where it does not exercise effective control and where the *acquis* is suspended.⁹² But in reality, how effective is this abovementioned development?

Between 22 and 25 May 2014, European citizens were called upon to directly elect their European Parliament representatives. The Turkish Cypriots, having been allocated two out of six seats representing the RoC in the Parliamentary elections, rushed to the polls to vote. They had five candidates and approximately 58,000 registered voters.⁹³ This was the very first time that the Turkish Cypriots were given the opportunity to have their voices heard in Europe. Regrettably, almost one third of the Turkish Cypriot voters were denied their fundamental right to elect European

⁹¹ Ibid, para 38 states that this practice also breached Article 14 of the Convention: ‘the enjoyment of the rights and freedom 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’.

⁹² Case C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055, paras 46-48.

⁹³ Agence France Presse, ‘Turkish Cypriots Angry over EU Vote in Greek Cyprus’ *Hurriyet Daily News* (26 May 2014) <<http://www.hurriyetdailynews.com/turkish-cypriots-angry-over-eu-vote-in-greek-cyprus.aspx?pageID=238&nid=66971&NewsCatID=351>> accessed 23 July 2015.

Parliament representatives as the Greek Cypriot administration failed to record their addresses; only those with a registered address were permitted to cast a ballot. Mehmet Pasa, a Turkish Cypriot voter, commented on the events that took place; ‘I came here to cast my vote but I couldn’t. When I demanded an explanation, they said I was making trouble and they asked me to get out.’⁹⁴ Thus, although possessing RoC passports and being EU citizens, Turkish Cypriots can barely participate in Europe as a result of the obstacles placed before them by the Greek Cypriot administration.⁹⁵ Deniz Birinci, a Turkish Cypriot candidate, said, ‘[t]his is a huge infringement of human rights and of people’s democratic and civil rights...I call on all the authorities and the EU to keep an eye on what’s going on here...’⁹⁶ This just proves that regardless of how the international mediators approach the Cyprus problem and what strategies they enact to solve it, as long as they try and marry the two sides of the island, their efforts will go to waste.

Just before the RoC took over the rotating EU presidency, in June 2012, hundreds of Turkish Cypriots marched from the European Parliament to the European Commission in Brussels dressed as ghosts. They were protesting that the RoC cannot represent the entire island and that they were Europe’s forgotten citizens. Paradoxically, the majority of the protesters would have had to acquire RoC passports to be able to travel to Brussels; so technically, as far as the Union is concerned, there were no Turkish Cypriots that had been denied their EU citizenship rights protesting that day.⁹⁷ Thence, there are two sides to the same coin.

It should be noted that the Turkish Cypriots are allowed to take part in EU programs,⁹⁸ and even work within the institutions of the EU. However, the feasibility of this is also questionable. For instance, in the first recruitment competition after the RoC became a Member State, the Commission asked for the examinations to be set

⁹⁴ Ibid.

⁹⁵ Ertan Karpazli, ‘Turkish Cypriots: The Ghosts of Europe’ (*The Platform*, 15 March 2015) <<http://www.the-platform.org.uk/2015/03/15/turkish-cypriots-the-ghosts-of-europe/>> accessed 23 July 2015.

⁹⁶ Agence France Presse (n 93).

⁹⁷ Karpazli (n 95).

⁹⁸ See Commission Decision (2006) 6533 of 15 December 2006 establishing a financial assistance programme to encourage the economic development of the Turkish Cypriot community - Part II; European Union Scholarship Programme for the Turkish Cypriot Community <<http://www.abburs.eu/en/>> accessed 23 July 2015.

in the Greek language;⁹⁹ subsequently, an action was brought before the Court of First Instance by two Turkish Cypriots, who claimed that this requirement amounted to unlawful discrimination contra citizens of Cyprus whose mother tongue is not Greek. The Court held that this action was inadmissible due to procedural issues;¹⁰⁰ the Court of Justice also upheld this in Order of 19 October 2007.¹⁰¹ Arguably, if there were no procedural issues, the Commission or the ECJ would most probably have acknowledged the violation of the equal treatment principle and thus the Turkish Cypriot applicants would have won the case. Unsurprisingly, ‘the new recruitment competitions for Cypriots may be passed in any official Community language.’¹⁰²

Overall, the Turkish Cypriots living in the ‘Areas’ do have access to the nationality of the RoC in accordance with the 1960 Constitution and as a result to EU citizenship; nevertheless, the constraints for the exercise of the rights that are correlated with the EU citizenship status are sincerely constricted in an area where the application of EU *acquis* is suspended.¹⁰³

7.6. The Turning Point...Back to the Property Issue

The ECtHR ensured to break with the expectation, adjust the irregularity and bring into line its Cyprus case law with its decisions on rights linked with property in circumstances involving post-conflict or political transitions, in the 2005 case of *Xenides-Arestis v Turkey*.¹⁰⁴ Here, the Court applied its ‘pilot judgment procedure’ which was a means of handling large groups of repetitive cases that derive from the same underlying issue.¹⁰⁵ In this case, the Court had found Turkey to be in breach of Articles 8 and 1 of Protocol 1 of the Convention and thence asked her to pioneer a generally applicable remedy which would guarantee ‘genuinely effective redress ... in relation to the present application as well as in respect of all similar applications

⁹⁹ EPSOforum <<http://epsforum.com/viewforum.php?f=126>> accessed 23 July 2015.

¹⁰⁰ Case T-455/04 *Beyatli and Candan v Commission*, Order of 5 March 2007 [2007] OJ C95/40.

¹⁰¹ Case C-238/07 *P Beyatli and Candan v Commission*, Order of 19 October 2007 [2008] OJ C51/30.

¹⁰² Nikos Skoutaris, ‘The Legal Aspects of Membership’ in J Ker-Lindsay, H Faustmann and F Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (IB Tauris 2011) 47.

¹⁰³ *Ibid* 48.

¹⁰⁴ *Xenides-Arestis v Turkey* App No 46347/99 (ECtHR, 22 December 2005).

¹⁰⁵ Registrar of the European Court of Human Rights, Pilot-Judgment Procedure: Information Note (2009) <http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf> accessed 25 July 2015.

pending before [the Court].'¹⁰⁶ The process of breaking with the expectation was then culminated in the Court's March 2010 decision of *Demopoulos and Others v Turkey*¹⁰⁷ This ruling was an acknowledgement of the right of self-determination of the Turkish Cypriot community as described by Beran.

The *Xenides-Arestis* decision laid down the guidelines for the reform of a Turkish Cypriot property compensation mechanism¹⁰⁸ which pushed the TRNC to establish the IPC in order to provide remedies to dispossessed Greek Cypriot property owners.¹⁰⁹ The validity and the effectiveness of the IPC was confirmed in the *Demopoulos* decision, which stated that the IPC had met the standards set out in *Xenides-Arestis*. The acceptance of the IPC as a domestic remedy indicates the use of the 'Namibia' exception. The respondent Turkish government insisted that they had 'cooperated . . . with the Court in bringing the pilot-judgment procedure to a successful conclusion;' conversely, the RoC Government claimed that Turkey had 'abused' the procedure.¹¹⁰

Augmenting awareness of the importance of the novel procedure is reflected in the position it played in the parties' pleadings in *Demopoulos*. The claimants of this case argued that Turkey's appeal to the 'administrative convenience' of the ECtHR would consequently force those with property claims to 'resort to an ineffective remedy [that] would give a wrong signal to Contracting States in any future pilot judgments, thus creating more, not less, work for the Court.'¹¹¹ Even if this is true, it is hard to ignore the discontent of the ECtHR caused by the repetitive property claims arising from Cyprus;¹¹² thus, with these two above-mentioned judgments, the ECtHR efficaciously established a group of ground rules which changed the way in which future Greek Cypriot property claims against Turkey are going to be dealt with.¹¹³

7.7. The *Avant-Garde Demopoulos* Decision...

The *Demopoulos* case concerned a group of Greek Cypriots who complained that they had been deprived of the enjoyment of their properties in the TRNC. Turkey as

¹⁰⁶ *Xenides-Arestis v Turkey* (n 104) para. 40.

¹⁰⁷ *Demopoulos v Turkey* (n 5).

¹⁰⁸ *Xenides-Arestis v Turkey* (n 104) paras 44-45.

¹⁰⁹ TRNC Law No 67/2005 of 19 December 2005 for the Compensation, Exchange and Restitution of Immovable Properties .

¹¹⁰ *Demopoulos v Turkey* (n 5) paras 57, 61, 63.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, para 81.

¹¹³ Williams & Gürel (n 6) 5.

the defendant argued that this application was inadmissible since the claimants had not approached the IPC and thus had not exhausted local remedies. Subsequently, the claimants argued that the necessity of exhausting the TRNC remedies is tantamount to legitimising the illegal regime in the north of Cyprus.¹¹⁴ Nevertheless, the Court dismissed this argument and after having examined the TRNC legislation, it concluded that the IPC constituted a functional framework of redress.¹¹⁵ It should be noted that the compensation for loss of use of property awarded by the Court in a case deemed admissible prior to *Demopoulos*, was rather close to the sum that would have been offered by the IPC for the same aim.¹¹⁶ The Court also stated that an imperative consideration in the prevention of loss to those subject to the illegal regime, as demanded by the ‘Namibia’ rule, was to prevent a legal vacuum in which victims of human rights violations cannot have redress. Thus, the Court found the claimants’ application inadmissible for non-exhaustion of national remedies. This decision evidently shocked the Greek Cypriots as it meant that remedies other than restitution were acceptable.

Whether or not these remedies are adequate is no longer the point; historically, the return of, or even compensation for land or property lost during a war to the defeated party is the exception and an accomplishment for the EU- which is an exceedingly norm based organisation- for the years post-1945. For instance, in 2009, the Union ensured- in the perspective of the ratification of the Treaty of Lisbon- that ‘the Czech Republic would not be vulnerable to legal challenge through EU Courts by the descendants of Germans ethnically cleansed from Czechoslovakia after 1945.’¹¹⁷ According to many scholars, political pragmatism and the need to strengthen the European order created after 1945, have habitually-although not all the time- prevailed over principles and human rights.¹¹⁸ Thus, even the possibility of compensation in the case of Cyprus is an adequate remedy; ‘Cypriots of both communities are likely to be better off than their co-Europeans who were expelled and lost their property in the 1930s and 40s, but nevertheless unlikely to (fully) succeed along the lines supported by the proponents of a “European solution.”’¹¹⁹

¹¹⁴ *Demopoulos v Turkey* (n 5) para 92.

¹¹⁵ *Ibid*, paras 121-123.

¹¹⁶ *Loizou and Others v Turkey* (Just Satisfaction) App no 16682/90 (ECtHR 24 May 2011) para 41.

¹¹⁷ Faustmann (n 3) 172.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

Furthermore, compensation for the interests of the ‘greater good’ in place of return or keeping of property/land is a globally welcomed principle concerning property rights. Arguably, this would apply to public works, such as road construction; nonetheless, it could be assumed that the EU will not put too much pressure on the principle of restitution. Instead, it will support any kind of solution that is agreed upon by the conflicting parties and this solution will most probably be protected by mechanisms that make recourse to the Court of Justice and the ECtHR only in very exceptional circumstances.¹²⁰ Thence, those who insist on full return of properties/land are not automatically backed up by the EU and the ECtHR. For instance, the ECtHR has taken into account the situation of persons currently occupying claimed properties, as well as other factors, such as their alleged location in a militarily sensitive zone or use for ‘vital public purposes.’¹²¹

7.8. The Reasoning of the Court: The Principle of Subsidiarity, The Passage of Time & The ‘Namibia’ Rule

The Court in *Demopoulos* commences its discussion of exhaustion of domestic remedies with a detailed elucidation on the principle of subsidiarity to national systems; here the Court highlights that:

[I]t does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should be the domain of domestic jurisdictions.¹²²

The corollary of this is that the Greek Cypriot complaints concerning the violations of the right to property under Article 1 of Protocol 1 of the Convention will no longer be heard by the ECtHR if the claimant has not approached the IPC first.¹²³ Alongside confirming that the sums of compensation provided by the IPC are sufficient in terms of constituting efficient redress for violation of the right to property, the Court also ruled that the remedies provided by this Commission are extensive enough to deal with complaints related to interference with the right to respect for the home.¹²⁴ The Court has also made it clear that the IPC mechanism can only be challenged if evidence is presented to the Court that this framework fails to provide an effective remedy. As a result, this suggests that the Greek Cypriot

¹²⁰ Ibid 173.

¹²¹ *Demopoulos v Turkey* (n 5) para 112.

¹²² Ibid, para 69.

¹²³ Ibid, para 128.

¹²⁴ Under Article 8 of the Convention.

authorities should overturn their current policy and convince claimants to utilise the IPC mechanism.¹²⁵

The Court summarised its case law on restitution and elucidated that;

The Court's case-law indicates that if the nature of the breach allows *restitutio in integrum* it is for the respondent State to implement it. However, if it is not possible to restore the position, the Court, as a matter of constant practice, has imposed the alternative requirement on the Contracting State to pay compensation for the value of the property. This is because the Contracting Parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach.¹²⁶

An interpretation of this statement in light of *Arestis-Xenides* and *Demopoulos* might be that the discretion of States in redressing violations of the Convention is sincerely limited in theory by the ECtHR's overt preference for restitution; nevertheless, States have a degree of freedom of choice to specify conditions under which restitution is viewed as practically impossible. The Court seems to follow this approach by accepting the possibility of compensation and exchange to provide redress and explicitly rejecting a 'material impossibility' standard for restitution that could trigger novel breaches via mass evictions of established occupants of claimed properties.¹²⁷ The Court highlighted that time is not on the side of the Greek Cypriots as the passage of time has withered away the bond between applicants and their properties and that the current occupants of those properties in the north have most probably acquired greater claims to protection under Article 8 of the Convention than their previous owners.¹²⁸ So, the passage of time has rendered the losses of the Greek Cypriots as 'increasingly speculative and hypothetical'.¹²⁹ Therefore, even though the Court believes that restitution needs to be an option, it accords a margin of appreciation to States in formulating remedies 'to assess the practicalities, priorities and conflicting interests on a domestic level even in a situation such as that pertaining in the northern part of Cyprus.'¹³⁰ Thus, the Court for once took into consideration the dimensions of the Cyprus problem and the individual rights of the

¹²⁵ *Demopoulos v Turkey* (n 5) para 128.

¹²⁶ *Ibid*, para 114.

¹²⁷ *Ibid*, paras 115-117. See Rhodri C Williams, 'Note on ECtHR Decision in *Demopoulos v Turkey*' (*TerraNullius*, 20 October 2010) <https://terra0nullius.wordpress.com/2010/10/20/note-on-ecthr-decision-in-demopoulos-v-turkey/#_edn41> accessed 23 July 2015.

¹²⁸ *Demopoulos v Turkey* (n 5) paras 133 and 136-137.

¹²⁹ *Ibid*, para 111.

¹³⁰ *Ibid*, paras 118-119. See also Williams (n 13).

Turkish Cypriots; indirectly, the Court assisted with the exercise of the right of secession of the Turkish Cypriots, even though it is not obliged to do so according to Beran.

Thus, even though the Court rejected the ‘global exchange’ idea on the grounds that the TRNC is an illegitimate State, it chose to *recognise* the government of this so-called illegitimate State simply because its recognition would in the long-run benefit the Court itself. This implies that in sensitive matters as such, the Court is free to behave as it sees fit. As a result, the ECtHR has overtly rejected the Greek Cypriot belief that restitution should only be refused in circumstances of ‘material impossibility’.¹³¹ The restrictions on the exercise of property rights inflicted by the IPC mechanism are considered justified in order to guard rights at the individual level-the current occupiers of the claimed property- but not at the collective level-the entire Turkish Cypriot community. For this reason, the *Demopoulos* ruling resembles the ECtHR’s earlier *Loizidou* decision.¹³²

The Greek Cypriot community believes that the jurisprudence obligated them to surrender to the legal control of the illegitimate regime on the basis of the ‘Namibia’ rule. Loucaides admits that *fait accompli*¹³³ via the passage of time creates situations that are materially impossible to reverse; yet, he insists that ‘...the law should retain as much and as long as possible its constructive role as an instrument to deter or avert the prevalence of force over justice.’¹³⁴ The indisputable international law principle ‘*Ex injuria jus non oritur*’¹³⁵ will not allow the ‘forcible’ transfer of populations and the ‘implantation of settlers’. Loucaides claims that if the passage of time legalises such events then the entire purpose of law would be rendered ‘pathetic’.¹³⁶ Thus, it should not be the choice of the law to accept the continuation of such violations. After the end of the Second World War, Oppenheim proclaimed that ‘[t]here is little room for doubt that acts of deprivation of property in disregard

¹³¹ *Demopoulos v Turkey* (n 5) para 116.

¹³² The *Loizidou* decision: ‘affirmed the rights of individual claimants who had been denied access to their property, while not endorsing an extension of such rights to the collective level in the form of a blanket right of return, as has often been asserted by Greek Cypriots.’ Williams & Gürel (n 6) 23.

¹³³ (A thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept it.)

¹³⁴ GL Loucaides, *Essays on the Developing Law of Human Rights* (Martinus Nijhoff Publishers 1995).

¹³⁵ (Law does not arise from injustice.) This principle dictates that unjust acts cannot create law.

¹³⁶ Loucaides (n 134).

of International Law are incapable of creating or transferring title.’¹³⁷ This is an extremely viable point. However, in the case of Cyprus, it should not be forgotten that people were forced out of their homes, especially the Greek Cypriots, because the Turkish troops came to the island to stop the ethnic-cleansing of the Turkish Cypriots; hence, to prevent the continuation of a another more serious human rights violation.¹³⁸ Thus, this grave suffering endured by the Turkish Cypriot community needs to be taken into consideration whilst discussing the Cypriot property issue. Furthermore, as Beran has asserted, emergency secession does not require the just division of assets of the existing State. Nevertheless, the Court has adopted Beran’s no-fault secession idea, which is subject to just division of assets (private as well as public) and arguably this is a feasible approach.

By ruling on the obligation to approach the Commission rather than the validity of any of its decisions, the court reaffirmed the shift described above, of giving broad *ex ante* effect to norms of the TRNC, rather than exceptional recognition *ex post facto* to specific acts based on these norms.¹³⁹

Ronen argues that it is incorrect for the Court to use the ‘Namibia’ doctrine in order to give effect to domestic remedies as a bar to access the ECtHR since ‘this is a stretch of the doctrine by any standard.’¹⁴⁰ He also believes that the Court has ‘confused’ the right to domestic remedies under Article 13 of the Convention with the duty to exhaust them under Article 35 of the Convention. Thus, according to Article 13, the TRNC or Turkey needs to provide remedies for potential human rights violations, and it is safe to state that the IPC does amount to a remedy that satisfies the obligation set out in this Article. Yet, the claim is that the ECtHR gave effect to the domestic remedies¹⁴¹ under the ‘Namibia’ rule as a procedural bar to international adjudication and not in order to safeguard human rights. The implication here is that the compulsion to exhaust domestic remedies is an obstacle to anyone who is seeking a remedy at the international level.¹⁴² Thence, the duty to exhaust domestic remedies does not benefit the population at large. Ronen further

¹³⁷ R Jennings and A Watts (eds), *Oppenheim’s International Law, Volume 1: Peace* (9th edn OUP 2008) 411.

¹³⁸ See JJ Preece, ‘Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms’ (1998) 20 *Human Rights Quarterly* 817.

¹³⁹ Ronen (n 56) 95.

¹⁴⁰ *Ibid.*

¹⁴¹ Under Article 35 of the Convention.

¹⁴² Ronen (n 56) 96.

contends that the Court's judgment should be read in a way that implies that the population should simply have *access* to a domestic body which will offer a domestic remedy, rather than the population should exhaust domestic remedies; this can be inferred from the statement: 'An appropriate domestic body, with access to the properties, registries and records, is clearly *the more appropriate forum* for deciding on complex matters of property ownership and valuation and assessing financial compensation.'¹⁴³

The counterargument is that the obligation to exhaust domestic remedies has not been created as a procedural bar to international adjudication, but as to give the wrongful contracting State a chance to put right the violation alleged contra them, before that allegation is submitted to Strasbourg.¹⁴⁴ In theory, if the Court has to deal with issues which are new compared to the practice in the domestic system, then it would no longer be fulfilling its destined function as a supra-national supervising body and would consequently be acting as a first instance court; *ipso facto*, the Convention system would be turning upside down, especially since the 'Interlaken Declaration' highlights that:

[T]he subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level.¹⁴⁵

The original idea behind the rule of exhaustion of domestic remedies was to accord the respondent State and its laws a level of respect and sovereignty by giving them the chance to be the primary enforcers of Convention rights; in fact, it started off as an international legal principle concerning diplomatic protection.¹⁴⁶ At the same time, by allowing the respondent State to provide for domestic remedies, the Court protects itself from case overload.

Nonetheless, these abovementioned factors do not fall within the purview of the 'Namibia' rule. The minority judges dissented in the fourth inter-state case on

¹⁴³ *Demopoulos v Turkey* (n 5) para 97.

¹⁴⁴ *Schenk v Germany* (Admissibility) App no 42541/02 (ECtHR, 9 May 2007).

¹⁴⁵ R English, 'How Do You "Exhaust Local Remedies" for the Purpose of Applying to Strasbourg?' (*UK Human Rights Blog*, 17 September 2012) <<http://ukhumanrightsblog.com/2012/09/17/how-do-you-exhaust-local-remedies-for-the-purpose-of-applying-to-strasbourg/>> accessed 3 June 2015.

¹⁴⁶ *Ibid.*

whether it was essential to give legal effect to the courts and laws of the TRNC simply because it was for the good of the local population at large; they outlined that the ‘Court should not assume too readily that it is acting for the benefit of the local population in addressing the legality of such arrangements’.¹⁴⁷ On a similar note, the ideology that the obligation to exhaust domestic remedies safeguards the sovereignty of the respondent State is only relevant when sovereignty is not denied; alternatively, there is no justification for such protection.¹⁴⁸ Meaning that, since the TRNC is not a sovereign State, its legislation cannot be given effect as a domestic remedy which needs to be exhausted prior to applying to an international tribunal; ‘...the decisions of a domestic remedial institution merit exceptional recognition *ex post facto*.’¹⁴⁹ Opposing this, it could be argued that even though the sovereignty of the TRNC has not been recognised, this self-declared Turkish Cypriot State is still internationally acknowledged as it continues to represent the interests of the Turkish Cypriots in UN led negotiations; thus, if it has a voice in other fields, the TRNC should be accorded a measure of respect by giving it the chance to rectify a wrong.¹⁵⁰ Furthermore, it should be underlined that it is Turkey and not the TRNC that is rectifying this wrong as Turkey is the State that has violated the rights of the Greek Cypriots according to the ECtHR.

Nonetheless, this entire argument can be stirred up even more by the fact that the Court stipulated in *Cardot v France*¹⁵¹ that the application of Article 35 cannot be rigid and should be without unwarranted formalism.¹⁵² Thence, it is very difficult to establish a general understating of how Article 35 should be interpreted and practiced. The enigma of Article 35 allows the Court to behave *emotionally* at times and act instinctively. The ECtHR’s pragmatic approach can be evidenced by the fact that it ignored those who questioned the subjective impartiality of the IPC since its members include Turkish military personnel appointed by the TRNC President.¹⁵³

¹⁴⁷ *Cyprus v Turkey* (Fourth Inter-state Case) (n 39), Dissenting Opinion of Judges Palm, Jungwiert, Levits, Pantiru, Kovler and Marcus-Helmons, para.102.

¹⁴⁸ Ronen (n 56) 96.

¹⁴⁹ *Ibid*, 97.

¹⁵⁰ Although the TRNC is not a sovereign state, the Turkish Cypriot community’s right to self-determination has been indirectly recognised as a result of the fact that they participate in UN sponsored negotiations.

¹⁵¹ *Cardot v France* (1991) Series A no 200.

¹⁵² English (n 145).

¹⁵³ S Smet, ‘Strasbourg Dances around the Cypriot Question’ (*Strasbourg Observers Blog*, 13 April 2010) <<http://strasbourgothers.com/2010/04/13/28/>> accessed 13 June 2013.

Some would argue that, alongside the IPC, the existence and efficiency of the legislative, executive and judicial branches of the TRNC have also been indirectly recognised as a result of this decision; it is the TRNC's Parliament, President and courts which are involved in the establishment of the IPC, 'in the appointment and dismissal of its members and in the hearing of appeals against its awards.'¹⁵⁴ Therefore, it is justifiable to assume that the Court has handled the *Demopoulos* case rather impulsively.

It would be interesting to know how the Court would have behaved if at issue were not Turkey, TRNC and Greek Cypriots but, for example, Israelis and Palestinians in East Jerusalem or even South Africa and Namibians. It is highly doubtful that the Court would have permitted the illegal regime to provide remedies for violations it committed as a result of its illegal demeanour, as this would be insulting those injured and rubbing salt into their wounds.¹⁵⁵ Though, a reaction as such would have rendered the Court ignorant to the political context of the *Demopoulos* case. Accordingly, for the first time ever, in its judgment, the ECtHR referred to the passage of time, the continuing evolution of the broader political polemic and the irreversible changes in the TRNC as important elements necessitating consideration in its legal determination.¹⁵⁶ This is an example of displaced diplomacy by the Court;

¹⁵⁴ Phoebus Athanassiou, 'The Status of the 'TRNC' through the Prism of Recent Legal Developments: Towards Furtive Recognition?' *The Cyprus Review* (2010) 22(1) 34.

¹⁵⁵ Ronen (n 56) 97.

¹⁵⁶ *Demopoulos v Turkey* (n 5) paras 83-86, 115:

'83. The Court observes that the arguments of all the parties reflect the long-standing and intense political dispute between the Republic of Cyprus and Turkey concerning the future of the island of Cyprus and the resolution of the property question.

84. In the present applications, some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once,

whether by sale, donation or inheritance.

85. Thus, the Court finds itself faced with cases 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. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.

86. The Court will proceed, in light of all the above considerations, to examine the two main branches of objections by the applicants and the intervening Government to the procedure before the IPC: firstly, whether the requirement to exhaust domestic remedies applies at all to the situation of Greek-Cypriot owners of property under the control of the "TRNC"; and then, secondly, whether or not the respondent Government in these cases have furnished a remedy in the IPC capable of providing effective redress.

which leads to one question: is such displacement a good thing? Even though only a few actors understand or practice diplomacy, it is essential to the conduct of conflict transformation. Diplomacy is a legitimate way of conducting international relations and bridging narratives.¹⁵⁷ It could be contended that both of the international courts- the ECJ and the ECtHR- have not really been diplomatic whilst handling cases arising out of this political anomaly, which has consequently contributed to setbacks in the Cyprus problem. *Demopoulos* is the first case where the ontology of the Cyprus problem has been considered by an international court. Indeed, as much as aid and alliance building, diplomacy is about toughness, perception and disagreement;¹⁵⁸ therefore, such displacement is a good thing as it is a realistic approach to the property issue in Cyprus.

The Court rightfully highlighted that:

...from a Convention perspective, property is a material commodity which can be valued and compensated for in monetary terms. If compensation is paid in accordance with the Court's case-law, there is in general no unfair balance between the parties.¹⁵⁹

The Court duly believes that the people who require the most protection are those who reside within the land which is under the illegal regime,¹⁶⁰ hence in the TRNC. In fact, this was the case in Namibia which consequently triggered the creation of the rule. Predictably, this approach has also been confronted with criticism; it has been argued that the 'Namibia' rule should be interpreted more generously so as to also

115. The applicants argued that this would allow Turkey to benefit from her illegality. The Court would answer that, from a Convention perspective, property is a material commodity which can be valued and compensated for in monetary terms. If compensation is paid in accordance with the Court's case-law, there is in general no unfair balance between the parties. Similarly, it considers that an exchange of property may be regarded as an acceptable form of redress. It is correct, as the applicants and intervening Government asserted, that the Convention should be interpreted as far as

possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*, [GC], no. 35763/97, § 60, ECHR 2001-XI); however, the Court must also have regard to its special character as a human rights treaty (amongst many authorities, *Banković and Others v. Belgium and 16 Other Contracting States* (dec.), [GC], no. 52207/99, § 57, ECHR 2001-XII). The Convention system deals, overwhelmingly, with individual applications. The present applications are cases about interferences with individual property rights, and the availability of redress therefore – they cannot be used as a vehicle for the vindication of sovereign rights or findings of breaches of international law between Contracting States.'

¹⁵⁷ See Iskra Kirova, 'Public Diplomacy and Conflict Resolution: Russia, Georgia and the EU in Abkhazia and South Ossetia' (Figueroa Press 2012) <<http://uscpublicdiplomacy.org/sites/uscpublicdiplomacy.org/files/legacy/publications/perspectives/CPDPerspectivesConflict%20Resolution.pdf>> accessed 23 July 2015.

¹⁵⁸ Robert Hutchings and Jeremi Suri, 'Introduction' in Robert Hutchings and Jeremi Suri (eds), *Foreign Policy Breakthroughs: Cases in Successful Diplomacy* (OUP 2015) 13.

¹⁵⁹ *Demopoulos v Turkey* (n 5) para 115.

¹⁶⁰ See *Baldy v Hunter*, 171 US 388 (1898) para 401.

apply to those who do not live within the TRNC but are negatively affected by the illegal regime;¹⁶¹ namely, the Greek Cypriots. However, if this argument is taken on board, restitution would be demanded and consequently, it would be to the detriment of those who live within the TRNC; they would be losing their current homes and the only people benefitting from the exception would be those living outside the illegal regime's territory. As a result, the purpose of the exception would be nullified.

The most outstanding paragraph of the *Demopoulos* decision was the one which proclaimed that it would be 'arbitrary and injudicious' for the Court to impose a duty to effect restitution which would forcibly evict many Cypriot citizens who have been living in their homes for some thirty five years, with the aim of restoring justice.¹⁶² Nonetheless, the eminent professors of international law, such as James Crawford, John Dugard, Alain Pellet and Christian Tomuschat,¹⁶³ in a joint opinion of 30 June 1999, proclaimed that it is wrong for a State which is in breach of a Convention to be permitted to buy the benefits of breaches of rules of international law having a status of *jus cogens* and thus to approve the original breach and entrench its character and outcomes, by payment of compensation.¹⁶⁴ Although this is a valid stance and it is true that compensation ignores 'justice', it lacks pragmatism and diplomacy and also ignores the infamous ontology of the Cyprus problem. The basic principle of the theory of utilitarianism states that; '[a]ctions are right to the degree that they tend to promote the greatest good for the greatest number.'¹⁶⁵ This principle defines the moral right in terms of an objective, material good. Realistically, the two Cypriot communities are not ready to live together once again; thus, demanding the return of properties is ludicrous. Compensation is a form of justice and it may be most

¹⁶¹ Ronen (n 56) 98.

¹⁶² *Demopoulos v Turkey* (n 5) para 116.

¹⁶³ Christopher Greenwood, Dieter Blumenwitz, Georges Abi-Saab, Gerhard Hafner, Francisco Orrego-Vicuna and Henry Schermers were also involved.

¹⁶⁴ C Greenwood, D Blumenwitz, G Abi-Saab, G Hafner, F Orrego-Vicuna, H Schermers, J Crawford, J Dugard, A Pellet and C Tomuschat, 'Opinion: Legal Issues Arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974' Joint Opinion, Geneva, 26-27 June 1999 <[http://www.moi.gov.cy/moi/pio/pio.nsf/All/A87E0AFB149260C3C2256D740028F4A2/\\$file/Opinion.pdf](http://www.moi.gov.cy/moi/pio/pio.nsf/All/A87E0AFB149260C3C2256D740028F4A2/$file/Opinion.pdf)> accessed 25 July 2015; see also C Meindersma, 'Legal Issues Surrounding Population Transfers in Conflict Situations' (1994) 41 *Netherlands International Legal Review* 31.

¹⁶⁵ John Stuart Mill, *Utilitarianism* (2nd revised edition, Hacking Publishing 2002).

appropriate where the re-establishment of political ties is particularly necessary.¹⁶⁶ Moreover, what is being ignored is the fact that Turkey will only be indirectly affected if restitution is demanded; the Turkish Cypriots will be paying for the price of Turkey's violation.

7.9. Taking Sides?

In its judgment, the ECtHR also referred to the political factors of the Cyprus conflict, such as the rejection of the Annan plan by 76% of the Greek Cypriot community.¹⁶⁷

The Annan Plan had provided for the property rights of Greek Cypriots to be balanced against the rights of those now living in the homes or using the land, some of them Turkish-Cypriot refugees from the south of the island, who had lost homes of their own, but many others of them Turkish settlers.¹⁶⁸

The judgment of the Court does not necessarily clarify or assess the relevance of the Annan Plan, despite the fact that it provides a detailed explanation of the provisions

¹⁶⁶ Burns H Weston, *International Claims: Post-War French Practice* (Syracuse University Press 1971).

¹⁶⁷ *Demopoulos v Turkey* (n 5) para 9.

¹⁶⁸ *Ibid*, para 10.

Para 11. Article 10 of the Annan Plan contained a detailed and complex treatment of property claims. First, in areas subject to territorial adjustment, properties would be restored to their former dispossessed owners. In areas not subject to territorial adjustment, the following regime was envisaged. Dispossessed owners (as well as institutions), who opted for compensation would receive full and effective compensation for their property on the basis of value at the time of dispossession adjusted to reflect appreciation of property values in comparable locations. Compensation would be paid in the form of guaranteed bonds and appreciation certificates.

Para 12. All other dispossessed owners had the right to reinstatement of one-third of the value and one-third of the area of their total property ownership, and to receive full and effective compensation for the remaining two-thirds. However, they had the right to reinstatement of a dwelling they had built, or in which they had lived for at least ten years, and up to one donum of adjacent land, even if this was worth more than one-third of the total value and area of their properties. Dispossessed owners could choose any of their properties for reinstatement, except for properties that had been exchanged by a current user or bought by a significant improver in accordance with the scheme. A dispossessed owner whose property could not be reinstated or who voluntarily deferred to a current user had the right to another property of equal size and value in the same municipality or village. They could also sell their entitlement to another dispossessed owner from the same place. The latter could in turn aggregate it with their own entitlement.

Para 13. Current users (defined as persons who had possession of properties of dispossessed owners as a result of an administrative decision) could apply for and would receive title of the property, if they agreed in exchange to renounce their title to a property of similar value in the other constituent state, of which they were dispossessed. Persons who owned significant improvements to properties could apply for and would receive title to such properties provided they paid for the value of the property in its original state. Furthermore, current users who were Cypriot citizens and were required to vacate property to be reinstated would not be required to do so until adequate alternative accommodation had been made available.

Para 14 Property claims would be administered by "an independent, impartial Property Board, governed by an equal number of members from each constituent state, as well as non-Cypriot members".

in the Plan regarding the property issue. Instead, the Court used the Plan in a way as to ‘measure the appropriateness’¹⁶⁹ of the IPC method. Thence, the Court adopted the ‘Annan knows best’ approach and had no compassion for the Greek Cypriots or no respect for the referendum result whilst hearing the *Demopoulos* case; to an extent its ruling implies that the state of affairs in the TRNC is seen to be accepted and irreversible. As a result, it opted to use the ‘Namibia’ exception and thus gave broad legal effect to the acts of the TRNC. In this sense, the ECtHR has tried to provide for structure changes, goal changes, context changes and overall changes in events, behaviour and communications in the Cyprus property issue in order to transform the Cyprus conflict in general. This is known as conflict transformation via juristocracy, and even though it does not always achieve the aspired objective and go in the desired direction, it helps to investigate the story of the conflict process.¹⁷⁰

According to Keohane an institution is ‘a persistent set of rules (formal and informal) that prescribe behavioural roles, constrain activity and shape expectations.’¹⁷¹ If the ECtHR is classified as an institution in accordance with Keohane’s theory, then it is capable of shaping the issues in conflict and can contribute to changes of objectives. The goal of conflict transformation is to promote changes that the parties can agree upon during negotiations. However, most of the effects of conflict transformation are indirect. A rare example of changes brought about by direct pressure is the EU’s involvement in the dispute between the Russians and the Estonians. According to the Estonian community, the EU was siding with the Russians in the fight over the rights of the Russophone minority; yet, in 1993-4 the EU’s pressure effectively provoked changes on both sides and eradicated the risk of future violence despite the fact that it did not solve the conflict *per se*.¹⁷² Interveners such as the ECtHR, the ECJ and the EU in general, are readily drawn into the conflicts they get involved with and subsequently the conflicting parties cannot

¹⁶⁹ Ronen (n 56) 97.

¹⁷⁰ It can achieve these aims better than conflict resolution methods.

¹⁷¹ RO Keohane and JS Nye, *Power and Interdependence* (4th edn Harper Collins 2011) 3.

¹⁷² ‘The Estonian government did step back from its threat to act against the towns of the North East, and the Russophone minority did step back from its threat to secede. Eventually the government made concessions in representing the rights of the Russophones to participate in local government.’ H Miall, ‘Conflict Transformation Theory and European Practice’ (Sixth Pan-European Conference on International Relations, ECPR Standing Group on International Relations, Turin 12-15 September 2007) 17.

avoid the objectives of these interveners. The proposed changes and decisions coming from these interveners become separate issues in the conflicts; thence, it is safe to state that '[t]ransformations can be malign as well as benign.'¹⁷³

It should be noted that the Court did not completely side with the TRNC in *Demopoulos*. For the first time ever, the Court referred to Turkey's status in the TRNC as an 'illegal occupation' and accentuated that its ruling did not dispute the fact that the government of the RoC is the sole legitimate government of Cyprus.¹⁷⁴ It therefore did not depreciate the 'illegality' of the TRNC. The Court did become aware of the sensitivity of legitimating the authority of the TRNC and consequently concluded its ruling by stating that it should not be interpreted as an obligation to utilise the IPC.

The applicants in *Demopoulos* tried to use their individual rights 'as a vehicle vindication for the vindication of sovereign rights or findings of breaches of international law between Contracting states.'¹⁷⁵ Interestingly, the Court reprimanded this behaviour. Usually, as long as applicants who have been victims of human rights violations do not exploit the process, their motives will not be questioned by the Court; Van Dijk *et al.* argue that the use of a complaint to advance a political objective is not in any way abuse of the ECtHR.¹⁷⁶ Thus, it could be argued that the Court's rebuke of the applicants was wrong. Additionally, the fact that the violation in *Demopoulos* is connected to the establishment of the TRNC, hence, to a breach of international law, does not lessen from it being a violation of a Convention right. So, the argument is that the ECtHR should not ignore general international law if it is of relevance and importance to the rights of the applicants, especially if the subject concerns procedural access to the court which is a human rights issue as well as an inter-state and institutional issue.¹⁷⁷

Conceivably then, the reason the Court did not deal with the vindication of breaches of international law between States was because it is incapable of solving all claims

¹⁷³ Ibid.

¹⁷⁴ *Demopoulos v Turkey* (n 5) paras 94, 96.

¹⁷⁵ Ibid, para 115.

¹⁷⁶ P Van Dijk, F Van Hoof, A Van Rijn and I Zwaak (eds), *Theory and Practice of the ECHR* (Intersentia 2006) 193.

¹⁷⁷ Ronen (n 56) 98.

that may come out of an inter-state conflict.¹⁷⁸ The Court evidently had to walk a tightrope in dealing with the *Demopoulos* case and had to present its decision whilst steering clear of making robust political statements regarding the Cyprus problem. Simply because the situation of occupation on the island is beyond the Court's competence to deal with, it wanted to forestall any claims of interference in areas where it was not welcome. Instead, the Court concentrated on fulfilling its renowned task, which is to secure the enjoyment by individuals of their unassailable human rights; the Court confirms that until the Cyprus problem is resolved, it will ensure that individuals continue to receive protection of their rights. It thus decided to adopt a pragmatic approach to this protection by proclaiming that even if the claimants do not live under the control of the TRNC, in the aim of Article 35(1) of the Convention, the IPC procedure should be treated as domestic remedies of the respondent State.¹⁷⁹

Conversely, it is crucial to mention that the Court did emphasise that claimants could opt to wait for a political solution if they do not want to exhaust the domestic remedies or if their applications have been declared inadmissible for non-exhaustion of domestic remedies.¹⁸⁰ This was another pragmatic move made by the ECtHR in order to protect its neutrality; the implication here is that the Greek Cypriots are not forced to bow down to the remedies provided for by their opponents or to acknowledge the legality of the TRNC laws. Thence, the Greek Cypriots could trigger changes via political processes. It should be noted that it is rather out of character for the Court to remind claimants that there is an alternative political course of action to legal redress. Nevertheless, the Court dramatically concluded by highlighting that if similar applications are lodged to the Court by Greek Cypriot applicants, their admissibility will be judged according to the principles established in the *Demopoulos* ruling.¹⁸¹

Claims by the conflicting parties and other actors that the Court's decisions were politically motivated, were foreseeable. The Court's decisions are habitually labelled as 'wrong' or as politically biased, whereas ideally, they should be accepted as legally binding injunctions even if they are undesired. Paradoxically, as a result of

¹⁷⁸ Ibid.

¹⁷⁹ Smet (n 153).

¹⁸⁰ *Demopoulos v Turkey* (n 5) para 128.

¹⁸¹ Smet (n 153).

the Court's efforts to withdraw itself from cases that are politically sensitive and require political settlements instead of international litigation, the negative attitudes towards the Court have augmented.¹⁸² Ironically, the then President of the RoC, Christofias, despite his anger towards the Court, was also aware that the property issue was one that had to be resolved via a settlement; he stated that 'the property issue, as well as the other aspects of the Cyprus problem, will be solved at the negotiating table'.¹⁸³ In the *Loizidou* decision, one of the dissenting judges highlighted the fact that the Court would eventually be sucked into an area that was of a purely political nature; subsequently, observers have noted that the *Demopoulos* decision represented a return of the property dispute to the political realm.¹⁸⁴

Unarguably, the Court's *Demopoulos* ruling came as a surprise to both of the Cypriot communities. One theory is that the Court may have opted to help the Turkish Cypriots simply in order to recreate equilibrium that it had disturbed as a result of the *Loizidou* line of decisions and thus regain its title as a Court which is free from politicised jurisprudence with regards to property controversies. Yet, since it finds itself burdened with a political, historical and factual complexity coming from an issue that should have been finalised by the conflict parties, the Court's application of the Convention cannot 'be either static or blind to concrete factual circumstances.'¹⁸⁵ Alternatively, its ruling would not be significant and rational.

7.10. *Demopoulos v Orams*

In the meantime, the clash between the *Demopoulos* decision and the prior ruling of *Apostolides v Orams* is difficult to ignore. So what is the relationship between these two cases? The latter decision, which has been analysed in the previous chapter, opened the way for Greek Cypriots with property in the north of the island to seek enforcement of rulings by the RoC courts contra people enjoying their property in

¹⁸² Williams & Gürel (n 6) 11.

¹⁸³ Bilge Yabancı, 'Another Crossroads in the Cyprus Conflict: New Negotiations, Hope for Change and Tough Challenges Ahead' (Research Turkey, 15 January 2014) <<http://researchturkey.org/another-crossroads-in-the-cyprus-conflict-new-negotiations-hope-for-change-and-tough-challenges-ahead/>> accessed 23 July 2015.

¹⁸⁴ A Solomou, 'Demopoulos and Others v Turkey' (2010) 104(4) American Journal of International Law 628; see also 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(5) European Law Review 720, 727.

¹⁸⁵ *Demopoulos v Turkey* (n 5) para. 85.

the TRNC via the courts of any other EU Member State.¹⁸⁶ Conversely, following the *Demopoulos* judgment, future claims brought to the Court of Justice regarding the property issue will be handled in a way that takes into account the ECtHR's decision; this will especially be the case if the EU's accession to the Convention takes place—even though this seems unlikely in light of *Opinion 2/13*.¹⁸⁷ Nevertheless, if the Union does accede¹⁸⁸ and a similar case does arise in the near future, there will no longer be a confusion stemming from the *Orams* ruling as a result of the Convention.¹⁸⁹ However, it should be noted that it is highly doubtful that the Greek Cypriots would pursue such litigations because of the costs involved.¹⁹⁰ Therefore, the conflicting parties need to reach a general consensus as to what the ECtHR's findings indicate for the resolution of the property polemic and subsequently communicate their final decision beyond the inter-state negotiations.¹⁹¹

¹⁸⁶ Case C-420/07 *Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571. For an analysis of this case, see N Lavranos, 'The ECJ and Cyprus: Keeping the Pandora Box Firmly Closed' (2009) European University Institute Working Paper 4/2009 <<http://dx.doi.org/10.2139/ssrn.1460639>> accessed 10 July 2014.

¹⁸⁷ CJEU, Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties. Opinion C 2/13. In Opinion 2/13 the Court stated that: 'The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.'

¹⁸⁸ Article 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.' If, in the opinion of the Court, the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms shall affect the Union's competences as defined in the Treaties, then the EU *cannot* accede to the ECHR. But it should be emphasised that the accession of the EU to the ECHR (which all the Member States wished for) would not affect EU competences as defined in the Treaties. Aidan O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty' (*Eutopia Law*, 18 December 2014) <<http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>> accessed 23 July 2015.

¹⁸⁹ It should be remembered that the Lisbon Treaty entered into force in December 2009, which is a few months after the ECJ handed down its ruling in the *Orams* case. For commentaries on Opinion 2/13, see Adam Lazowski and Ramses A Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 *German Law Journal* 179 <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1672>> accessed 23 July 2015; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 *German Law Journal* 213 <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1673>> accessed 23 July 2015; Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13' (2015) 16 *German Law Journal* 147 <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1670>> accessed 23 July 2015.

¹⁹⁰ International Crisis Group, 'Bridging the Property Divide' (Europe Report no 210, 2010) <<http://www.crisisgroup.org/en/regions/europe/turkey-cyprus/cyprus/210-cyprus-bridging-the-property-divide.aspx>> accessed 13 June 2013.

¹⁹¹ Williams & Gürel (n 6) 9.

Arguably, this will inform people of the steps that have been taken and the steps that are yet to be taken.¹⁹²

7.11. Setting The Parameters...

Taken as a whole, the decisions of the ECtHR aim to identify the outer limits within which the conflicting parties have a certain amount of political space to reach a consensus. Basically, the *Demopoulos* ruling eliminates the extreme demands that are found in the proposals submitted by the TRNC and the RoC regarding the property issue. In summary, the *Demopoulos* decision states that the Convention does not demand physical restitution of all claimed property as the execution of such a requirement would result in new human rights violations. More importantly, the negotiations for the political solution of the Cyprus problem need to take into account this very sensitive abovementioned fact.¹⁹³ Furthermore, the ruling highlights that the remedies compatible with the conditions of the Convention for loss of properties are compensation and exchange. Nevertheless, the Court did stipulate that a ‘global exchange and compensation scheme’ which does not encompass restitution will only be regarded as a domestic remedy for property claims if it emerges out of a negotiated solution to the Cyprus problem.¹⁹⁴

7.11.A. A Nightmare Come True-*Property Exchange in Southern Cyprus*

Prior to concluding the chapter, it is worth mentioning a ‘groundbreaking’ event that took place quite recently in Cyprus concerning the exchange of property. For the first time ever, in 2012, the RoC Government approved the exchange of property between a Greek Cypriot and a Turkish Cypriot, north and south of the island. It has been heavily emphasised by the Greek Cypriot Attorney-general, Petros Clerides, that this was a ‘special one off case’. Nonetheless, the decision of the RoC Government to transfer ownership of Turkish Cypriot property located in the south to Greek Cypriot refugee Dr Michael Tymvios and subsequently purchase the land from Tymvios, has drawn a lot of attention, especially from the TRNC.

¹⁹² Report of the UN Secretary General on his mission of good offices in Cyprus (24 November 2010) S/2010/603, para 32<http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/603> accessed 18 July 2015.

¹⁹³ *Demopoulos v Turkey* (n 5) paras 116-117.

¹⁹⁴ *Ibid*, paras 85 and 114-115.

In 2003, the ECtHR ruled in favour of Tymvios by finding Turkey liable of breaching his human rights.¹⁹⁵ By 2007, after having applied to the IPC, the claimant reached an amicable settlement with Turkey, agreeing to exchange six hundred *donums*¹⁹⁶ of land in the north for twenty-seven *donums* of Turkish Cypriot land in the south. This amicable settlement caused the Greek Cypriot government a lot of problems as the relevant land in the south now has two schools sitting on it and a few businesses. The Attorney-general advised the Land Registry in the area where the property was located-Larnaca- to refuse the transfer of the Title Deeds to Tymvios. Tymvios then filed two lawsuits at the Larnaca District Court contra the RoC for failing to authorise the transfer, while demanding one million Euros for each year they delayed the transfer. The ECtHR strengthened Tymvios' case in 2008¹⁹⁷ by endorsing the amicable settlement between him and Turkey and finding that the outcome did not violate his human rights by any means. Since that approval, the Council of Europe's Committee of Ministers has been responsible for monitoring the implementation of the decision. Tymvios even claimed that he would take the RoC Government to the ECtHR in order to nullify the 'guardianship act' in Cyprus that was preventing him from seeing the deal through. If the 'guardian' had refused to accept the Court's ruling, then it would have propelled the Greek Cypriot administration into a collision course with the Court and as a consequence with the Council of Europe.¹⁹⁸ The Greek Cypriot administration believed that such an exchange would open the floodgates and thus damage their policy on the road to a settlement. It even went as far as asking the Court to reassess the issue, and made an official call to the Greek Cypriot community to not follow in the footsteps of Tymvios.¹⁹⁹

Eventually, Greek Cypriot Interior Minister, hence the guardian, Eleni Mavrou, proposed to cabinet that the transfer be approved and that the land be bought off Tymvios for thirteen million Euros. He stipulated that these proposals were in the public interest and would definitely not 'open the door to the exchange of

¹⁹⁵ *Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey* (n 42).

¹⁹⁶ A 'donum' is 14,400 square feet. It is an Ottoman unit of area equivalent to the Greek stremma or English acre.

¹⁹⁷ *Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey* App no16163/90 (ECtHR, 22 April 2008) para 15.

¹⁹⁸ Atun (n 31).

¹⁹⁹ Ibid.

properties'²⁰⁰ between the 'Green Line'. Subsequently, he proposed a private land sale with Tymvios since expropriation would have restricted the State as regards to what it could do with the said property in the future.²⁰¹

Thence, it was confirmed that this case did not set a precedent, especially since the road to the ECtHR had been closed with the *Demopoulos* ruling. The sole reason the guardian agreed to this amicable settlement was because it had the blessing of the ECtHR and its implementation was being watched by the Council of Europe's Committee of Ministers. Interestingly, the Attorney-general simply dismissed the probability of another challenge in the local courts going all the way to Strasbourg if and when the Land Registry declines to validate the next exchange of property agreed at the IPC between a Greek and Turkish Cypriot property owner.²⁰²

Overall, this case simply indicates that this novel approach-exchange facilitated by the IPC- is actually legally possible.²⁰³ Consequently, the RoC Government will need to be able provide a solid reason to elucidate why it refuses a similar case of exchange in the future, considering it has already approved it once. The ECtHR's decision has also provided an alternative means for the Turkish Cypriots to repossess their property in the south; as mentioned earlier, since 1974, in order to repossess their properties, Turkish Cypriots, despite being EU citizens, have been forced to reside in the south. Arguably, the ECtHR has once again demonstrated via its case law, that it indirectly supports partition.

7.12. Conclusion

The critics of the 'pilot judgment procedure' tend to believe that this procedure is a self-protective reaction by the Court to an unmanageable case-load; thus, the Court has removed the load off its own shoulders and passed it on to national authorities, despite the fact that it had previously assumed jurisdiction over such matters. Nevertheless, the critics do not acknowledge that there is also a legal rationale alongside an administrative foundation to the 'pilot judgment procedure'. It should

²⁰⁰ Evmripidou (n 30).

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ The IPC 'has paid GBP 155,012,381 in total to the applicants as compensation and has ruled for exchange and compensation in two cases, for restitution in one case and for restitution and compensation in five cases. In one case it has delivered a decision for restitution after the settlement of the Cyprus issue, and in one case it has ruled for partial restitution.' Jean Christou, 'No Response yet on IPC Land-swap Deal' *Cyprus Mail* (24 April 2014) <<http://cyprus-mail.com/2014/04/24/no-response-yet-on-ipc-land-swap-deal/>> accessed 23 July 2015.

be noted that the case overload issue is not the sole reason for why the Court adopted this approach; the predominant reason was because the Court is not authorised to individually resolve ‘clone’ cases where this task rests with national authorities. In fact, it could be argued that the *Demopoulos* decision is an attempt by the ECtHR to maintain the principle of subsidiarity; hence, the belief that decisions should not be taken far from those who are directly concerned.²⁰⁴ The Court basically adopted a ‘constitutional’ justice model whilst dealing with property cases coming from Cyprus; meaning that it simply supervises them. Indeed, it is doubtful whether or not an alternative model would have functioned better.²⁰⁵

It should not be forgotten that the most imperative duty for a country that has ratified the Convention is to ensure that cases do not reach the ECtHR; the only way to do this is by taking national level measures which guarantee the respect for human rights and if unsuccessful provide domestic remedies.²⁰⁶ This obligation also implies that the claimants have right to an effective domestic remedy, which is addressed in Article 13 of the Convention and that such remedies have to be exhausted prior to approaching the Court.²⁰⁷ These rules are founded on the principle that the component national authorities have the legal duty, democratic legitimacy and the competence to avert and handle human rights violations. The doctrine of subsidiarity is built on this principle.²⁰⁸ In this light, even if there is no risk of a case overload, it would be expected of the Court to establish a novel model in order to deal with a human rights violation which has occurred repetitively in a country.

Indisputably, the application of the subsidiarity principle in Cyprus is drastically difficult. This is because property violations cannot be effectively redressed by the actions of a single national authority; in the sense that the current redress is not politically acceptable even though it meets all of the technical necessities. Thence, the only way to provide for a satisfactory domestic remedy is to bring together a vast amount of actors to participate in a web of political negotiations. In order to understand why the application of the principle of subsidiarity is complicated in Cyprus, it would be useful to refer back to the Court’s first test of the ‘pilot judgment

²⁰⁴ Williams & Gürel (n 6) 12.

²⁰⁵ Solomou (n 184) 635.

²⁰⁶ This duty is mentioned in the first Article of the Convention. It stipulates that parties ‘shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention’.

²⁰⁷ Article 35 ECHR (Admissibility criteria).

²⁰⁸ Williams & Gürel (n 6) 12.

procedures’ and compare the Cyprus case with the Polish ‘Bug River Cases’. With regards to the ‘Bug River Cases’ the ECtHR found that the Polish government’s domestic remedy, which came about as a result of the amendment of Polish legislation, was satisfactory in relation to addressing the claims of the concerned Polish nationals.²⁰⁹ In contrast, in *Demopoulos*, it was said that Turkey had provided an efficient domestic remedy via the legislative act of an illegitimate State—the TRNC. This remedy attended the claims of those Cypriots living in the internationally recognised²¹⁰ RoC which does not have control over the area where the concerned properties are found.²¹¹ The difference between *Demopoulos* and the ‘Bug River Cases’ is axiomatic; although the Court succeeded in applying the subsidiarity principle in Poland, it fails to satisfactorily do so in Cyprus despite its sincere efforts.

Therefore, even though the IPC meets the technical necessities for supplying an efficient domestic remedy, the fact that such a vast amount of actors are involved, means that the IPC’s decisions will never be as politically legitimate and as welcomed as a negotiated solution to the property issue and in general to the Cyprus problem.²¹² Even so, the ECtHR’s decision in *Demopoulos* should not be regarded as a renunciation of its duty. In actual fact, it can be defended as an ascription of responsibility in a situation where the conflicting parties had failed to respect and abide by their responsibilities ascribed by the Convention; for instance, via a negotiated solution of the conflict.²¹³ The need for a negotiated solution with which all conflicting parties will comply because they genuinely believe that it is for their best interest, has been a unceasingly highlighted since the first three inter-state applications by Cyprus contra Turkey. The European Commission of Human Rights proclaimed that:

²⁰⁹ Registrar of the European Court of Human Rights, ‘European Court closes pilot judgment procedures in Polish “rent control” cases, following introduction of compensation scheme’ Press Release No 284 (31 March 2011).

²¹⁰ Except by Turkey and the TRNC.

²¹¹ Williams & Gürel (n 6) 13.

²¹² See *Demopoulos v Turkey* (n 5) paras 89 and 92-102 for the claimants’ and the RoC’s arguments, and the Court’s reasoning on the application of the requirement of exhaustion of domestic remedies.

²¹³ *Ibid*, para 85: ‘Thus, the Court finds itself faced with cases 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.’

[T]he 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 ... intercommunal talks constitute the appropriate framework for reaching a resolution of the dispute.²¹⁴

Undeniably, the Court's *Demopoulos* ruling represents a defining moment in the course of trying to resolve the Cyprus problem as it acknowledges the democratic right of self-determination of the Turkish Cypriots; but it obviously does not end the property issue or the ongoing political 'lawfare'. Thence, the corollary of this is that a negotiated solution is the only way to ensure human rights, in relation to the property issue on the island, are upheld. As expected, the *Demopoulos* decision has been treated by the Turkish Cypriot community as a victory. Whilst on the other hand, the Greek Cypriot community has zealously criticised the Court for failing to remain impartial and for not understanding the consequences of its decision. The Greek Cypriots had desired that the *Loizidou* line of decisions would influence the resolution of the property problem by suggesting a structure governed not by property exchanges or compensation, but by restitution. The Court rubbed salt into the wounds of the Greek Cypriots by stating that restitution would not be granted simply because the current occupants of the claimed properties have rights to these properties.²¹⁵

The Court's decision to shape and then recognise the IPC as a redress mechanism is understandable in relation to its case load and also reasonable in light of the principle of subsidiarity.²¹⁶ It would not be true to state that the acceptance of the IPC as a resolution of the property issue is completely in the favour of the Turkish Cypriot and the Turkish community. Overall, it could be argued that the ECtHR's case law in general, scraps the Turkish Cypriot plan of 'global exchange and compensation' and consequently encourages the parties to negotiate. Albeit the IPC mechanism permits the Greek Cypriot property claims to be resolved via compensation, if it is regularly applied, it would be damagingly costly for Turkey;²¹⁷ the IPC has received more than

²¹⁴ Council of Europe (1979) (n 44).

²¹⁵ *Demopoulos v Turkey* (n 5) 117.

²¹⁶ Williams. & Gürel (n 6) 25.

²¹⁷ O Çilsal, A Kyriacou and F Mullen, 'The Day after III: The Cyprus Peace Dividend for Turkey and Greece' (2010) PRIO Report, PCC Paper 1/2010, 11. <<https://www.prio.org/Global/upload/Cyprus/Publications/The%20day%20after%20III.pdf>> accessed 23 July 2015. 'On the savings side, using the precedent of property cases at the European Court of Human Rights as a guide, we find that Turkey's maximum savings from property litigation

6,000 applications to date.²¹⁸ The Greek Cypriot applicants were also advised that they are not required to claim to the IPC, but that the Court would no longer entertain their property claims unless they had done so and that their sole alternative would be to ‘await a political solution.’²¹⁹

Interestingly, even if the TRNC could purchase ownership of the land in the north through the IPC mechanism, with the help of Turkey, the property issue would still not be resolved pleasingly; normalisation and compromise will only ever be achieved via a negotiated solution.²²⁰ Even though the Court’s ruling gives clarity in how to resolve property issues in the north of the island-²²¹ Greek Cypriots need to go through the IPC application process before they would be able to bring a claim to the ECtHR- much confusion continues over property rights in the south. The Greek Cypriot authorities have yet to establish their own IPC or even apply the legal principles set down by the ECtHR for all Cypriot refugees. In fact, many Greek and Turkish Cypriots are claiming that their rights to a fair legal remedy are being obstructed in southern Cyprus.²²²

Indeed, years and years of negotiations and litigations have failed to resolve the property problem in Cyprus; nonetheless, these efforts have not been pointless. Masses of ideas have been presented in order to assist the search for a solution to the problem.²²³ These negotiations, mechanisms and decisions should be treated as a form of ‘trial and error’; hence, they should be repeated and varied until a correct

could be as high as EUR 89 billion, or 20% of GDP, while based on cases at the Turkish Cypriot Property Commission, its minimum saving would be EUR 24 billion, or 5.4% of GDP.’

²¹⁸ In the vast majority of cases the remedy ordered by the IPC has been compensation for the applicant. The Exchange and Restitution remedies have been order in just a handful of cases.

Where compensation is ordered, this is paid by the Turkish government and not the new property owners.’ Worldwide Lawyers, ‘Lost Property in Northern Cyprus: The Immoveable Property Commission’ (4 May 2015) <<http://worldwidelawyers.co.uk/2015/05/04/lost-property-in-northern-cyprus-the-immovable-property-compensation-commission/>> accessed 23 July 2015.

²¹⁹ *Demopoulos v Turkey* (n 5) para 128.

²²⁰ Williams & Gürel (n 6) 25.

²²¹ How does the IPC operate? ‘The IPC assesses claims by pre-1974 owners of properties in the Northern territory of Cyprus and can make binding orders for one of the following three remedies to be granted to the Greek Cypriots who lost their homes:

- Restitution (reinstatement of the property to applicant)
- Exchange (offering an alternative property to the applicant) or
- Compensation for the loss of the property

Once a settlement has been reached, applicants are not able to make a claim in respect of their property again in the future.’ Worldwide Lawyers (n 218).

²²² Embargoed, ‘Property Issue’ <<http://www.embargoed.org/property-issue.php>> accessed 23 July 2015.

²²³ Williams & Gürel (n 6) 26.

solution is found. One thing is for sure and that is, the property problem will not be solved if it is treated ‘as a battle to be won by one side at the expense of the other.’²²⁴ It should be regarded as a multifaceted problem that is merely solvable by way of compromise and just division. The international courts need to acknowledge the sufferings endured by both of the conflicting parties; in the same way, the parties need to realise that it will be near enough impossible to address and remedy these injuries in their entirety.²²⁵ Indeed, the responsibility of political actors to negotiate a settlement that addresses the property issue in Cyprus has been a persistent theme in litigation in Strasbourg, but unfortunately not in Luxembourg. It is safe to assert that the ECtHR has been more successful in comparison to the ECJ with regards to delivering momentous decisions in relation to the property issue and actually changing the dynamics, the events, the context, the communications and the goals of the Cyprus conflict. Nonetheless, the decisions of these courts, whatever they may be, will never be effective enough to satisfactorily terminate the Cypriot property problem or other human rights violations north of the ‘Green Line’. Indeed, the Greek Cypriot property rights will be best protected via a negotiated solution instead of through continued litigation; the ECtHR will most probably agree to allow restitution as part of a negotiated settlement, but it will definitely not rule that the Convention requires such a solution. Taken as a whole, the *Demopoulos* ruling protects the interests of the Turkish Cypriots.

There are obviously merits and demerits of the judicialisation of such a sensitive issue. Individual cases concerning a ‘grand scale’ issue on the island, such as property, will highly affect the status of that existing problem. The effects of the *Demopoulos* ruling on the continuing efforts to resolve the Cyprus problem are significant. While the Court was predominantly concerned with preventing a human rights vacuum from prevailing in the north of the island pending a negotiated solution of the conflict, it was aware that its decisions would heavily impact on the terms of the negotiations. The Court’s previous decisions pushed for Turkey to acknowledge its responsibility for Convention breaches in northern Cyprus and remedy property dispossessions accordingly; however, the Court now sees itself

²²⁴ Ibid.

²²⁵ Ibid.

vindicated by the establishment of the IPC mechanism.²²⁶ Some would argue that the Court seems to be annoyed by the high cost of this accomplishment; ‘to the extent it may have encouraged the Greek Cypriot side to reject a largely human-rights compatible settlement in the form of the 2004 Annan Plan.’²²⁷ The Court’s approval of the IPC can even be read as an attempt to rearrange the equilibrium; ‘now that the Turkish Cypriot side has been shorn of the conceit that past violations are entirely negotiable, the Greek Cypriots must likewise abandon the notion that they are entirely reversible.’²²⁸ Nevertheless, the fact that one side’s needs are placed above the other side’s needs, alters the dynamics of the unresolved conflict, re-ignites and augments the animosity between the conflicting parties.

It could be argued that for the first time, the judicialisation of an issue pertaining to the Cyprus problem has actually been for the benefit of the isolated Turkish Cypriots; the Court provided a contextualised and politicised interpretation of the law and thus acknowledged the ontology of the Cyprus problem by providing a temporary solution which respects the fact that there is an ongoing political conflict on the island. Critics would argue that the Court’s decision has undermined the concept of a negotiated settlement on the island as it has advocated separation instead of reunification by giving the Turkish Cypriots the chance to permanently own the properties and land that once belonged to the Greek Cypriots in the north; hence, it has legitimised the current property allocation in Cyprus and indirectly justified a negotiated partition.²²⁹ Nevertheless, it could be contended that the Court has not put forward a concrete settlement to the property issue; it simply has tried to encourage a negotiation and the just division of assets in line with Beran’s theory of democratic self-determination. According to the Court, the IPC is effective ‘in making realistic provision for redress in the current situation of occupation that is beyond [the] Court’s competence to resolve.’²³⁰

²²⁶ *Demopoulos v Turkey* (n 5) para 108.

²²⁷ Williams (n 13).

²²⁸ Ibid.

²²⁹ William Chislett, ‘Cyprus: Time for a Negotiated Settlement?’ (2010) Real Instituto Elcano Working Paper 21/2010
<http://www.realinstitutoelcano.org/wps/wcm/connect/5a63d98043198299b21ff35cb2335b49/WP21-2010_Chislett_Cyprus_Time_Negotiated_Partition.pdf?MOD=AJPERES&CACHEID=5a63d98043198299b21ff35cb2335b49> accessed 23 July 2015.

²³⁰ *Demopoulos v Turkey* (n 5) para 127.

It is near enough impossible to prevent the judicialisation of certain aspects of the Cyprus conflict, especially since international relations and international law are effectively ‘joint disciplines’; political scientists and international lawyers have been reading and drawing on one another’s work with augmenting frequency and for a wide range of purposes.²³¹ It was about time that the international courts actually rendered a judgment that provided a temporary practical solution to one of the ‘grand issues’ within the Cyprus problem. Furthermore, the Turkish Cypriots in the north would not have acknowledged the extent of their Union citizenship rights but for the involvement of the ECtHR.

²³¹ Anne-Marie Slaughter, Andrew S Tulumello and Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law* 367 <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1381&context=scholarly_works> accessed 23 July 2015.

8. The Long Road of Shattered Dreams and Broken Promises

*'Westron wynde when wylt thou blow?'*¹

The EU's negative impact on the Cyprus problem dramatically amplified after the RoC's accession. Primarily because, the whole of Cyprus is in the EU, yet the north of the island does not fully benefit from the rights and freedoms arising out of the membership.² Secondly, the promise made by the European General Affairs Council on 26 April 2004, stating that the EU was ready and willing to reward the Turkish Cypriot community by lifting their international isolation which has been going on for decades, for playing a constructive role towards the goal of reaching a lasting settlement in Cyprus by voting in favour of the Annan Plan,³ was not kept.⁴ This broken promise is a result of the power acquired by the RoC since its accession contra the Turkish Cypriot community. Turkish Cypriots still live in economic, political and even cultural isolation and their calls for help have been repeatedly ignored.⁵ The Union is aware that while the Turkish Cypriots agreed to a settlement, they are left out of all of the EU institutions and although they are visualised as legitimate EU citizens *vis-à-vis* the RoC, they are only being represented by the Greek Cypriots.⁶ For instance, despite the fact that they are

¹ Anon, early 16th century.

² This naturally hinders the uniform application of the EU *acquis*; nonetheless, this crucial fact is ignored by the Union and analysed in a different light. The cut-off date in this chapter for the analysis of the political situation in Cyprus is 2014.

³ Dondu Sariisik, 'Nationalist Victory in Cyprus may Ease Strained Turkey-EU Ties' *Hürriyet Daily News* (Ankara, 19 April 2010) <<http://www.hurriyetdailynews.com/n.php?n=nationalist-victory-in-cyprus-to-ease-strained-turkey-eu-relations-2010-04-19>> accessed 15 July 2014.

⁴ European Commission Press Release No 8566/04 (26 April 2004), European Council, 2576th Council Meeting - General Affairs - Luxembourg <http://eur-opa.eu/rapid/press-release_PRES-04-115_en.htm> accessed 18 July 2014; see also Direnç Kanol, 'What Has Gone Wrong with the EU's Structural Foreign Policy towards the Turkish Cypriot Community?' (2011) 1(2) *Interdisciplinary Political Studies* 166.

⁵ Mensur Akgün and Sylvia Tiryaki, 'A Forgotten Promise: Ending the Isolation of Turkish Cypriots' (2010) 12(1) *Insight Turkey* 23, 24.

⁶ European Commission, 'Representation in Cyprus: Turkish Cypriot Community' (30 November 2011) <http://ec.europa.eu/cyprus/turkish_cypriots/index_en.htm> accessed 29 July 2014. Dubiously, the EU remarked that the personal rights of the Turkish Cypriots are not impeded as EU citizens, since they are also citizens of the RoC.

European citizens, Turkish Cypriots cannot directly trade with the EU.⁷ Accordingly, the two Cypriot communities have been further divided by the EU, and the Turkish Cypriot community, as a whole, is no longer willing to cooperate with the club which is unable to uphold the principle of equality in the island. If the EU eventually decides to keep its previously broken promise of direct Turkish Cypriot trade with the Member States, and consequently makes amends with the Turkish Cypriot community, it will rejuvenate the weakening talks on a Cyprus settlement. Simultaneously, this act will 'undo one of the principal knots that hamstring Europe's relationship with Turkey.'⁸ The aim of the direct trade regulation, which was first initiated in 2004, was to take the cue from the UN Secretary General and to hint to the Turkish Cypriot community that the EU no longer believed in the idea of punishing them. Paradoxically, the direct trade regulation was quickly shelved. It was then brought back on to the table by the Commission in the aftermath of the ratification of the Treaty of Lisbon in late 2009, as the Treaty offered a chance to unblock the deadlock over the direct trade regulation between the EU and northern Cyprus by giving a voice to the European Parliament on the issue; this could have been used to revitalise the comatose state of Turkey's EU accession process.⁹ Even though Turkey is habitually criticised by the EU officials for not implementing, in a non-discriminatory way, the Additional Protocol to the Ankara Agreement, her response has never changed: 'a port for a port'.¹⁰ The government of the RoC in

⁷ The Green Line Regulation sets forth the rules for trading Turkish Cypriot products over the Green Line. 'There is not one single Turkish Cypriot product on their [Greek Cypriot] shelves because of the psychological barriers. Not one single bottle,' states a report published in 2013 by the Turkish Cypriot Chamber of Commerce (KKTO), KKTO Vice President Salahi Serakinci, speaking to a group of visiting journalists from the Diplomacy Correspondents Association (DMD);

see Deniz Arslan, 'Turkish Cypriots Want Direct Trade with EU, Rapid Settlement' *Today's Zaman* (Lefkosa, 15 November 2013) <<http://www.todayszaman.com/news-331602-turkish-cypriots-want-direct-trade-with-eu-rapid-settlement.html>> accessed 15 July 2014.

⁸ Didem Akyel Collinsworth and Hugh Pope, 'The Lisbon Treaty Shines a Ray of Hope on Cyprus-Solving the EU-Turkey-Cyprus-Triangle' (International Crisis Group, 15 April 2010) <<http://www.crisisgroup.org/en/regions/europe/turkey-cyprus/cyprus/pope-akyel-the-lisbon-treaty-shines-a-ray-of-hope-on-cyprus.aspx>> accessed 15 July 2014.

⁹ Nathalie Tocci, 'The Baffling Short-sightedness in the EU-Turkey-Cyprus Triangle' (2010) 10(21) *Istituto Affari Internazionali* 1, 3 <<http://www.iai.it/pdf/DocIAI/iai1021.pdf>> accessed 28 July 2014.

¹⁰ As previously mentioned, in 1974, the government of the RoC decided to close all of the ports outside its control, i.e. in northern Cyprus, to international trade. As a response, Turkey closed all of its ports, airports and airspace to the RoC. Despite repeated calls, Turkey continues to refuse to fulfil its obligation of full non-discriminatory implementation of the Additional Protocol to the Association Agreement. Ankara wants the EU to allow a port and an airport in the Turkish Cypriot north of the island to be opened to international trade in order for it to fulfil its obligation of full non-discriminatory implementation of the Additional Protocol. As a result, in December 2006 the EU council decided not to open eight of Turkey's negotiating chapters. See European Commission Press

1974 decided to close all ports outside its control and since then the seaports in Famagusta and Kyrenia, in northern Cyprus, have been closed to all shipping;¹¹ consequently, Turkey refuses to open its ports and airspace to Greek Cypriot ships and aircraft unless the EU fulfils the commitment it made in 2004, which is to terminate the isolation of northern Cyprus and to trade directly with it.¹² For this reason, with the Treaty of Lisbon, the Commission could see some light at the end of the tunnel as it offered an opportunity to terminate this highly tiring stalemate which exists between the two Cypriot parties and has characterised the ‘unedifying Cypriotization of EU policies towards Cyprus and Turkey’¹³ since the membership of the RoC. According to the ‘Game theoretic’ model, the Cyprus conflict is ‘a sustained series of events and opportunities in bargaining where the disputants are confronted with choices of cooperative and non-cooperative behaviour.’¹⁴ As briefly mentioned in chapter 4, the Cyprus conflict is a vigorous non-cooperative game and in order to change it into a cooperative game,¹⁵ third party mediators need to offer side-payments and, or, binding agreements, as this would encourage mutual cooperation and mutual reward. It is also important that third party mediators put forward binding threats so that the two conflicting parties acknowledge the consequences of spoiling the negotiation process; ‘In the sequential bargaining that follows, there should be an effective loss function attached to the expected utility each side desires to obtain. This loss function guarantees the sides’ adherence to the rules of bargaining and prevents them from dragging out the talks.’¹⁶ However, as it stands, the EU- which is a predominant third party mediator involved in this conflict- has done nothing but deepen the problem by putting forward legal grounds -which actually have no validity- to maintain the status quo of the Turkish Cypriots.

Release No 16289/06 (11 December 2006), Council of the European Union, 2770th Council Meeting - General Affairs and External Relations - Brussels’ <http://europa.eu/rapid/press-release_PRES-06-352_en.htm?locale=en> accessed 15 July 2014.

¹¹ The airports of Geçitkale and Ercan in northern Cyprus are only recognised as legal ports of entry by Turkey and Azerbaijan.

¹² European Council on Foreign Relations, ‘European Foreign Policy Scorecard 2010/2011: Wider Europe - Bilateral relations with Turkey’ <<http://www.ecfr.eu/scorecard/2010/wider/44>> accessed 31 July 2014.

¹³ Tocci (n 9).

¹⁴ Birol A Yesilada and Ahmet Sozen, ‘Negotiating a Resolution to the Cyprus Problem: Is Potential European Union Membership a Blessing or a Curse?’ (2002) 7(2) *International Negotiation* 261, 270 <<http://academos.ro/sites/default/files/biblio-docs/837/game.pdf>> accessed 13 July 2014.

¹⁵ John C Harsanyi, *Rational Behavior and Bargaining Equilibrium in Games and Social Situations* (CUP 1989).

¹⁶ Yesilada & Sozen (n 14) 280.

Nevertheless, it should be noted that the constructive approach of the Turkish Cypriot community in the Annan Plan referendum process, did prompt sympathy in the international community. In fact, several EU and U.S. politicians and bureaucrats illuminated the fact that the Turkish Cypriots could no longer be held responsible for the deadlock that still persists on the island.

Kofi Annan also pointed out in his report to the Security Council on 28 May 2004, that all of the restrictions on the Turkish Cypriot community need to be lifted. Annan invited the members of the Council to:

[G]ive 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, not for the purposes of affording recognition or assisting secession, but as a positive contribution to the goal of reunification.¹⁷

Moreover, the European Commission back in its April 2004 Proposal for a Council Regulation invited the European Council to encourage the economic development of the Turkish Cypriot community in order to facilitate the reunification of the island and terminate the isolation of the Turkish Cypriots. Accordingly, in light of the UN policies and the EU proposals, it no longer makes sense to assert that the Greek Cypriot administration represents the whole of Cyprus. For instance, the Annan Plan referenda reflected the recognition by the UN and the EU of the right of Turkish Cypriots to decide the future state of affairs in Cyprus as equal partners; furthermore, as a consequence of the referenda, the two mediators also accepted the separate constitutive powers of the two Cypriot sides. Thus, the continued insistence on classifying the Greek Cypriot administration as the sole legal government of Cyprus goes utterly against the actuality which surfaced in the referenda that was held on both sides of the island. To continue to insist that the Greek Cypriot administration is the legal government of the RoC is a policy discrimination contra the Turkish Cypriot community and is an incongruous denial of the Union's recognition of the rights of Turkish Cypriots in its official statements both before and since the referenda.¹⁸ The 'state of necessity' principle has always been the legal ground for supporting the position taken by the Greek Cypriot administration; in order to be

¹⁷ Kaya Arslan, 'Integrating North Cyprus into the EU' (2005) *Turkish Policy Quarterly* <<http://www.euractiv.com/enlargement/integrating-north-cyprus-eu/article-152509>> accessed 18 July 2014.

¹⁸ *Ibid.*

able to raise this argument, the subsistence of an abnormal situation is a prerequisite. Arguably, since the Greek Cypriot community voted heavily against the Annan Plan and thus rebutted the framework for a comprehensive settlement of the Cyprus problem, they contributed to the maintenance of the abnormal situation on the island. As a result, the ‘state of necessity’ principle cannot be accepted as the legal ground for supporting the position adopted by the Greek Cypriot administration, post-referenda.

Undeniably, if the Greek Cypriot administration continues to be internationally recognised as the sole government of Cyprus, then the Greek Cypriots will never feel the need to put an end to the abnormal situation in Cyprus.¹⁹ Therefore, if the Union wants to stop dancing around in circles, it urgently needs to initiate an agreement of direct trade with the Turkish Cypriots. Indeed, the Union is not blind to this reality; however, since 1 May 2004, the EU has found itself in an unpleasant situation unprecedented in the history of the organisation, from which extrication is difficult. Even though the EU contributes to a more efficient application of a compromising settlement by assisting the Turkish Cypriot development and integration of the two communities, it is unable to provide the two sides of the ‘Green Line’ with motivation to pursue a solution in the near future. So, the role that the EU plays in the Cyprus problem does not facilitate the achievement of a compromising settlement. Undeniably, the membership of the RoC has created more hurdles for peace on the island and has added to the inflexibility of both Cypriot communities.²⁰

This chapter will critically analyse the policy adopted by the UN and the EU for Cyprus since the latter’s EU membership and it will highlight the political, moral and legal weaknesses of the policy. It will commence by explaining how the ‘European Solution’ is not as sweet as it sounds and continue by analysing the progression of the peace negotiations since the accession. Subsequently, it will highlight the mistakes made during the drafting of the Annan Plan and explain why the favoured ‘secret diplomacy’ approach will not bring about a settlement in Cyprus. The chapter will follow on by examining the contradictions between the Union’s will to create direct economic and trade link with the Turkish Cypriots and

¹⁹ Ibid.

²⁰ George Kyris, ‘The European Union and the Cyprus Problem: A Story of Limited Impetus’ (2012) 3(1) *Eastern Journal of European Studies* 87, 95.

the EU's legal structure. In the words of Kofi Annan: 'membership of [politically divided] Cyprus in the European Union coupled with Turkey's membership aspirations has seriously complicated future peace negotiations on the island.'²¹

8.1. The European Solution to the Cyprus Problem: *A Dream Come True?*

The 'European Solution' to the Cyprus problem used to be idolised by the majority of the Greek Cypriots.²² For many, this represented a forward looking proposal for a settlement; however, the reality is that the 'European Solution' is far from being a modern proposal. Prior to and throughout the drafting of the Annan Plan, Greek Cypriot nationalists claimed that by delaying a solution until after Cyprus joined the EU, a proposal for a settlement more favourable to the Greek Cypriot community will no doubt arise. Primarily, the nationalists insisted that once the RoC joins the EU in a divided manner, democracy will be implemented on the basis of one person, one vote; thence, the Greek Cypriots, as the majority on the island, would have political control of Cyprus' administration as a whole. Secondly, they believed that the EU would demand the full implementation of human rights on the island, and accordingly this would equate to the return of all property expropriated by the Turkish state from 1974 onwards. Thirdly, and by far the most cunning belief was that derogations from the *acquis* would not be permitted; meaning that the creation of an ethnically Turkish Cypriot federal state would be prevented as the right of freedom of settlement, which is a fundamental principle of the Union, would be fully applied.²³ Albeit the 'European Solution' has a positive connotation, it was clearly intended as a recipe for the creation of a Greek Cypriot-controlled unitary state.

Unfortunately for them, the nationalists overestimated the power of the 'European Solution'. It should be noted that it is difficult to find a political system where democracy is equated with full proportionality²⁴ and this principle can definitely not

²¹ Birol Yesilada, 'Emperor Has No Clothes: EU's Cyprus Challenge' (The Cyprus Conflict: Looking Ahead, North Cyprus, Cyprus Policy Centre, Eastern Mediterranean University, Famagusta 2007) <http://www.cypruspolicycenter.org/haber_oku.asp?haber=57> accessed 19 July 2014.

²² Post Euro Crisis, most Greek Cypriots view the EU as a disaster. See Barçın Yinanç, 'Greek Cyprus "Punished for Blackmailing Europe"' *Hürriyet Daily News* (Istanbul, 9 September 2013) <<http://www.hurriyetdailynews.com/greek-cyprus-punished-for-blackmailing-europe.aspx?pageID=238&nID=54065&NewsCatID=351?>> accessed 20 July 2014.

²³ James Ker-Lindsay, *The Cyprus Problem: What Everyone Needs To Know* (OUP 2011) 99.

²⁴ For instance, in the US Senate, all states are equally represented, even though there are huge population disparities between California and Rhode Island, for example.

be found in the EU.²⁵ Furthermore, the law does not dictate that all property will be returned to its original owners with no exceptions, since there is no such thing as an automatic right to own a property. In fact, international law states that ‘people cannot be arbitrarily deprived of their property. There must be some fair and legitimate process.’²⁶ The property issue in Cyprus has been the focal point of the peace talks for many years; the prime suggestion in order to facilitate an eventual settlement is the expropriation of property with suitable compensation. It has been strongly argued that this option is for the ultimate public good.²⁷ Finally, although the EU is a community based on legal uniformity, there is no obligation for laws to be universally applied at all times with no exceptions. Derogations are an option given to permit for greater flexibility in the application of the law, enabling Member States to take into consideration special circumstances.²⁸ In the case of Cyprus, it was too optimistic to think that the freedom of settlement would be applied automatically. Thus, unfortunately for the advocates of the ‘European Solution’, the RoC’s EU accession has not drastically changed the parameters of a solution. Since the EU does not govern the internal political structures of its Member States, the issues such as property, territory, governance and security are currently being handled in near enough the same way as they were before the accession of the RoC.²⁹

8.2. The Immediate Aftermath of the Annan Plan

The failure of the Annan Plan cast a shadow over the peace talks; nevertheless, the optimists never gave up on the paradigm of a settlement. They argued that if the two conflicting parties sat down at a table, they would be able conjure up an agreement that excludes the areas of the Annan Plan which were considered to be unviable. President Papadopoulos however, firmly rejected this idea and in January 2006 stipulated that he did not intend to rush into a novel Peace Process, especially one which was to be controlled by international mediators; he also proclaimed that future talks would not be subject to strict timeframes and would in fact be open-ended.³⁰

²⁵ Ker-Lindsay (n 23) 99.

²⁶ United Nations, The Universal Declaration of Human Rights, Article 17.

²⁷ Ker-Lindsay (n 23) 100.

²⁸ Eurofound: The European Industrial Relations Dictionary, ‘Derogation’ (March 2007)

<<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/derogation.htm>> accessed 20 July 2014.

²⁹ Ker-Lindsay (n 23) 101.

³⁰ ‘Nicosia is willing to be involved in negotiations for the solution of the Cyprus problem, with careful preparation, without arbitration and strict timeframes.’ Republic of Cyprus Press and

Papadopoulos was verbally attacked by the British Foreign Secretary, Mr. Jack Straw, during a discussion on the Cyprus problem in the House of Commons on 7 February 2006. Straw behaved in a way which was deemed to be contrary to all established diplomatic principles; the use of phrases such as, the ‘Greek Cypriot Government’ and the ‘administration of President Papadopoulos’ instead of the ‘government of the RoC’ extremely angered the Greek Cypriot community. Nevertheless, Straw continued to criticise the attitude of the government of the RoC, which he argued, could lead to permanent partition. He even went further by hinting that some countries will eventually begin to recognise the status quo on the island since the government of the RoC is slyly trying to cut all contact with the Turkish Cypriot community.³¹ Mr. Yiorgos Lillikas, the spokesman of the RoC Government, responded to Straw’s statements and described them as being provocative;

We have ascertained serious contradictions in Great Britain’s policy. On one hand, he states the willingness of Great Britain to contribute to the solution of the Cyprus problem; on the other hand, he clearly takes a biased stance in favour of the Turkish positions. With Mr Straw’s statements the proof of neutrality and objectivity are in no way safeguarded... We are determined to defend our rights but also to fight in order to safeguard the correct framework for the solution of the Cyprus problem and the correct process which will lead to the solution of the Cyprus problem.³²

Notwithstanding the antagonism, it seemed as though the Greek Cypriot strategy was in fact to delay the talks for as long as possible, maybe even until Turkey was ready to join the EU. The Greek Cypriot leader believed that Turkey would rather force the Turkish Cypriot community to accept a settlement on Greek Cypriot terms instead of facing the possibility of a veto by the Greek Cypriots. President Talat³³ sent a letter to the UN Secretary-General claiming that President Papadopoulos, in his statements to the French magazine ‘*L’Express*’ on 5 May 2006, overtly rejected the idea of a bi-zonal, bi-communal federation as it would bring to an end to the prospect of domination of Cyprus by the Greek Cypriots. In response to this claim, Mr. Lillikas argued that ‘the firmness of the President of the Republic on the issue of the bizonal,

Information Office, ‘2006: Papadopoulos-Putin Meeting – Joint Statements of Papadopoulos-Anan – 8 July Agreement – EU Freezes Six Chapters in Turkey’s Accession Course’ (2006)

<<http://www.moi.gov.cy/moi/pio/pio.nsf/6645bc8e70e73e2cc2257076004d01c1/5f2c3c733a27182dc2257838003bae7d?OpenDocument>> accessed 23 July 2014.

³¹ Ibid.

³² Ibid.

³³ The President of the TRNC at the time. Mehmet Ali Talat was inaugurated on 25 April 2005, succeeding retiring President Rauf Raif Denktaş.

bicommunal federation has been repeatedly proved'; he then invited Talat to elucidate the type of solution he wanted for the island: 'a solution of two states or of one state under a federal form.'³⁴

Nonetheless, the Greek Cypriot leader quickly came to realise that he would not be allowed to delay the peace talks for approximately fifteen years, which is necessary before Turkey would be ready to join the EU. A significant and dramatic development occurred on 8 July 2006. The UN orchestrated an agreement between Papadopoulos and Talat on the principles for future talks; this was known as the '*Gambari Process*'. Novel ideas were once again unwelcomed as the agreement reaffirmed that the unification of the island could only ever be based on the creation of a bi-zonal, bi-communal federation with political equality.³⁵ However, the two leaders did agree on the fact that the status quo was damaging both of the communities on the island.³⁶ Suppositionally, the July 2006 agreement was the 'first major statement of joint principles since the 1977 and 1979 high-level agreements.'³⁷ Still, substantially, it was no way revolutionary as it solely opened the doors to the holding of talks about the likelihood of re-commencing negotiations.³⁸ As a result, the 2006 agreement was of minimal practical importance; commentators argued that 'all sides needed to buy time and appear as if they are making progress, but deep

³⁴ Republic of Cyprus Press and Information Office (n 30).

³⁵ Ker-Lindsay (n 23) 75.

³⁶ Ibid. 'Set of Principles for future talks:
1 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.

2 Recognition of the fact that the status quo is unacceptable and that its prolongation would have negative consequences for the Turkish and Greek Cypriots.

3 Commitment to the proposition that a comprehensive settlement is both desirable and possible, and should not be further delayed.

4 Agreement to begin a process immediately, involving bi-communal discussion of issues that affect the day to day life of the people and concurrently those that concern substantive issues, both of which will contribute to a comprehensive settlement.

5 Commitment to ensure that the "right atmosphere" prevails for this process to be successful. In that connection, confidence building measures are essential, both in terms of improving the atmosphere and improving the life of all Turkish and Greek Cypriots. Also in that connection, an end must be put to the so-called "blame game". Republic of Cyprus Press and Information Office (n 29).

³⁷ Ker-Lindsay (n 23) 75.

³⁸ Its inconsequentiality was emphasised by the polemics that surfaced over the agenda for discussions and the configuration of the teams involved in these talks.

Ibid.

down their intentions are not sincere'³⁹ and therefore the agreement was nothing but a political deception.

8.3. The Perfect Solution: *Is It Just A Myth?*

Realistically, there is no recipe for a solution that will satisfy everyone's needs. The Annan Plan did not make up for the historic injustice and nor did it pay attention to the demographic, political and attitudinal characteristics; however, it did offer a future for the troublesome island and its people, especially for the Turkish Cypriot community. For instance, it was extremely flexible, as restrictions such as those on the right of return, could be softened, if not completely removed, upon the mutual demand of the Cypriots of the north and south.⁴⁰ Regrettably, a better plan will not surface in the foreseeable future.⁴¹ Certain truths cannot be overlooked; the 'no' voters complained that the Annan Plan did not allow all of the refugees to return to their villages. On the other hand, the 'no' vote has stopped a hundred thousand Cypriots from returning to their original homes. The Greek Cypriots were furious with the fact that the Annan Plan allowed nine hundred and fifty Turkish soldiers to remain on the island; yet with their negative vote, they have in actual fact *allowed* thirty five thousand Turkish soldiers to stay on the island.⁴² They complained that the Plan proposed the naturalisation of 45,000 Turkish settlers in the north; nonetheless, they gave way to more settlers from Turkey, which has consequently led to further emigration by Turkish Cypriots, as a result of rejecting the settlement.⁴³

Nevertheless, It should be noted that it is extremely doubtful that any settlement plan will achieve a simultaneous 'yes' vote by both of the Cypriot communities if another referendum is held, as security fears of both sides of the island will not be overcome concurrently. The Cyprus conflict is not simply a conflict of substantive issues, but mostly a conflict of mistrust, fear and suspicion rooted in historical hostilities. According to a 'Regression Analysis' -which is 'a statistical tool for the

³⁹ Alexander Lordos, '8 July 2006: The Unappreciated Breakthrough' (2007) *Cyprus Polls* 1, 1 <<http://www.cypuspolls.org/8JulyArticle.pdf>> accessed 20 July 2014.

⁴⁰ A north and south majority would have been required for such a change to take place.

⁴¹ Niels Kadritzke, 'Hardliner with a Long Memory Dominated the Greek Referendum Vote. Cyprus: Saying No to the Future' *Le Monde Diplomatique* (English Language edn, Paris, May 2004) <<http://mondediplo.com/2004/05/07cyprus>> accessed 20 July 2014.

⁴² *Ibid.*

⁴³ Niels Kadritzke, 'Cyprus, North and South' *Le Monde Diplomatique* (English Language edn, Paris, April 2002) <<http://mondediplo.com/2002/04/09cyprus>> accessed 21 July 2014.

investigation of relationships between variables⁴⁴ conducted by Alexandros Lordos, members of certain Greek Cypriot demographic groups are more likely to vote against the implementation of a settlement plan than others. His analysis indicated that those in the lower income categories were more inclined than others to vote 'no' in the 2004 referendum.⁴⁵ Qualitative examination has disclosed that those who belong to this demographic group are worried that real wages will decrease once an agreement is concluded because of competition in the labour market from Turkish Cypriot workers. Alas, this fear *was* reasonable as the Greek Cypriot leadership failed to effectively disclose the concerns of its people during the Annan Plan's drafting process. Thus, the critics who claim that the Annan Plan solely catered for the needs of the Turkish Cypriot community, should first question whether or not the Greek Cypriot leadership actually gave the Greek Cypriot community a voice during the drafting of the Plan.

...the Turkish Cypriot leadership asked for, and got, safeguards that investment in the north would be regulated in the first few years after a settlement, thus protecting Turkish Cypriot businessmen from a potential inrush of Greek Cypriot capital, so the Greek Cypriot leadership could have asked for equivalent temporary safeguards to protect the Greek Cypriot workforce from an inrush of Turkish Cypriot labourers.⁴⁶

Illogically, they did not hunt for such safeguards. As a result of the lack of reliable public opinion information, the sectoral agitation and fear was completely bypassed by the Greek Cypriot leadership; instead, the default Greek Cypriot official position that 'anything aiming to unify is acceptable, whilst anything aiming to be disruptive is unacceptable'⁴⁷ was the only available policy guideline. Thus, the belief was that hunting for safeguards would have caused more unnecessary hurdles in the peace process.

⁴⁴ 'It includes many techniques for modelling and analyzing several variables, when the focus is on the relationship between a dependent variable and one or more independent variables.' Alan O Sykes, 'An Introduction to Regression Analysis' (1993) Coase-Sandor Working Paper Series in Law and Economics 20/1993 <http://www.law.uchicago.edu/files/files/20.Sykes_.Regression.pdf> accessed 21 July 2014.

⁴⁵ Alexander Lordos, 'From Secret Diplomacy to Public Diplomacy: How the Annan Plan Referendum Failure Earned the Cypriot Public a Seat at the Negotiating Table' in Andrekos Varnava and Hubert Faustmann (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (IB Tauris 2009) 15.

⁴⁶ Ibid.

⁴⁷ Ibid.

As argued by Lord David Hannay,⁴⁸ a settlement on the island will come about as a result of the joint efforts of the UN, the U.S.A., and the U.K. He argued that the Peace Process is nothing other than a balancing act between the divergent mentalities and concerns of the leaders of the principal players of the conflict, namely; Greece, Turkey and Cyprus. For Lord Hannay, the fifth and final draft of the Annan Plan⁴⁹ was the epitome of an agreement as the negotiators and the outside players did their very best to ensure that all the competing influences were balanced. However, he claims that the timing has never been right for a solution as the various players have never been placed under the same amount of political pressure simultaneously, which would in turn encourage them to seal the agreement at the same time.⁵⁰ A contrasting account was provided by Claire Palley, who stringently criticises the UN's conflict transformation methods. She insists that the UN's role as a 'facilitator' was an utter facade as it acted as a 'key decision maker' in the previous settlement negotiations. Additionally, she claims that the special representatives of the U.K. and the U.S.A. solely represented the interests of Turkey. Thus, the concerns of the two Cypriot leaders were absolutely sidestepped, meaning that Annan V was an inhumane, technically impractical and a slapdash affair, all aimed at satisfying Turkey's desires rather than reuniting the two stubborn sides.⁵¹

The aim is not to analyse the two drastically different viewpoints, but to bring to light the common factual ground that exists in both of the abovementioned evaluations. Firstly, both authors have highlighted the fact that the UN was not just a note taker in the negotiations, but in fact the architect of the '*take it or leave it*' settlement proposal. Secondly, the authors have reached a consensus on how important the concerns and demands of the 'motherlands'⁵²—specifically Turkey—were during the drafting process of the Annan Plan. They both infer that the process was in effect three-sided, as the architect was receiving requests for issues to be considered in the Annan Plan from not only the Greek and Turkish Cypriots, but also

⁴⁸ He was the UK Special Representative to Cyprus until 2003.

⁴⁹The Annan Plan had undergone five revisions in order to reach its final version. The fifth revision of the Annan Plan proposed the creation of the United Cyprus Republic, covering the island of Cyprus in its entirety except for the British Sovereign Base Areas. This new country was to be a federation of two constituent states—the Greek Cypriot State and the Turkish Cypriot State—joined together by a federal government apparatus.

⁵⁰ David Hannay, *Cyprus: The Search for a Solution* (IB Tauris 2005).

⁵¹ Claire Palley, *An International Relations Debacle: The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Hart Publishing 2005).

⁵² The guarantors, Turkey and Greece, are referred to as motherlands.

from Turkey. Oddly enough, Greece chose to remain silent on most matters; even though she had the same level of influence as Turkey with regards to shaping the Plan, she opted to stay out of this playing field.⁵³ Last but not least, both authors realise-‘if not through assertion then certainly through omission’⁵⁴- that the wider Cypriot public played a very limited role in the drafting of the Plan which could have changed their lives had it been adopted.⁵⁵

8.4. Death to ‘Secret Diplomacy’!

Supposedly, the technical committees⁵⁶ and the two elderly gentlemen-who were educated in the U.K. and were driven out of power before the referendum⁵⁷- ‘that spoke on behalf of the two Cypriot communities insulated from their public within the context of a highly secretive process of international diplomacy,’⁵⁸ sufficed to represent the Cypriot people during the negotiations. Unfortunately, a ‘secret diplomacy’ model was applied to the case of Cyprus, whereby, diplomacy was carried on by the leaders of Cyprus without the knowledge and consent of the Cypriot people; arguably, it should have been a process primarily concerned with the demands of the Cypriot people, hence, a ‘public diplomacy’⁵⁹ process. The two elderly gentlemen frequently misguided the UN intermediaries regarding the genuine concerns of their people. Lord Hannay has provided interesting examples of how the two leaders misled the UN and their own people; for instance, Clerides gave up on the proposal he had made for the complete demilitarisation of Cyprus. He had been fighting for this aim passionately for public and political reasons despite the fact that the Turkish Cypriots and the Turks had vigorously opposed it. In 1999, Clerides changed his tone as he came to terms with the fact that no matter what, any solution would have to include Turkey’s right of unilateral intervention and the right for Turkish troops to stay on the island.⁶⁰ Indeed, Clerides had no other choice than to give into the Turkish demands on the security matter, as his contestation would have caused the talks to completely crumple; besides, he was obliged by the EU to display

⁵³ Lordos (n 39) 2.

⁵⁴ Ibid 3.

⁵⁵ Ibid.

⁵⁶ They were appointed to examine the financial and legal matters.

⁵⁷ President Denktaş (TRNC) and President Clerides (RoC).

⁵⁸ Lordos (n 39) 5.

⁵⁹ Public diplomacy means trying to influence public opinion in foreign states as one way of bringing pressure on the foreign governments.

See Adam Watson, *Diplomacy: The Dialogue Between States* (Psychology Press 1982).

⁶⁰ Hannay (n 50) 32.

a pacifying attitude.⁶¹ Nonetheless, Clerides knowingly gave away his own peoples' security concerns, as he was more accountable to the outside players than to his own community. This all happened within the context of a secretive process; the Greek Cypriots did not know of this compromise until the day when it was seen reflected in the Annan Plan.⁶² Accordingly, some would argue that Clerides' *selfish* trade paved the way for the rejection of the UN plan by the Greek Cypriot community.

An example of how Denktaş represented his people poorly at the negotiating table was when he claimed that cross-voting was not welcomed by the Turkish Cypriot community. The Peace Plan was subsequently shaped in accordance with this view; 'The Greek Cypriots would have liked to have had electoral arrangements that involved some cross-voting of Greek Cypriots for Turkish Cypriot candidates and vice-versa, in an attempt to get away from a two-states mentality after a settlement.'⁶³ Interestingly, Lordos conducted a survey on the issue and found that the Turkish Cypriots were in fact more eager about the idea of cross-voting than the Greek Cypriots; the Turkish Cypriots see it as an assurance that the Greek Cypriot politicians would respect their concerns within the context of the federal legislature.⁶⁴ The reason Denktaş felt the need to mislead the UN was simply because he believed that cross-voting would render his political opinions obsolete in the future and would work for the benefit of moderate Turkish Cypriot parties, such as the Republican Turkish Party. So, cross-voting was a personal abhorrence to Denktaş and not to the majority of the Turkish Cypriot community.⁶⁵

⁶¹ The reason for this is because the RoC was striving to join the EU at this point.

⁶² Lordos (n 39) 5.

⁶³ Hannay (n 50) 30.

⁶⁴ Lordos (n 39) 5.

⁶⁵ *Ibid.*

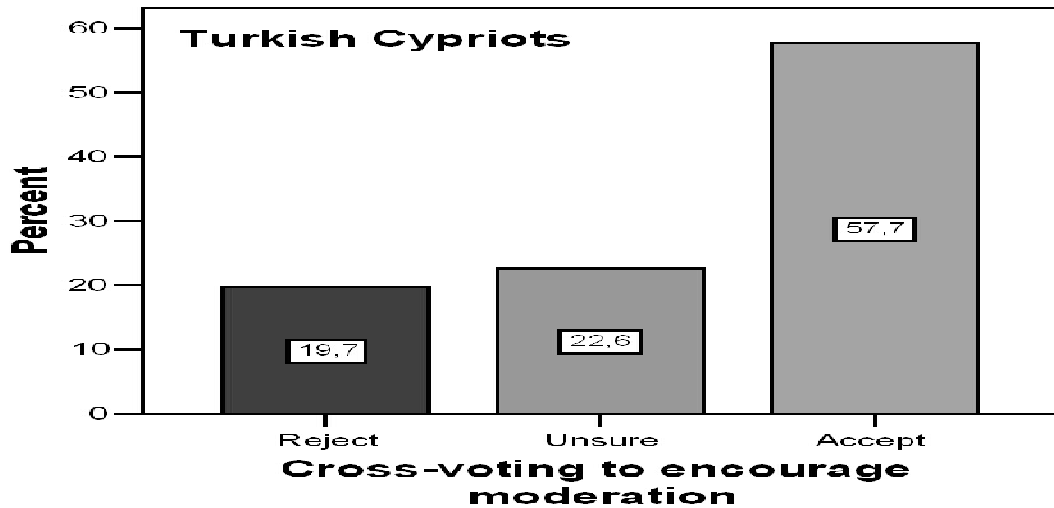


Figure 1⁶⁶

In spite of the overpoweringly negative predictions of the Annan Plan referendum in several polls, subjective evidence shows that just a couple of weeks before the vote, the outside players were rather confident that an overwhelming ‘yes’ will resound on 24 April 2004. Moreover, the intermediaries tactfully chose to close their ears to the alarm bells that were screaming approximately three months before the vote.⁶⁷ The warning of a sociologist who was commissioned by the UN to find out the opinions of both the Greek and Turkish Cypriots with regards to the Annan Plan, received a response as such: ‘Do not worry about how the Plan will fare at the referendum. “Nikos” (Nikos Anastasiades, chairman of DISY party) and “Demetris” (Demetris Christofias, chairman of AKEL party) will pull it through to a ‘Yes’’.⁶⁸ The outside players believed that these two aforementioned parties were obliged to say ‘yes’ to the Plan and consequently their *loyal* supporters, which would together equate to

⁶⁶ ‘The issue of cross-voting was tested with the Greek Cypriot and Turkish Cypriot public in an extensive inter-communal poll conducted in May 2005’.

Alexander Lordos, ‘Options for Peace: Mapping the Possibilities for a Comprehensive Settlement in Cyprus’ (2005) Cyprus Polls <<http://www.cypruspolls.org/OptionsForPeaceTextAndCharts.pdf>> accessed 22 July 2014.

⁶⁷ Lordos (n 39) 6.

⁶⁸ Ibid. The AKEL party (The Progressive Party of Working People) is a Greek Cypriot communist party. It supports an independent, demilitarised and non-aligned Cyprus, and a federal solution of the internal aspect of the Cyprus problem. It places particular emphasis on rapprochement with the Turkish Cypriots. AKEL’s policy towards the Turkish Cypriots has always been a conciliatory one. The DISY (The Democratic Rally) is a conservative and Christian-democratic political party in the RoC, led by Nicos Anastasiades, the president of the RoC. DISY is a member of the European People’s Party. The leaders of the Democratic Rally support practical solutions to solving the Cyprus problem.

sixty five percent of the Cypriot electorate, would also follow in their footsteps; *ipso facto*, the Plan would definitely pass on the south of the island.⁶⁹ In the end, AKEL did not support the Annan Plan since it received heavy criticism from its electoral base for originally supporting it. On the other hand, DISY came out strongly in favour of the Plan; however, it is interesting to note that according to exit polls, only forty percent of its electoral base followed the party's footsteps. Thence, even if both of the parties supported the Plan, their followers would not have necessarily provided that support. In a situation as sensitive as this, one's political stance is irrelevant; what matters, is the advantages and disadvantages one will personally encounter as a result of a settlement on the island and therefore one needs to behave individualistically and not cooperatively. For instance, many nationalists in the north, such as Denktas's own son, Serdar Denktas, secretly wanted this Plan to pass despite his love for his father and the TRNC; he said, 'This is a decision relating to our future. A wrong step might darken our future. That is why we would do a serious assessment...'⁷⁰In conclusion, by utterly bypassing the objections and the suggestions of the Cypriots, the Annan Plan was doomed to fail. Thus, 'secret diplomacy' does not hold the key to any solution of the Cyprus problem.

The UN intentionally refused to embrace the suggestions of the sociologist it appointed, as the extensive concerns of the Cypriot community would have disrupted the carefully constructed equilibrium between the Greek Cypriots, the Turkish Cypriots and Turkey at that stage. This was understandable as Denktas only agreed to sit at the negotiating table under very specific conditions and within a defined framework. Thus, the concerns of the Cypriot public would have most probably exceeded the negotiating boundaries of Denktas, Ankara and most importantly the boundaries of the Turkish military institution. As a result, the outside players claimed that it was 'impossible' to have even contemplated giving the Greek Cypriot public a chance to negotiate; consequently, they put all of their trust in the manipulative powers of the political parties mentioned above.⁷¹ Indeed, there is a

⁶⁹ Lordos (n 39) 6.

⁷⁰ Serdar Denktas made great contributions to the improvement of the Annan plan. Talat pointed out that the DP (The Democratic Party led by Serdar Denktas) will have a key role at the referendum and its position will determine the course of events. He said that if the DP decides for a 'yes' vote at the referendum, then the referendum process would be painless. Republic of Cyprus Press and Information Office: Turkish Press and Other Media No 63 *Hellenic Resources Network* (4 April 2005) <<http://www.hri.org/news/cyprus/tcpr/2004/04-04-05.tcpr.html>> accessed 21 July 2014.

⁷¹ Lordos (n 39) 7.

possibility that ‘public diplomacy’ could be dangerous, in the sense that, it could give way to negative discussions which would result in confidence distraction instead of confidence building.

According to the intermediaries, the best scenario would have been for the Annan Plan to have gained support from both of the Cypriot communities and Cyprus to have reunified before the EU accession. This would have also solved Turkey’s EU problem. On the other hand, the most dreaded scenario would have been for the Plan to have collapsed and for Ankara to have been blamed for this failure. *Ipsa facto*, Turkey’s demands during the drafting process of the Plan were at the top of the hierarchy of priorities, leaving the fears of the Greek Cypriots-which were classified as being uncertain and vague as the UN did not want to conduct a Public Opinion Analysis in order to clarify these concerns- right at the bottom of that triangle. For the UN and the EU, Turkey leaving the negotiating table and subsequently hindering her own EU prospects, was more of an impending threat than the risk of the Greek Cypriots voting ‘no’ in the referendum.⁷² Such were the consequences of applying a ‘secret diplomacy’ model to the Cyprus problem.

8.5. ‘Public Diplomacy’ in Cyprus: *The True Colours*

Lordos conducted an inter-communal survey in May 2005, in the form of a questionnaire. The sample was made up of one thousand Greek Cypriots and one thousand Turkish Cypriots and the data was collected through face to face interviews.⁷³ The aim of the survey was to try and acknowledge the reasons why the Cypriots voted in the way that they did during the 2004 referendum and to find solutions to the sensitive issues underlying the Cyprus problem that are jointly accepted by the two communities.⁷⁴ The two graphs below indicate the overall percent acceptance by the Cypriots of certain issues in the Annan Plan.⁷⁵

⁷² Ibid 12.

⁷³ Respective polling companies undertook the responsibility for the actual field-work.

⁷⁴ These sensitive issues include: Security, Property Rights and the Status of Turkish Settlers.

⁷⁵ Lordos (n 39).

11. Settlers in northern Cyprus are those who have immigrated from Turkey to the TRNC for purely personal reasons and family advancement and are not involved in the confrontational politics of Cyprus. The Annan Plan proposed naturalising forty-five thousand people, as well as everyone married to a Turkish Cypriot, and maintaining another five percent of the Turkish Cypriot constituent state population as immigrants.

See Neophytos Loizides, ‘Contested Migration and Settler Politics in Cyprus’ (2011) 30 *Political Geography* 391, 392 <<http://www.kent.ac.uk/politics/carc/reading-group/Loizides%20Paper.pdf>> accessed 22 July 2014.

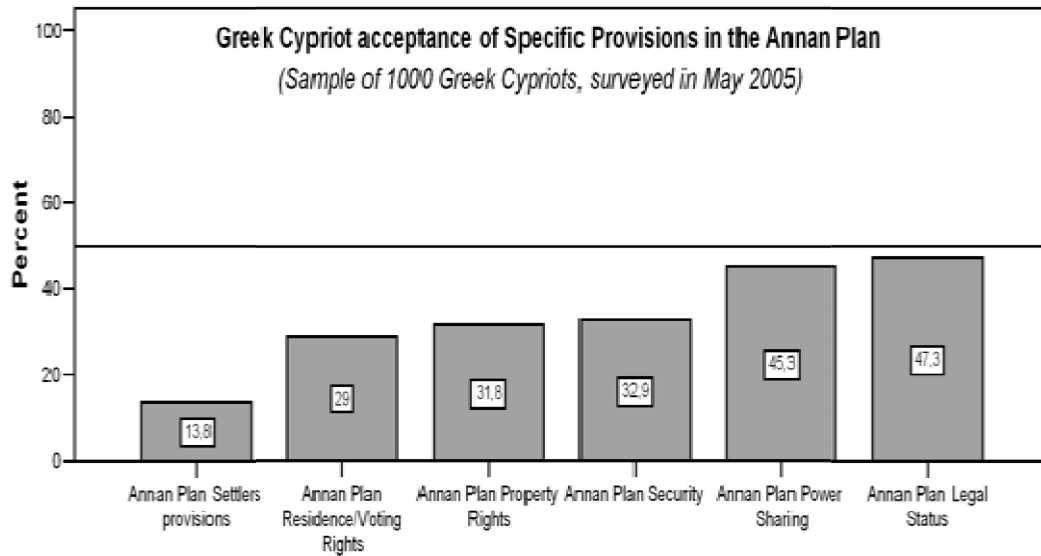


Figure 2

The results indicate that the Greek Cypriots were definitely not rejecting the Annan Plan outright; they simply found certain aspects of the Plan less acceptable than the others. Nonetheless, the extremely delicate issues of security, property, residence rights and settlers, were approved by very few of the Greek Cypriots. Unsurprisingly, these three areas in the Plan were near enough completely shaped by the demands of Turkey.⁷⁶

The Annan Plan was 'constructively ambiguous' in relation to the legal status of state affairs. The legal status section of the Plan refers to the legal continuity / legal succession of the state *vis-à-vis* the 1960 RoC Constitution. These concepts were merely touched upon in the Plan and the two Cypriot communities were given just enough evidence to 'to assume that the new state of affairs came into being in accordance with their own historical and legal thesis.'

See Alexander Lordos, 'Rational Agent or Unthinking Follower? A Survey-based Profile Analysis of Greek Cypriot and Turkish Cypriot Referendum Voters' (2006) *Cyprus Polls* 1, 8 <<http://www.cypriospolls.org/RationalOrUnthinking.pdf>> accessed 23 July 2014.

⁷⁶ Around twenty nine percent to thirty two percent approved the security, property and residence rights, whilst only fourteen percent agreed to the rights of settlers.

Ibid.

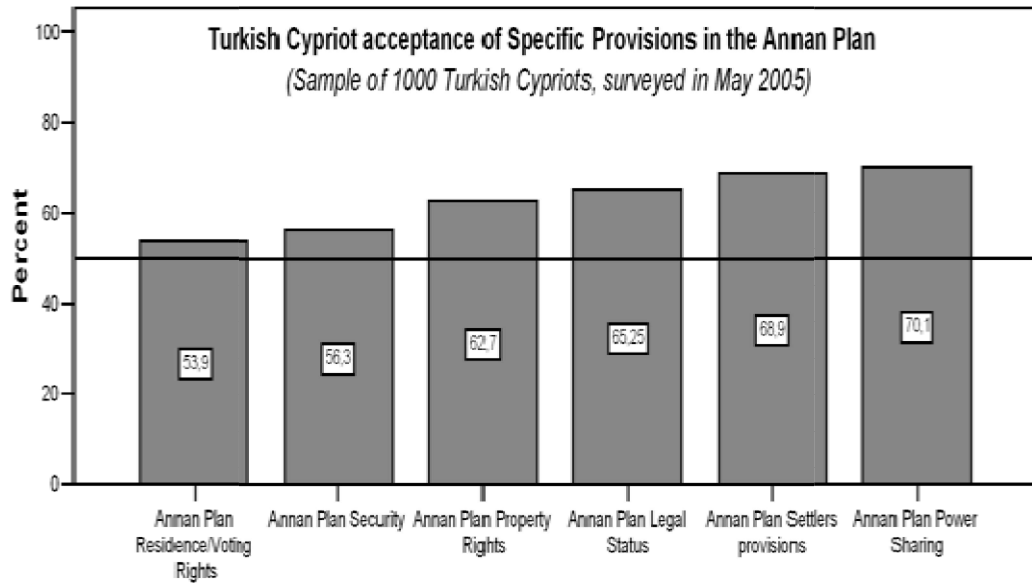


Figure 3

According to the survey, the Turkish Cypriots welcomed all of the provisions of the Plan. Nevertheless, the areas of security and residence rights were half-heartedly accepted by the sample of Turkish Cypriots.⁷⁷ So, if the provisions of these two areas of the Annan Plan did not satisfy the needs of the entire Cypriot community, then who did they aim to please? The majority of the Turkish Cypriots believe that, although the final security provisions of the Plan were Turkish Guarantees solely in place for their own protection and in order to prevent the reoccurrence of genocide and *Enosis*,⁷⁸ they are not really reasonable. The Turkish Cypriots feel threatened by Greece's continued military presence in Cyprus as it was Greece's military presence and its conspiracy with the Greek Cypriot militants that triggered off the events that led to the 1974 intervention and thence the Cyprus problem. In that sense, the security provisions only satisfied the needs of Turkey, who forbade the Turkish Cypriot leadership from negotiating the matter without Ankara, from the very first moment. It should be born in mind that Cyprus is far too important for Turkey strategically, and the provisions found in the Plan maintained the balance of power between Greece, Turkey and the U.K. in the Eastern Mediterranean. The survey explicitly shows that the two Cypriot communities still do not trust one another

⁷⁷'The Security provisions of the Plan only receive a 56% approval rating, while the Residence Rights provisions of the Plan only receive a 54% approval rating.'
Lordos (n 39) 12.

⁷⁸*Enosis* refers to the movement of various Greek communities that live outside of Greece, and for incorporation of the regions they inhabit, to the Greek state. The most well-known case is the struggle for the political union of Greece and Cyprus.

enough to be able to accept such security provisions; yet, a third party's demands take priority over the Cypriot concerns.⁷⁹

The supporters of a 'secret diplomacy' approach in the case of Cyprus would suggest bringing back the Annan Plan for a new referendum after a few subtle modifications have been made to it. Lordos, in September 2004 conducted a survey to find out the Greek Cypriot public opinion in relation to the changes that need to be made to the Annan Plan.⁸⁰ The most important feature of this survey was a rank-ordered list of changes to the Plan considered to be absolutely necessary by more than fifty five percent of the Greek Cypriots that took part.⁸¹ The results were subsequently shown to the Turkish Cypriot politicians; predictably, they completely ruled out the proposed changes since they believed that such adaptations would not gain the support of the Turkish Cypriots in a future referendum. This reaction encouraged Lordos to conduct a similar survey on the Turkish side of the island. He wanted to know which of the changes deemed essential by the Greek Cypriots would be welcomed by the Turkish Cypriots and which ones would be outright rejected.⁸² The results were surprising, yet extremely positive.

⁷⁹ Lordos (n 39) 13.

⁸⁰ Alexander Lordos, 'Can the Cyprus Problem be Solved? Understanding the Greek Cypriot Response to the UN Peace Plan for Cyprus' (2004) Cyprus Polls: An Evidence-based Study in Co-operation with CYMAR Market Research Ltd <<http://www.cypruspolls.org/GreekCypriotsReport.pdf>> accessed 22 July 2014.

⁸¹ 'The arbitrary cut-off point of 55% was chosen with the reasoning that any Plan which disregards a "55% +" concern will have great difficulty in getting through a referendum.' Lordos (n 38) 8.

⁸² *Ibid.* This survey was conducted in January 2005 in an equivalent poll of Turkish Cypriots.

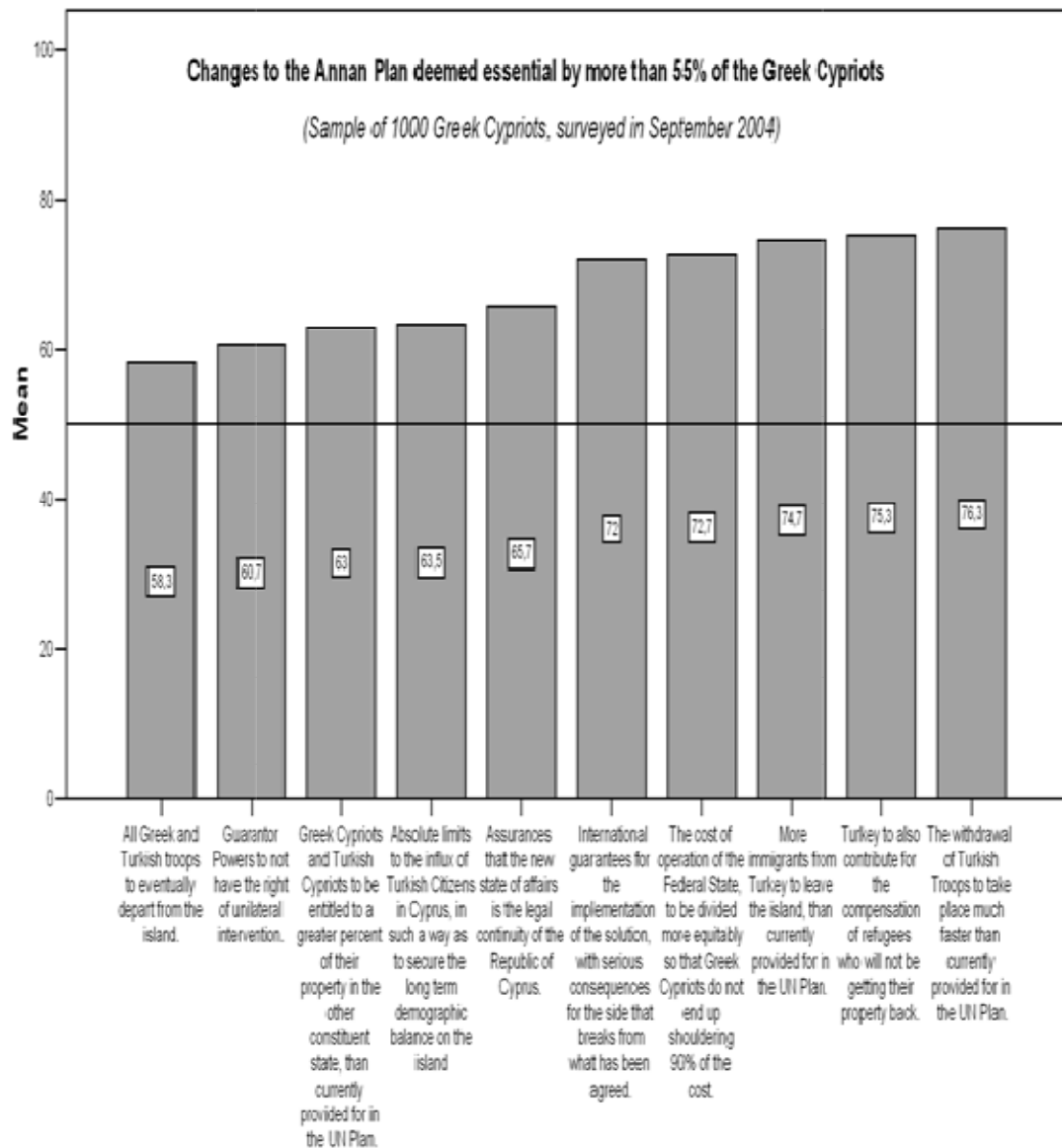


Figure 4

The Turkish Cypriots were rather lenient about the potential changes to the Annan Plan, specifically with regards to amendments that would be made to property rights, residence rights, issues of financial equity and guarantees, for the implementation of the solution. Nonetheless, as mentioned earlier on, the Turkish Cypriots appeared opposed to any one-sided concessions on security related issues and on the issue of Turkish settlers. Interestingly, they did not insist that these two issues were non-negotiable and in fact seemed to agree to the idea of approaching these problems from a different angle.⁸³ These surveys confirm that the Annan Plan cannot be used as a foundation for the next round of negotiations, as mutually accepted solutions to

⁸³ Lordos (n 66).

Nonetheless, they definitely ruled out the option of moving towards the Greek Cypriot position.

the problem areas can only come about if they are approached in a completely new way.⁸⁴

Firstly, the Cyprus problem needs a democratic solution; hence, secession also needs to be an option. Secondly, the Cyprus problem needs to be divided into sub-sections, or 'sub-problems' and solved in a way that pleases the two communities on the island; subsequently, the final settlement - which will come about after having juxtaposed the solutions to the 'sub-problems'- will be welcomed by the people of both sides.⁸⁵ Thus, a new negotiating process needs to achieve jointly welcomed solutions and work through all of the options methodically without ruling out anything, in order for the positions of the two Cypriot communities to unite; once this has been achieved, the conflicting parties will come to a general consensus regarding the foundation for a solution.⁸⁶

The diagram below, created by Lordos, is a schematic representation of a peace process founded on a 'public diplomacy' model.⁸⁷

⁸⁴ Lordos (n 39) 10.

⁸⁵ Obviously, the security issue will have to be dealt with in a different fashion, as the Cypriot people are too subjective about the matter.

⁸⁶ Lordos (n 39) 17.

⁸⁷ Ibid 19.

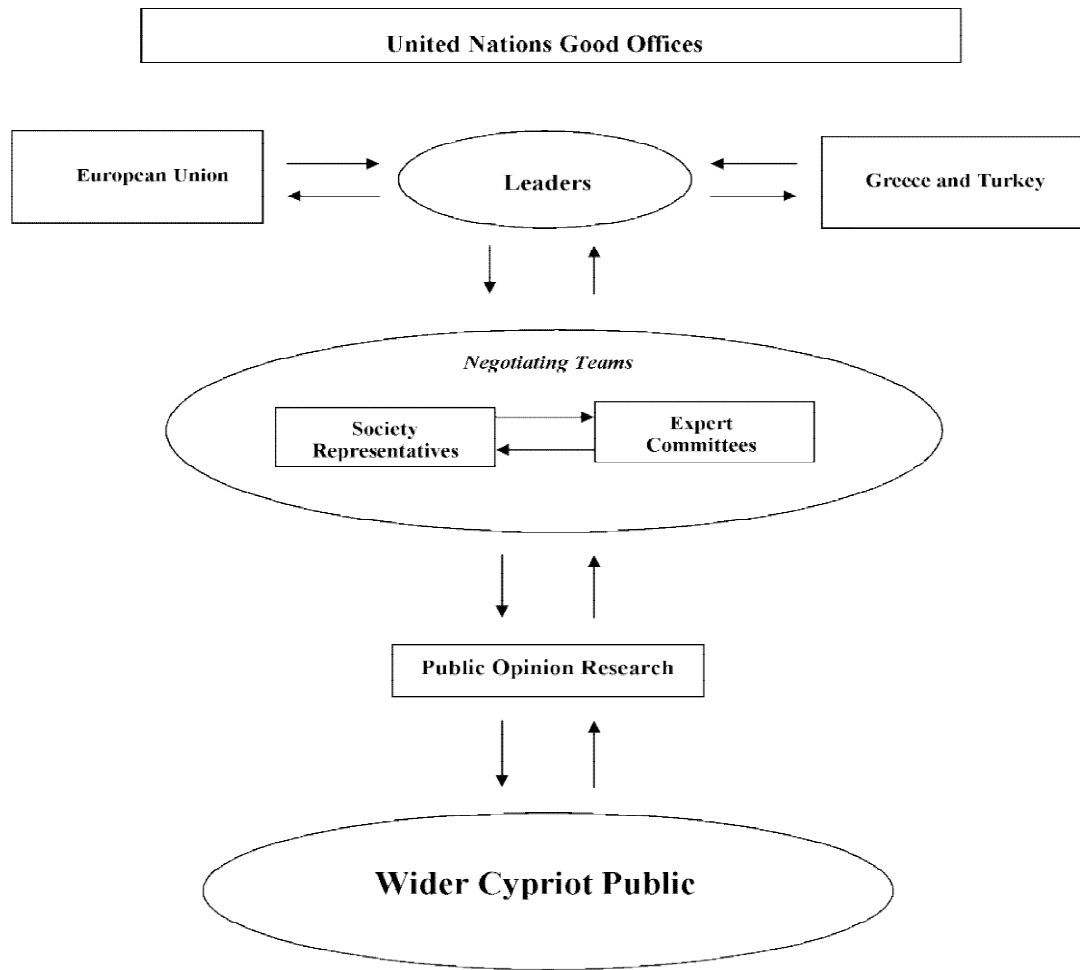


Figure 5

The top half of this representation is in essence covered by the '*Gambari Process*'. The bottom half however, starting from the society representatives, to the public opinion research and the engagement with the general public, is completely out of the equation, with no substitutes. The inference here is that the '*Gambari Process*' is yet another example of a 'secret diplomacy' process, which implicitly ignores the concerns of the Cypriot public on both sides of the island. Thus, it will not manufacture a plausible settlement. On the other hand, this interpretation can be reversed; the technical and political angles of the peace talks are sufficiently elucidated in the '*Gambari Process*' and therefore the only thing that is left, is for the Process to include the wider Cypriot public. It must be noted that there aren't any noteworthy practical boundaries that prevent the inclusion of a societal dimension into this Process. At the very least, such an inclusion will guarantee a positive vote

from both sides of the island in a new referendum, as the settlement plan will be a true reflection of what the Cypriot people need.⁸⁸

Public opinion polling was first ever used in the context of conflict resolution by Professor Colin Irwin in Northern Ireland during the years before the signing of the Good Friday Agreement;⁸⁹ he indirectly proved that conflict resolution is no longer an act of high level diplomatic negotiating and that a public opinion poll is in fact the missing piece of the political puzzle, especially when a referendum needs to be won in order for the Peace Plan to be adopted. The Northern Ireland experience demonstrates how important it is to use such polls; public opinion polls in Northern Ireland took place prior to the referendum which was won.⁹⁰ Unfortunately, a lesson will only ever be learnt the hard way; in Cyprus ‘the idea of conducting opinion polls in order to appropriately calibrate the plan and render it acceptable to the people was at the time turned down.’⁹¹ Since the failure of the Annan Plan, it has been commonly agreed, among high diplomatic circles, that reliable public opinion information is needed in order to ensure that the technical and detailed negotiations do not go to waste as a result of the lack of knowledge about what the Cypriots actually want from the future.⁹²

Deplorably, the reality does not reflect this positive portrait painted above. In hindsight, the diplomatic search for mutually acceptable compromises is a ‘walk in the woods.’⁹³ Today, the two Cypriot communities have completely distanced themselves away from one another and the highly criticised top-down model⁹⁴ of conflict resolution is still being used; undeniably, both the communities are aware of the political and technical dimension of the Cyprus problem, however, they do not understand or even know what the opposite side actually wants. At one point in time, the Greek Cypriots and the Turkish Cypriots were united -not only by flag and a government but- as a community; they *knew* one another. Now, they have nothing in

⁸⁸ Lordos (n 39) 22.

⁸⁹ Colin Irwin, *The People's Peace Process in Northern Ireland* (Palgrave Macmillan 2002).

⁹⁰ *Ibid.*

⁹¹ Lordos (n 75).

⁹² *Ibid.*

⁹³ Watson (n 59) ix.

⁹⁴ A top-down model is when an ‘impartial’ mediator proposes a settlement and local leaders sign up to it after negotiations. See Lordos (n 75) 33.

common and this has been reinforced by their lack of involvement in the peace negotiations, which would have allowed them to reconnect.⁹⁵

8.6. The Talks that Emerged in 2008

February 2008 altered the fate of the Cypriot Peace Process as the Greek Cypriots elected the leader of the Greek Cypriot communist party, (AKEL), Dimitris Christofias, as their new President. Even though Christofias had voted against the Annan Plan, he is a moderate man. In fact, two weeks into his presidency, he met with his Turkish Cypriot counterpart-Talat, and agreed to recommence the talks. Having learnt from the mistake of allowing outsiders to meddle in their internal affairs, the two leaders agreed that talks were to fall under a Cypriot-led process.⁹⁶ Unavoidably, the UN would smooth the progress of the process, but only through the assistance of the UN Secretary General's special advisor on Cyprus-Alexander Downer.⁹⁷ In the first stage, the two leaders decided to conduct the talks via six working groups covering, EU matters, the economy, property, governance, territory and security.⁹⁸ These groups were to either provide guidance to the leaders or solve the issues by themselves. By September 2008, Christofias and Talat decided to kick start regular and high-level talks, which they would be controlling. Despite the close relationship of the two leaders, the talks progressed slower than observers had anticipated.⁹⁹ The Greek Cypriot assertion that the Annan Plan could not form the foundation for discussions was the principal reason the talks were dragging. As a result, the areas the two sides had agreed to in Annan V were up for re-negotiation.

⁹⁵ It is crucial to acknowledge the fact that a new conflict will arise in Cyprus if a settlement plan based on reunification is ratified before the two communities gain the opportunity to build a bond. The UN, the EU and even the Guarantor States, have never encouraged the people of the two conflicting parties, to directly make amends. For instance, each side could have included in their national curriculum, Greek and Turkish lessons, or the two sides could have established joint institutions in order to bring together their academics and researchers. These are very basic examples which could potentially work wonders; yet, the actuality is that the foundations for a long lasting settlement have not been laid down.

Cemal Gunduz, 'Kıbrıs'ta olası bir çözüm sürdürülebilir mi?' *Kıbrıs Postası*, (Lefkosa, 4 November 2013)<http://www.kibrispostasi.com/index.php/cat/1/col/208/art/19848/PageName/KIBRIS_POSTAS> accessed 18 July 2014.

⁹⁶ Ker-Lindsay (n 23) 75.

⁹⁷ He is the ex-Australian foreign minister.

⁹⁸ Ker-Lindsay (n 23) 75.

⁹⁹ For instance, the issue of governance was considered to be a relatively easy area in comparison to the other areas, however, the leaders 'failed to make much early headway.'

Ibid 76.

Simultaneously, the pace of the talks was hindered by the Greek Cypriot statement that there could be no timetables for the negotiations.¹⁰⁰ In response to this, the Turkish Cypriot politicians decided to further complicate matters by demanding things that would be utterly unacceptable to the Greek Cypriots. One of these demands was that all mainland Turks should be given rights that are equivalent to EU citizens in Cyprus, such as the right to move to the island. The Peace Process hit further obstacles in April 2010 when Talat was voted out of office by the Turkish Cypriot community and replaced by hardliner Dr. Dervis Eroglu. By 2011 it was naive to think that a solution to the Cyprus problem would ever come about.¹⁰¹ In 2013, when Eroglu was asked about what had changed since the rejection of the Annan Plan, he answered by stating ‘almost nothing’ and he does not blame himself for the lack of development, despite his nationalism; in actual fact, he may be right. Rather logically, Eroglu argued that:

The Republic of Cyprus is recognized by the whole world. They were accepted into the EU as well. Given the circumstances, the question is: Why should they want an agreement? As you all know, after Turkey applied to join the EU, they were told to solve the Cyprus problem. But those who created the Cyprus problem, Greece and southern Cyprus, are in the EU now. None of the EU member countries told them to solve the Cyprus problem, and then to come to the EU,...As long as the embargoes continue and two of the UN Security Council's members, Russia and China, support the Greek Cypriot side, it would be difficult to reach an agreement on Cyprus that the Greek Cypriot side would accept. There is nothing to motivate or push the Greek Cypriot side for a solution.¹⁰²

8.7. Back To The Future: *The Deadlock*

The chronic Cyprus problem has recently re-occupied the agendas of the international players as a result of the discovery of natural gas reserves in the Eastern Mediterranean. Naturally, one would assume that this discovery is a boon for the region's states; however, the International Institute for Strategic Studies, indicates that by exploiting the reserves, historical rivalries and territorial disputes from the Middle East to the south of the EU will heighten.¹⁰³ This prediction is on point as the

¹⁰⁰ Ibid.

¹⁰¹ Ibid 77.

¹⁰² World Bulletin, ‘Hopes High in Cyprus Despite Disagreements’ (15 November 2013) <<http://www.worldbulletin.net/?aType=haber&ArticleID=122960>> accessed 15 July 2014.

¹⁰³ International Institute for Strategic Studies, ‘Gas Finds Complicate Eastern Mediterranean Security’ (2013) <<http://www.iiss.org/en/publications/strategic%20comments/sections/2013-a8b5/gas-finds-complicate-eastern-mediterranean-security-72d6>> accessed 20 July 2014.

most active country in the gas discovery has been Cyprus; ¹⁰⁴ the RoC claims that some hundred trillion cubic feet of gas lies off its coastline.¹⁰⁵ The RoC's willpower to proceed unilaterally in relation to the reserves has extremely frustrated Ankara, who wants to see a revenue-sharing deal with the Turkish Cypriot community. As a result of this Greek Cypriot determination, Turkey decided to intervene by signing a continental shelf delimitation agreement with the TRNC. Eroglu has referred to this agreement as 'a precautionary measure to make our Greek counterparts desist.'¹⁰⁶ The agreement permits Turkey to drill off Cyprus' southern coast, which irrefutably angers the RoC. Conversely, Turkey's now President, Erdogan, states that the RoC's exploratory drilling incapacitates the peace talks between the two Cypriot communities and he further claims that a solution to the Cyprus problem has to be addressed prior to such an exploration.¹⁰⁷ In fact, Ankara threatened sanctions contra twenty nine companies bidding to explore for oil and gas deposits in the area.¹⁰⁸ The tension is unavoidable and for this reason the outside players have insisted that the peace talks need to re-commence on the island as soon as possible.

Incontrovertibly, the two conflicting parties are currently going through an extremely sensitive period, more so as the outside players are also hungry for the abovementioned natural gas reserves. The external pressure has encouraged the two Cypriot leaders to take steps to return to the negotiating table; yet, simultaneously, the leaders are afraid of what the future holds and how this pressure is going to alter the dimension of the peace talks.¹⁰⁹

Nonetheless, despite that the newly elected Greek Cypriot President, Anastasiades,¹¹⁰ firmly stated that the south would not be blackmailed into restarting the negotiations and nor would it be pushed into sticking to a timetable, a 'Joint Declaration' was signed on 11February 2014 by the two leaders of Cyprus. This declaration has set

¹⁰⁴ Ibid.

The estimated reserves of up to 8 tcf in the Aphrodite field would more than cover Cyprus's entire energy needs for many years to come. Ibid.

¹⁰⁵ Nikolaj Nielsen, 'EU Assistance to North Cyprus Tangled in Conflict' (*EU Observer* Brussels, 24 May 2012) <<http://euobserver.com/institutional/116373>> accessed 21 July 2014.

¹⁰⁶ ISN Security Watch, 'Natural Gas Discoveries in the Eastern Med Reignite Old Rivalries' (Zurich, 26 June 2013)

<<http://oilprice.com/Energy/Natural-Gas/Natural-Gas-Discoveries-in-the-Eastern-Med-Reignite-Old-Rivalries.html>> accessed 18 July 2014.

¹⁰⁷ International Institute for Strategic Studies (n 103).

¹⁰⁸ Nielsen (n 105).

¹⁰⁹ Gunduz (n 95).

¹¹⁰ He assumed office on 28 February 2013.

out the framework of the future negotiations and has laid a solid foundation for the resumption of the talks.¹¹¹ However, even though the conflicting parties have a shared objective, the steps to be taken towards this objective are still missing; the problem is that the leaders seriously lack trust for one another and therefore they are solely focusing on points that have been negotiated and settled for years.¹¹² A series of cold exchanges took place between the parties involved in the conflict during the time preceding the signing of the declaration, to the extent that the Turkish Cypriot chief negotiator- Professor Kudret Ozersay- openly accused the Greek Cypriots of dragging their feet.¹¹³ Alexander Downer, the UN appointed Special Advisor on Cyprus, was highly criticised by President Anastasiades:

Some should not live with the illusion that they will obtain laurels of success if they think they could lead us through blackmail in to a dialogue for the sake of the dialogue...we do not live in Australia; we live in Cyprus with its own particularities....And they who are obliged to implement resolutions, should consider they should be the ones to uphold them and not promote the views of one side to expose the other.¹¹⁴

The Greek Cypriot leadership has repeatedly accused Downer for being prejudiced contra the southern side of Cyprus. Several Greek Cypriot politicians have even called for him to be replaced. One reason for this call is the lack of support Downer has given the RoC with regards to the demand by the Greek Cypriot side, for the return of Maras/Varosha,¹¹⁵ 'the walled city in Cyprus.'¹¹⁶ The Greek Cypriot leadership has stipulated that the return of this city is a precondition to opening the talks, in exchange for permitting direct trade at Famagusta port in northern Cyprus and opening up certain chapters in Turkey's EU accession. Downer visited Ankara in September 2013 and was supposed to have relayed this proposal to the Turkish

¹¹¹ Kudret Ozersay, 'Cyprus Settlement: The Missing Link' (lecture, London School of Economics and Political Science, London 9 June 2014). So far, the screening period and the conversion period have been agreed upon by the two sides. Moreover, all of the issues concerning the federal judiciary have been agreed upon. There have been convergences on EU matters such as, the representation of both sides in the EU institutions, but the nature of derogations has not been settled.

¹¹² Ibid.

¹¹³ Chris Summers, 'Cyprus Talks: Turkish Cypriots Deplore Deadlock' *BBC News Europe* (London, 27 April 2012)
<<http://www.bbc.co.uk/news/world-europe-17851456>> accessed 20 July 2014.

¹¹⁴ *LGC News*, 'Anastasiades Lashes out at Downer' (TRNC, 3 November 2013)
<<http://www.lgcnews.com/anastasiades-lashes-downer/>> accessed 22 July 2014.

¹¹⁵ Maras/Varosha is a quarter in the Cypriot city of Famagusta. It is located within Northern Cyprus. Prior to the Turkish interference of Cyprus in 1974, it was the modern touristic area of Famagusta. Its inhabitants fled in 1974, and it has remained abandoned ever since as it is guarded by Turkish Troops.

¹¹⁶ *LGC News* (n 114).

Foreign Minister, Ahmet Davutoglu; allegedly, this was not on the programme. Davutoglu later stated that Maras/Varosha would only ever be discussed in conjugation with the broader negotiation of the Cyprus problem.¹¹⁷ Furthermore, Downer has purportedly sent an email to the European Commission President, Jose Manuel Barroso, stating that the EU should not augment its role in the peace talks, as in hindsight it would be doing more harm than good. Undeniably, this is a valid concern as the EU is failing to act within the parameters. Indeed, support for an externally managed peace process is crucial, however, the third party mediators need to take active steps to guarantee that the conflicting parties are equally bound to find a solution; sadly, the EU failed to ensure that the incentives for the Greek Cypriot side to find a solution were just as great as those for the Turkish Cypriot side. The Union openly allowed the Greek Cypriots to play the system by guaranteeing membership without a solution to the problem.¹¹⁸ If the third party mediator is not going to make sure that both of the conflicting parties are bound to find a solution, then its actions will be nothing but an imposition.¹¹⁹

On the whole, the Greek Cypriot leadership does not trust Downer as he comes across as being biased against the Greek Cypriots. Unsurprisingly, Anastasiades requested for a legal representative of the European Council to be appointed to the UN Good Offices in order to provide support throughout the Peace Process and to underline the limits within which a solution can be devised according to EU *acquis* and principles; in retrospect, the direct and indirect involvement of the EU in this political conflict is an assurance that the Greek Cypriot needs will be met.

The two opponents are already disagreeing over the nature of a federal Cyprus and specifically over what 'single sovereignty and single citizenship' means; hence, a framework has been set in the 'Joint Declaration', but there is no structure.¹²⁰ Early

¹¹⁷*Cyprus Mail*, 'Davutoglu Unwilling to Discuss Varosha'(Nicosia, 14 September 2013)

<<http://cyprus-mail.com/2013/09/14/davutoglu-unwilling-to-discuss-varosha/>> accessed 22 July 2014.

¹¹⁸ Richard G Whitman and Stefan Wolff, *The European Union as a Global Conflict Manager* (Routledge 2012) 65.

¹¹⁹ Nonetheless, the UN Good Offices were left somewhat confused about this email incident, as Downer has been an open supporter of the idea that broadening the talks to include outside players such as the EU, Turkey and Greece, would in fact aid the Peace Process.

Stefanos Evripidou, 'A Critical Time in the Peace Process'*Cyprus News* (Nicosia, 2 November 2013)

<<http://cyprus-mail.com/2013/11/02/a-critical-time-in-the-peace-process/>> accessed 23 July 2014.

¹²⁰ *Ibid.*

November 2013, the animosity between the leaders of the two sides resurfaced; Anastasiades accused Eroglu of being arrogant as a result of his demands and Eroglu responded by stating that he is simply defending the rights of the Turkish Cypriot community.¹²¹ Moreover, a rather worrying fact surfaced during this polemic; Anastasiades had made these accusations against the Turkish Cypriot President following his visit to the EOKA¹²² House:

It seems that Mr Anastasiades is not pleased with my [Eroglu's] insistence on our sovereignty and the continuation of Turkey's active and effective guarantee. It is obvious that Anastasiades is continuing to evaluate the EOKA ideology and today, he also dreaming about taking us back to the pre 1974 conditions.¹²³

Eroglu called on Anastasiades to acknowledge the realities in Cyprus before adopting an attitude and informed him that he will never be able to bring the Turkish Cypriot community under the Greek Cypriot sovereignty via brainwashing the Turkish Cypriots. Subsequently, he stressed that: 'We [Turkish Cypriots] will never sacrifice our political equality and equal status of the founding states.'¹²⁴ It seems as though the Peace Process that commenced in 2008 and is still continuing today, will never come to a successful end, especially since the Greek Cypriots are being encouraged to revisit the EOKA ideology.¹²⁵ In fact, it would be suicide for the Turkish Cypriots to rapidly agree to any kind of concessions during this potential new wave of nationalism in southern Cyprus.

On 10 November 2013, Prime Minister Erdogan added more fuel to the fire at a 'Turkey-EU Relations' conference in Poland, by openly stating that 'there is no country named Cyprus'. He also claimed that the 'south Cyprus Greek administration' was accepted into the Union for purely political reasons and not because it had met the Copenhagen criteria; his words were,

¹²¹ *BRT News Today* 'Eroglu's Response to Criticisms by Anastasiades' (Lefkosa, 12 November 2013) <<http://tfnorthcyprus.wordpress.com/2013/11/12/north-cyprus-brt-news-of-today-12th-november-2013/>> accessed 24 July 2014.

¹²² EOKA was a Greek Cypriot nationalist paramilitary organisation that fought a violent campaign for the end of British rule of Cyprus, as well as for self-determination and for union with Greece. It was active from 1955 until 1959.

¹²³ *BRT News Today* (n 121).

¹²⁴ *Ibid.*

¹²⁵ See Makarios Drousiotis, 'An Evaluation of the EOKA Struggle' (*Makarios Drousiotis*, 1 April 2005) <<http://www.makarios.eu/cgi-bin/hweb?-A=713&-V=english>> accessed 24 July 2014.

They do not admit it as south Cyprus. They admit it as Cyprus. There is no country named Cyprus. There is the local administration of south Cyprus. Because there is north Cyprus and a Green Line exists between them. Who is there at the Green Line? Security battalions established by the UN. Absolutely no country within the EU laws should experience security problems. That place has such an internal problem. How could you admit it? The decision is totally a political decision.¹²⁶

The spokesperson of Greece's Foreign Affairs Ministry- Konstantinos Koutras- responded to this by arguing that: 'The Turkish Prime Minister's disputing the very existence of the Republic of Cyprus should finally awaken the international community as to Turkey's true intentions regarding the Cyprus issue...'¹²⁷

Overall, the point to note is that the Greek Cypriots have not made any steps to invoke their solidarity with Turkish Cypriots since the Annan Plan referendum and the outside players have not sufficiently pressurised them to do so; analysts say that a high number of Greek Cypriots feel that 'no solution is better than a bad solution,' such as the Annan Plan.¹²⁸ Meanwhile, the Turkish Cypriots who voted for a united future and were harassed by a Turkish secret police, which is still under military control, have not been rewarded by any of the intermediaries for their bravery and pro-peace attitude. Unfortunately, the Turkish Cypriots still live in isolation because of their Greek compatriots and the lack of outside support.¹²⁹ Straw, quite comfortably said in the course of the interview that offended the Greek Cypriots, 'If the Greek Cypriot side becomes a member of the EU [in such circumstances], then they would represent only the southern part, because the island is de facto divided.' The implication here is that the Union will not leave the Turkish Cypriots in the dark if Cyprus joins the club as a divided island; he continued by

¹²⁶ Republic of Cyprus Press and Information Office: Turkish Cypriot and Turkish Media Review No 213/13 *Hellenic Resources Network* (11 November 2013) <<http://www.hri.org/news/cyprus/tcpr/2013/13-11-11.tcpr.html#01>> accessed 24 July 2014.

¹²⁷ *International New York Times*, 'Turkish PM's Comments on Cyprus Prompt Strong Response from Greek Foreign Ministry' *Kathimerini English Edition* (Athens, 12 November 2013) <http://www.ekathimerini.com/4dcgi/_w_articles_wsit1_1_12/11/2013_527426> accessed 25 July 2014.

¹²⁸ Ewen MacAskill and Helena Smith, 'New Date to be Set after Blunder over Cyprus Referendum: Vote would have Marked Anniversary of Greek Coup' *The Guardian* (Athens, 5 March 2004) <<http://www.theguardian.com/world/2004/mar/05/turkey.eu?INTCMP=ILCNETTXT3487>> accessed 28 July 2014.

¹²⁹ Niels Kadritzke, 'Cyprus: Saying No to the Future' *Le Monde Diplomatique* (English Language edn, Paris, May 2004) <<http://mondediplo.com/2004/05/07cyprus>> accessed 22 July 2014.

overtly stating that ‘The Turkish Cypriot side would not be punished. The Turkish Cypriot position would be appreciated.’¹³⁰ Alas, the reality is far from this.

According to Ozersay, the influence of the EU during the Peace Process will be extremely limited until and unless there is a set deadline in Turkey’s EU accession process. In theory, pending a settlement on the island, the European Commission has various responsibilities with regard to Cyprus, which are over and above its normal responsibilities toward a Member State. Its predominant duties are; to closely follow the negotiation process, to provide technical and political support, to directly implement the aid programme decided by the EU Member States to help the Turkish Cypriots prepare for reunification and to regularly report on the implementation of the GLR. In order to meet these responsibilities, the Commission’s Directorate-General for Enlargement has established the Task Force for the Turkish Cypriot community, which runs a European Union Programme Support Office in the Turkish Cypriot part of Nicosia;¹³¹ the Programme Support Office will act as a contact with the Turkish Cypriot community and help deliver the assistance required.¹³² Since the application of EU *acquis* and standards are suspended in the north of Cyprus, the Commission was unable to set up a delegation in the TRNC. As an alternative, it was obliged to establish a headquarters-based Task Force in southern Cyprus with a local Programme Support Office in the north. In contrast to normal delegations, the Programme Support Office has no head and thus has to defer all of its decisions back to the Commission headquarters.¹³³

Ozersay stipulates that currently there is a representative of the EU Commissioner who is also a member of Downer’s delegation, providing legal advice to the UN Cyprus team on matters related to EU *acquis*. So, the only thing that the Union has done in order to aid the situation in Cyprus since Cyprus’ membership is to send in this EU expert carrying a UN Identification card; this is exactly what President

¹³⁰ MacAskill & Smith (n 128).

¹³¹ The official office of the European Commission in Cyprus is situated in the EU House at 30 Byron Avenue, 1096 Nicosia. This office is the representation of the European Commission in Cyprus.

¹³² European Commission, ‘Enlargement: Aid Programme for the Turkish Cypriot Community’ (4 December 2013) <http://ec.europa.eu/enlargement/tenders/aid-programme-tcc/index_en.htm> accessed 26 July 2014.

¹³³ Nielsen (n 105).

Anastasiades wanted.¹³⁴Of course, the Commission is issuing reports on the implementation of the GLR and providing technical assistance, but at the bare minimum. Thus, even though the EU has the institutional capacity, it does not have the coherent political will to attempt to repair the damage it has caused by welcoming into the club a divided island.

The idea of a Cypriot-led solution has evidently failed and consequently it is time to start all over on a clean slate; Ozersay claims that 'We [Cypriots] are exhausted. Neither side believes we will be successful.'¹³⁵He suggests that an independent, neutral power should lead both sides to a settlement; however, the roadmap needs to be fixed by the two Cypriot parties.¹³⁶ With this, he implies that the UN and the EU are far from being neutral mediators as they have moved schematically in their dealings with the Cyprus problem. The missing link in the current negotiation process is this alleged roadmap which needs to be devised within a political context and not in a vacuum. For all of these years, the third party mediators have been underestimating the lack of trust between the Cypriot leaders and between the communities and thus have been drawing up roadmaps which have been ignorant to this simple fact. In addition, they did not acknowledge the danger of the lack of a mutually hurting stalemate, or even worse, they purposely ignored it. In order for there to be a settlement on the island, both of the conflicting parties need to equally feel the pain of the Cyprus problem; realistically, while there is hurt on both sides of the island, the status quo has only ever really damaged the Turkish Cypriots and consequently this makes it hard for the Greek Cypriots to share power and prosperity with the Turkish Cypriots.

The EU has done everything in its power to ensure that the Greek Cypriots do not suffer as a result of the deadlock in the peace process; it welcomed the RoC into the club in the absence of a settlement, it permitted the administration on the south of the island to represent the whole of Cyprus and speak on behalf of the Turkish Cypriot community and it gave them the authority to veto any proposals that would upgrade the status of the Turkish Cypriots. Moreover, the Greek Cypriot authorities will most

¹³⁴ He demanded for a legal representative of the European Council to be appointed to the UN Good Offices in order to provide support throughout the Peace Process. The EU will always favour a Member State over a non-member state/entity/territory, and that is why the Greek Cypriot President demanded for an EU representative to get involved in the process.

¹³⁵ Summers (n 113).

¹³⁶ Ibid.

probably acquire the power to exploit the hydrocarbon findings on the island without the consent of their Turkish Cypriot counterparts, even though they do not deny that they are the co-owners of the findings.¹³⁷ Ozersay claimed that;

If, like EU entry, Greek Cypriots are allowed by the international community to unilaterally exploit this natural resource that is agreed internationally to belong to both communities, without either the prior express consent of Turkish Cypriots or before a comprehensive settlement is found, then hydrocarbons will not help, but hinder a political solution in Cyprus.¹³⁸

Ipsa facto, why should they feel the need to share power and prosperity? The third party mediators need to decide whether or not they want to change the status quo in Cyprus as it seems as though they approve of it; if so, they need to take steps to promote the recognition of the TRNC.

As reported by the Turkish Cypriot daily, '*Halkin Sesi*' newspaper, on 11 November 2013, Turkey has in actual fact prepared a 'Plan B' for the Cyprus problem. If a solution cannot be found within the framework of the UN parameters, then the plan is 'to go outside the UN parameters and to concentrate on the two-state formula with the mentality that solution is born from the non-solution'.¹³⁹ According to the Turkish newspaper '*Hurriyet*', Ankara will carry out 'one last experience' with a possible negotiating process and if the results are negative then it will launch a rigorous diplomatic traffic in order to upgrade the TRNC international status.¹⁴⁰

Erdogan argues that the parameters on the island have been altered upon the discovery of the natural gas reserves in Cyprus' exclusive economic zone and he insists that the RoC cannot extract this natural gas. He warns that if they attempt to extract and use it, then either a novel partnership agreement with the TRNC will be needed or a discussion on the idea of two states will be initiated; alternatively, this will escalate to violence.¹⁴¹ The question that seems to surface is: if the formula of upgrading the TRNC's status was in Turkey's pocket, then why has she waited for thirty years to reveal this? Indeed, this question opens up 'Pandora's Box', but for

¹³⁷ Ozersay (n 111).

The Greek Cypriot authorities are agreeing with companies and deciding the future of the gas and the island without the consent of the Turkish Cypriots.

¹³⁸ Ibid.

¹³⁹ Republic of Cyprus Press and Information Office(n 126).

¹⁴⁰ Ankara argued that the deadline for 'Plan A', hence a potential negotiating process, was March 2014, yet nothing has changed so far.

¹⁴¹ Republic of Cyprus Press and Information Office(n 126).

the time being it can only be assumed that for the first time, Turkey has been left with no other choice but to reveal this secret.

Turkey is aware that a new partnership agreement with the TRNC will not be concluded and the peace negotiations on the island will not result in a solution due to the habitually disputed security factor in the negotiation process; consequently, the Greek Cypriots will ignore the Turkish threat and proceed with pursuing claims to hydrocarbon deposits in waters south of the island, where the treasure lies. Accordingly, the Turkish Cypriots will legally lose out on the benefits of the natural gas reserves in Cyprus. Thus, Turkey needs to ensure that the Turkish Cypriots gain some sort of international recognition, whether it is via the recognition of the TRNC or via the creation of a federal state on the island with Turkey and Greece acting as guarantors.

Erdogan probably believes that the recognition of the TRNC is more likely to happen than a federal settlement on the island, since the negotiations have failed for so long and the Greek Cypriot side does not seem to take steps forward because Turkey will not abandon its strategic interest in the island. Moreover, it could be argued that the Greek Cypriots are purposely dragging their feet at the negotiation table at a time like this, simply so they can benefit from the natural gas reserves themselves, without having to legally share it with the Turkish Cypriots. It could be assumed that once these reserves are fully exploited—which should take approximately ten years—the Greek Cypriots will be willing to sit at the table. Eroglu noted that as soon as the Greek Cypriots learned of the ‘quality and the quantity of the natural gas that would come out [of the reserves], they started to avoid the negotiation table more.’ Furthermore, Eroglu claims that since the discovery of this treasure, nationalistic views amongst the Greek Cypriots have also re-surfaced.¹⁴² Therefore, the recognition of the TRNC will be the only way for the Turkish Cypriots to obtain their half of the treasure found on the island, as a settlement in Cyprus is nothing but a romantic fantasy; Lord Hannay once rightly said, ‘Nobody ever lost money betting against a Cyprus solution.’¹⁴³

¹⁴² World Bulletin (n 102).

¹⁴³ *The Economist*, ‘The Cyprus Problem, A Glimmer of Hope: Yet Another Round of Talks to Reunify the Divided Island Begins’ (Athens, 15 February 2014)

In 1963 the marriage between the Greek and Turkish Cypriots failed horribly; the Turkish Cypriots have been living in the *garden* of their shared home for all of these years, waiting to be invited back in by their partner to arrange a completely new marriage; yet, even though the Greek Cypriots want the north back, they feign reluctance. There is ‘no time this time to feign reluctance’¹⁴⁴ as the idea of a new marriage is starting to lose its appeal in northern Cyprus.

8.8. The Wound Management Skills of the EU

Since the failure of the Annan Plan as a result of the Greek Cypriot ‘no’ vote, the Member States have desired to find ways to improve the status of the Turkish Cypriots through political and legal means but without directly recognising the TRNC.¹⁴⁵ On 26 April 2004, immediately prior to the RoC’s accession, the Council had invited the Commission to bring forward comprehensive proposals in order to enhance the economic integration of the island and improve the contact between the two conflicting parties. By July 2004, the Commission had drawn up two proposals to this end. The first proposal dealt with financial aid to northern Cyprus and the second was a proposal of a preferential regime for Turkish Cypriot goods entering the EU customs territory¹⁴⁶ and including the recognition of Turkish Cypriot Chamber of Commerce’s authority to certify origin.¹⁴⁷ The aim was to put in to practice these two regulations simultaneously. However, a proposal came from Luxembourg, which was holding the EU’s term presidency at the time, to separate the two regulations. Subsequently, President Talat refused to accept the two hundred and fifty nine million Euros worth of financial aid that was to be offered by the EU to the Turkish Cypriot community because of the separation of the direct trade regulation from this package. He argued that the financial assistance regulation alone would not be as effective without the direct trade regulation also going into force simultaneously. As a result, the financial assistance proposal was rejected in Brussels at a working session of the representatives of Member States. According to Talat,

<<http://www.economist.com/news/europe/21596573-yet-another-round-talks-reunify-divided-island-begins-glimmer-hope>> accessed 19 July 2014.

¹⁴⁴ Eddie Vedder and Matt Cameron, ‘Evacuation’ (*Pearl Jam*, 16 May 2000) <<http://pearljam.com/music/lyrics/all/all/20853/evacuation>> accessed 18 July 2014.

¹⁴⁵ Harry Anastasiou, *The Broken Olive Branch: Nationalism, Ethnic Conflict, and The Quest for Peace in Cyprus, Vol 2: Nationalism versus Europeanization* (Syracuse University Press 2008) 230. Note that the EU’s economic development efforts are directed at the Turkish Cypriot community, rather than at any geographical, political or legal entity.

¹⁴⁶ With exceptions, such as animals and animal products.

¹⁴⁷ Akyel Collinsworth & Pope (n 8).

financial aid on its own could never dress the wounds of the Turkish Cypriot community;

President Mehmet Ali Talat wishes to assure the people of “TRNC” that they must be patient a little while longer, and that despite the lack of desired changes, their desires will be realized. He also believes that Turkish Cypriots must accept the possibility that 259 million Euros worth of financial assistance offered by the European Union may be lost because of his refusal to accept the funds without implementing direct trade relations.¹⁴⁸

There are two sides of the same coin; Mr Lillikas stated that:

After many deliberations within the EU, two months ago, we had reached an agreement with a statement which would be issued by the Commissioner and which would allow the provision of the financial assistance package to the T/C [Turkish Cypriots] and would separate the discussion on trade from that on financial assistance. Twenty-four out of the twenty-five EU member countries supported this approach and the Commissioner’s proposal as well as the written statement he had prepared; and the country which prevented the taking of the decision giving the assistance to the T/C, was Great Britain, which isolated and in full opposition to the other twenty four member states blocked this decision, thus depriving the T/C of the EU economic assistance. Alone and without any support from the other 25 member states, it insisted on linking the financial assistance with the direct trade.¹⁴⁹

Thus, according to the Greek Cypriot leadership, the U.K. had hindered the development of northern Cyprus by rejecting the proposal of financial aid, even though the rejection was in line with the Turkish Cypriot side’s wishes. So, the RoC skilfully made it seem as though she was more than willing to support the advancement of northern Cyprus.¹⁵⁰ Nonetheless, the pressure to agree to the decoupling of the two regulations from within the Turkish Cypriot community augmented as they could not live with fear of losing the financial aid altogether.¹⁵¹ Eventually, this fear was eradicated as the EU Committee of Permanent

¹⁴⁸ Republic of Cyprus Press and Information Office: Turkish Press and Other Media No 123/05 *Hellenic Resources Network* (1 July 2005) <<http://www.hri.org/news/cyprus/tcpr/2005/05-07-01.tcpr.html#01>> accessed 28 July 2014.

¹⁴⁹ Republic of Cyprus Press and Information Office (n 30).

¹⁵⁰ By refusing the direct trade regulation, the RoC necessitated the separation of the two regulations. This resulted in the rejection of the aid regulation by the Turkish Cypriot leadership; thus, the RoC indirectly blocked the aid regulation.

¹⁵¹ Republic of Cyprus Press and Information Office (n 30).

Representatives reached a decision on 24 February 2006 to approve the long-delayed Aid Regulation No 389/2006¹⁵² which stipulated that:

259 million Euros earmarked for the Turkish Cypriot community in the event of a settlement, should be used 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 and on improving contact between the two communities and with the EU.

The aim of this programme is to:

- promote social and economic development in the Turkish Cypriot community (particularly rural, human-resources and regional development)
- develop and refurbish infrastructure (particularly energy, transport, environment, telecommunications and water supply)
- foster reconciliation, build confidence and support civil society
- bring the Turkish Cypriot community closer to the EU, through information and contacts between Turkish Cypriots and other EU citizens
- help the Turkish Cypriot community prepare for the implementation of EU law once a comprehensive settlement of the Cyprus issue is agreed.¹⁵³

The issue regarding the direct trade regulation was referred to discussion with changes and preconditions, which were unanimously accepted by the twenty five Member States.¹⁵⁴

¹⁵² Council Regulation (EC) 389/2006 of 2 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 L 65/5 (Regulation 389/2006).

Article 1:

The Community shall provide 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 the preparation for the *acquis communautaire*.

¹⁵³ European Commission (n 133).

¹⁵⁴ Republic of Cyprus Press and Information Office (n 30).

The explanatory memorandum attached to the Commission's proposal for a financial aid regulation elucidates that, whilst the predominant aim of financial support is the 'facilitation of the reunification of Cyprus by encouraging economic and social development,' this process also includes 'alignment with the *acquis*.'¹⁵⁵ Therefore, Article 2 of the regulation provides that:

Assistance shall be used to support, *inter alia*, preparation of legal texts aligned with the *acquis communautaire* 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 communautaire* in view of the withdrawal of its suspension in accordance with Article 1 of Protocol No 10 to the Act of Accession.¹⁵⁶

This aid project was perceived by the Turkish Cypriots as though the Union was opening twelve chapters of the EU *acquis*¹⁵⁷ for negotiations and therefore the recognition of the TRNC was near. The EU's relevance to the Turkish Cypriot community dramatically augmented as a result of these proposals, since the Union constitutes the first major international actor to bilaterally engage with the Turkish Cypriots. Despite the fact that the Cyprus problem challenges the effectiveness of EU law on the ground and the Union's conflict management abilities, the

¹⁵⁵ European Commission, 'Proposal for a Council Regulation establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community' COM (2004) 465 final.

¹⁵⁶ Article 2 of Regulation 389/2006 (n 152):

Assistance shall be used to support *inter alia*:

the promotion of social and economic development including restructuring, in particular concerning rural development, human resources development and regional development,

the development and restructuring of infrastructure, in particular in the areas of energy and transport, the environment, telecommunications and water supply,

– 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 Community scholarships,

preparation of legal texts aligned with the *acquis communautaire* for the purpose of these being immediately applicable upon the entry into force of a comprehensive settlement of the Cyprus problem,

preparation for implementation of the *acquis communautaire* in view of the withdrawal of its suspension in accordance with Article 1 of Protocol No 10 to the Act of Accession.

See also Ali Erel, 'Turkish Cypriot Community Needs to Develop a Program to Prepare for the Adaption of the *Acquis Communautaire*' (*Cyprus EU Association*) <<http://www.quickwasp.com/kab/statement022.html>> accessed 22 November 2013.

¹⁵⁷ Chapters include: free movement of capital, public procurement, company law, competition policy, financial services, agriculture and rural development, food safety, veterinary and phytosanitary policy, transport policy, statistics, social policy and employment, environment, consumer and health protection. In addition to these twelve chapters, fourteen other *acquis* chapters are eligible for consideration within this program.

Europeanisation of the Turkish Cypriot domestic arena has empowered and professionalised the quality of the Turkish Cypriot civil society.¹⁵⁸ Incidentally, the EU constitutes a ‘bridge’ between the deserted community and the international *fora*.¹⁵⁹

The abovementioned misapprehension was rapidly corrected by the EU, which stated that these negotiations will never amount to the same status of States whose candidanship has been validated.¹⁶⁰ It clarified that there is a sharp distinction between the steady alignment with the *acquis* by the authorities of northern Cyprus and the application of the *acquis* in northern Cyprus, which can only ever be done as a result of a unanimous decision of the Council under Article 1(2) of Protocol No 10.¹⁶¹ The Commission could understand why the Turkish Cypriots interpreted this project in the way that they did, as there is a degree of similarity in this context with the adoption by the EU applicant States which apply the *acquis* either *proprio motu*¹⁶² or under obligations in pre-accession instruments.¹⁶³ Therefore, it highlighted that even though such actions aim to facilitate economic integration, they definitely do not alter the rules or the territorial application of EU *acquis*.¹⁶⁴ Preambular paragraph 5 to the Regulation plainly detaches ‘exceptional and transitional’ measures to facilitate the full application of the *acquis* in northern Cyprus following a solution to the Cyprus problem, from the procedure foreseen in Protocol No 10 for the full and formal application of the law.¹⁶⁵ Thus, the EU once again underlined that the TRNC was not a ‘collocutor.’

¹⁵⁸ George Kyris, ‘Europeanization beyond Contested Statehood: The European Union and Turkish-Cypriot Civil Society’ (2013) *Journal of Common Market Studies* <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Publications/Kyris_JCMS_2013.pdf> accessed 30 July 2014.

¹⁵⁹ Kyris (n 20) 94.

¹⁶⁰ Erel (n 156).

¹⁶¹ Protocol No 10 Act of Accession 2003 [2003] OJ L 236/955.

¹⁶² (On his own impulse.)

¹⁶³ The Commission stated that ‘due to the isolation of the Turkish Cypriot community over the last years, the activities will have a strong focus on helping with *acquis* approximation, especially as regards investments to comply with European norms, inter alia, in the environmental and transport areas.’ Emine Erk, ‘Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’ (*Turkish Cypriot Human Rights Foundation*, 29 June 2009) 14 <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/turkish_cypriot_human_rights_foundation_en.pdf> accessed 20 July 2015.

¹⁶⁴ *Ibid* 13.

¹⁶⁵ *Ibid* 14.

Northern Cyprus also became a beneficiary of the TAIEX¹⁶⁶ programme in 2004, which helps the Turkish Cypriot community prepare for the implementation of EU *acquis*; it provides the Turkish side with information and updates relating to legislative issues¹⁶⁷ so that they are prepared to immediately apply the law in view of the withdrawal of its postponement.¹⁶⁸ This training- which has been based on the EU missions in northern Cyprus or Turkish Cypriot visits to Member States for the exchange of best practices-has resulted in the construction of a ‘Programme for Future Application of *Acquis*’ that relates to thirteen prioritised policy areas.¹⁶⁹ George Kyris’ research indicates that this assistance has been classified by the EU officials as being the most prominent endeavour of the Union in the Mediterranean.¹⁷⁰ The Commission’s Summary Project Fiche of 2006 evaluated the work done by TAIEX in the north and came to the conclusion that the ‘administrative capacity is low throughout the community, knowledge of the *acquis* is limited and therefore the absorption capacity is similarly limited.’¹⁷¹ Seemingly, the Commission was disappointed with the lack of development and re-emphasised the requirement for extensive preliminary work to be done by both the Turkish Cypriots and the EU together in a strategic manner.¹⁷² The Commission believed that with this strategic approach, the Turkish Cypriot community will come closer to the EU and the legal and economical differences which exist between the south and the north of the island will be eradicated; such a strategy could even hasten an early solution to the conflict.¹⁷³

It should be noted that this strategic approach has only been moderately espoused by the EU, since the complex political situation in Cyprus and the non-recognition of the TRNC by Brussels, has posed serious challenges to the Union’s mission in

¹⁶⁶ As previously mentioned, TAIEX funds short-term peer-to-peer technical assistance advice and training. See European Commission, ‘Enlargement: TAIEX’ (19 May 2014) <http://ec.europa.eu/enlargement/tenders/taiox/index_en.htm> accessed 23 July 2014.

¹⁶⁷ TAIEX provides short-term technical assistance and advice in the field of approximation, application and enforcement of the *acquis communautaire*.

¹⁶⁸ Erel (n 156). In order to withdraw the suspension, a unanimous decision of the Council under Article 1(2) Protocol 10 is needed.

¹⁶⁹ Kyris (n 20) 94.

¹⁷⁰ Ibid.

¹⁷¹ Standard Summary Project Fiche, ‘Micro and Small Enterprises Loan Project’ (2006) CRIS Number: 2006/018-488.02.04. Instrument of financial support to encourage the economic development of the Turkish Cypriot community <http://ec.europa.eu/enlargement/pdf/turkish_cypriot_community/objective_2_loan_scheme_for_sme_s_en.pdf> accessed 28 July 2014.

¹⁷² Ibid.

¹⁷³ Erel (n 156).

northern Cyprus and arbitrated the ability of the Union to help the Turkish Cypriot community.¹⁷⁴ However, particular progress has been documented in north Cyprus, specifically in the areas of environment, agriculture, statistics,¹⁷⁵ financial activities and competition law.¹⁷⁶

All of these aforementioned efforts by the EU aggravated the Greek Cypriot administration, which tried every possible means to thwart the upgrading of the Turkish Cypriots; for instance, they refused to permit EU interaction with post-1974 Turkish Cypriot institutions or projects that in any way interfere on Greek Cypriot property in the north.¹⁷⁷ But, the Commission and the Parliament were both adamant to pursue the objective of helping the Turkish Cypriots. For this reason, in 2007, the German EU presidency commenced an examination project on how to help the isolated Turkish side. A report was conducted by the Parliament's High-Level Contact Group¹⁷⁸ which drafted proposals for: a direct trade regulation¹⁷⁹ between the EU and the Turkish Cypriots, the amelioration of Turkish Cypriot educational institutions with the aim of integrating them into EU programs, the creation of institutions that will allow the Turkish Cypriots to have a political voice in the international realm and making Turkish an official EU language.¹⁸⁰ Moreover, the group considered whether 'to grant Turkish Cypriots a form of representation in the European Parliament, with all six MEPs...from Cyprus currently being Greek Cypriot.'¹⁸¹ Instead, it was decided that the Turkish Cypriots should be given 'the status of observer' in order to be represented in the Parliament.

¹⁷⁴ European Commission, 'TAIEX Activity Report' (2009) ISBN 92-79-15727-1, 18 <http://ec.europa.eu/enlargement/taieux/pdf/report-2009/tar09_web_en.pdf> accessed 28 July 2014.

¹⁷⁵ European Commission 'TAIEX Activity Report (2007) ISBN 92-79-08208-5, 10 <http://ec.europa.eu/enlargement/taieux/pdf/report-2007/taieux-activity-report-07_en.pdf> accessed 28 July 2014.

¹⁷⁶ European Commission 'TAIEX Activity Report' (2008) ISBN 92-79-11488-5, 20 <http://ec.europa.eu/enlargement/taieux/pdf/report-2008/tar08_en.pdf> accessed 29 July 2014.

¹⁷⁷ International Crisis Group, 'Divided Cyprus: Coming to Terms on an Imperfect Reality' (Europe Report No 229, 14 March 2014) 32 <<http://www.crisisgroup.org/~media/Files/europe/turkey-cyprus/cyprus/229-divided-cyprus-coming-to-terms-on-an-imperfect-reality.pdf>> accessed 5 August 2014.

¹⁷⁸ Composed of a cross-political group of EU parliamentarians established by the EU Assembly in 2005.

¹⁷⁹ Direct trade with the TRNC was prohibited in ECJ ruling Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex Parte SP Anastasiou (Pissouri) Ltd & others* (1994) ECR I-3087, Case C-219/98 *Anastasiou II* and Case C-140/02 *Anastasiou III*.

¹⁸⁰ *Anastasiou* (n 145) 231.

¹⁸¹ *Ibid.*

In reality, the Greek Cypriot authorities sternly resisted the commencement of any of these projects, thus the German Presidency broke the ice and stated that they would find a solution which would be accepted by both communities. This was a sign that the EU would fail to maintain its initial enthusiasm in ending the isolation of the Turkish side.¹⁸² The High-Level Contact Group extremely criticised the EU for failing to stick by its word.¹⁸³ Talat remarked that ‘[a]fter the referendum result the EU said we would be brought in from the cold, but we have yet to feel any warmth...Ending the international isolation of Turkish Cypriots is not just tactical to improve our lives. It is a strategic matter for the solution of the Cyprus problem.’¹⁸⁴ Eleven years after the RoC joined the EU, Turkish Cypriots are still not being represented in the European Parliament and they have also not been invited as observers; the six MEPs representing Cyprus are still all elected from the Greek Cypriot community. Furthermore, nothing has been done in order to give the Turkish Cypriot community the right to have a proper say about EU *acquis*.

Indeed, it would not be an easy task to grant Turkish Cypriots a form of official representation in the Parliament as this would equate to indirectly recognising the TRNC and it would also violate suspension of the *acquis*; ¹⁸⁵ yet, it is simple and necessary to grant them observer status, as technically they are EU citizens. The observer status would allow Turkish Cypriot representatives to attend debates and even take part by invitation. Obviously, they would not have the right to vote or to exercise other official duties in the same way as the MEPs; however, by giving this status, the Union would have taken an important step towards enfranchising and acknowledging the Turkish Cypriot community. Such a development will be following the concept of the PACE, which has established a mechanism to fulfil the demands of the Turkish Cypriots for access to the political debates. Prior to 2004, a Turkish Cypriot parliamentarian was solely asked to attend committee meetings in PACE whenever the Cyprus issue was to be discussed;¹⁸⁶ since the adoption of Resolution 1376 (2004), PACE took the decision to include the elected

¹⁸² Ibid.

¹⁸³ Ibid 232.

¹⁸⁴ Vincent Boland and Daniel Dombey, ‘EU “has Broken its Promises to North Cypriots”’ *Financial Times* (Brussels, 10 September 2004) <<http://www.ft.com/cms/s/0/d6ba6dec-0361-11d9-acc4-00000e2511c8.html#axzz3Btn9yTWI>> accessed 6 August 2014.

¹⁸⁵ M Brus, M Akgun, 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* (Tesev Publications 2008) 36.

¹⁸⁶ Resolution 1113 (1997) of the Parliamentary Assembly of the Council of Europe.

representatives of the Turkish Cypriot community in the work of the Parliamentary Assembly beyond the framework of Resolution 1113.¹⁸⁷ Consequently, Turkish Cypriot representatives can now provide their opinions on all matters at the discussion table; yet, they still cannot cast votes.

This positive development did not last for long; in July 2007, the Conference of Presidents of the European Parliament vetoed such a proposal. It was contended that, legally speaking; it is not possible to invite Turkish Cypriot observers.¹⁸⁸ From a political point of view, if the two Cypriot parties agree that Turkish Cypriot representatives should acquire observer status, then the Union would not necessarily dismiss such a proposal.¹⁸⁹ Realistically, this does not seem plausible for the time being. Thus, the depoliticised approach of the Conference of Presidents of the European Parliament towards the legal issues surrounding such a proposal ruined the chances of promoting democracy and equal treatment in Cyprus.

Liberal Democrat European Justice and Human Rights spokeswoman and London MEP Sarah Ludford, has commented on the lack of EU support for the Turkish Cypriots:

I am angry that instead of helping find a solution, too many MEPs have made the situation worse by taking their cue from the obstructive line of the Republic of Cyprus. It is particular outrageous that an institution - the European Parliament - supposed to assist dialogue and compromise refuses to allow Turkish Cypriot voices to be heard in our debates.¹⁹⁰

It could be assumed that the reason the Turkish Cypriots are not given observer status in the Parliament is because this status would allow them to indirectly represent the TRNC parliament, which according to the Union, is an illegal institution belonging to an illegal State. Besides, who would elect these observers and who would organise their elections without giving the TRNC some sort of a legitimate voice?¹⁹¹ The EU has once again dismissed the democratic right of self-determination of the Turkish Cypriot community. What is ironic is that the EU

¹⁸⁷ Resolution 1376 (2004) of the Parliamentary Assembly of the Council of Europe.

¹⁸⁸ See Brus et al (n 185) 42: Summary of Decisions of the Conference of Presidents Meeting on 12 July 2007.

¹⁸⁹ Brus et al (n 185) 43.

¹⁹⁰ Sarah Ludford, 'Turkish Cypriots Let Down by MEPs' (*Sarah Ludford Liberal Democrats*, 18 April 2013) <<http://www.sarahludfordmep.org.uk/node/2218>> accessed 18 August 2014.

¹⁹¹ *Famagusta Gazette*, 'Cyprus Government Calls on Turkish Cypriots to Participate in EP Elections' (*Famagusta*, 22 December 2013) <<http://famagusta-gazette.com/cyprus-government-calls-on-turkish-cypriots-to-participate-in-ep-elections-p21822-69.htm>> accessed 28 August 2014.

claims to be an organisation founded on the principle of democracy, yet it denies this basic right to the Turkish Cypriots who are also EU citizens.

It should also be noted that Brussels failed to dispute the decision of Nicosia to elect solely Greek as their working language, ignoring their other constitutional language, Turkish. Therefore, the opportunity to send a signal of good faith by making Turkish an official EU language in 2004 was sadly lost and has not been retrieved since.¹⁹² The Luxembourg-based European Court of Auditors, rightfully highlighted, on 23 May 2012, that the ‘EU assistance to the Turkish Cypriot community in northern Cyprus is complicated by political and legal difficulties’ as a result of the RoC membership.¹⁹³

The Greek Cypriots have no inducement to compromise on a just *modus operandi* because they belong in the EU family and have all the bargaining tools at the negotiation table; they can afford to push the Turkish Cypriots into a tighter corner.¹⁹⁴ The Greek Cypriot government has managed to obstruct all the aforementioned EU proposals- either directly or indirectly. Primarily, 120 million Euros provided for in the financial aid regulation failed to be approved by the Council of Ministers in time and was thus lost;¹⁹⁵ albeit the remaining 139 million Euros was forcefully approved, official EU sources have admitted that it would be extremely difficult to convince the Greek Cypriots to support some of the planned projects.¹⁹⁶ Ironically, official EU documentation stipulates that more than ninety nine percent of the 259 million Euros aid programme for the Turkish Cypriot community has been contracted by the Commission before the deadline of 18

¹⁹² Ludford (n 190).

¹⁹³ Nielsen (n 105).

¹⁹⁴ Cetin Ramadan, ‘Re: The Guardian Article - “The Scandalous History of Cyprus”’ (*Atcanews*, 25 March 2010) <http://www.atcanews.org/press_release/ATCA%20Letter%20to%20Robert%20Ellis%2025%20March%202010.pdf> accessed 19 August 2014.

¹⁹⁵ It had to be approved by the 31 December 2005.

¹⁹⁶ The implementation of the financial aid will be done via the Programme Support Office in Nicosia. *NTV-MSNBC*, ‘EU Commission Opens Office in TRNC: The European Union Commission is Set to Co-ordinate the Financial Aid to Given to Turkish Cypriot Side’ (Istanbul, 23 June 2006) <<http://arsiv.ntvmsnbc.com/news/377799.asp>> accessed 19 August 2014.

See also Nathalie Tocci, ‘The Missed Opportunity to Promote Reunification in Cyprus’ (The Cyprus Conflict: Looking Ahead, North Cyprus, Cyprus Policy Centre, Eastern Mediterranean University, Famagusta 2007) 76 <<http://www.cypruspolicycenter.org/dosyalar/nathalie.doc>> accessed 18 August 2014.

December 2009.¹⁹⁷ Moreover, since 2011, assistance has continued in the form of annual allocations of 28 million Euros¹⁹⁸ in order to support the ongoing UN process.¹⁹⁹ It should be reminded that only 139 million Euros have been set aside to help the Turkish Cypriots and thus the EU is surprisingly hiding the fact that 120 million Euros have been deducted from the original sum.²⁰⁰

8.9. Israel's Wrath

The Greek Cypriots have not been the only ones frustrated with the aid directed at the Turkish Cypriots. Israelis have also opposed this assistance. The argument launched by the Israelis, highlights the fact that half of the residents in northern Cyprus are illegal settlers, and the land is under illegal occupation by Turkey. Although the EU's official policy is that the Turkish occupation is illegitimate, by giving northern Cyprus this financial aid, the EU has funded the illegal Turkish settlement enterprise.

The reason they are so angry with this assistance is because the Union does not recognise Israel's sovereignty over the Israeli entities located cross the 'Green Line' and therefore the EU has a duty to keep its money from going there. The 2013 Commission Guidelines stipulate that any Israeli entity seeking funding from or cooperation with the Union will have to submit a declaration confirming that the entity has no direct or indirect links to the West Bank; hence, Israeli institutions and bodies situated across the pre-1967 'Green Line' will be automatically ineligible for such funding. This is apparently the international price Israel has to pay for its occupation.²⁰¹ However, contra the guideline, the EU purposefully provides direct financial aid to settlements in occupied territory, such as northern Cyprus. Accordingly, the Union funds the occupation of its own Member State. With the EU building the infrastructure of the occupying government by giving grants to the

¹⁹⁷European Union Infopoint 'EU Aid Programme' <<http://www.abbilgi.eu/web/Home/tabid/40/language/en-US/Default.aspx>> accessed 19 August 2014. Apparently, a total of 880 contracts, most of them grants, have been signed.

¹⁹⁸ A sum that amounts to roughly 0.8 percent of Northern Cyprus's GDP.

¹⁹⁹ Nielsen (n 105).

²⁰⁰ Projects include study abroad scholarships for students at the numerous Northern Cyprus universities, developing and diversifying the private sector through grants to small and medium-sized businesses; various kinds of infrastructure improvements (telecom upgrades, traffic safety, waste disposal); community development grants, funding to upgrade "cultural heritage" sites, and so forth.'

Eugene Kontorovich, 'How the EU Directly Funds Settlements in Occupied Territory' *The Jerusalem Post*, (Jerusalem, 28 September 2013) <<http://www.jpost.com/LandedPages/PrintArticle.aspx?id=327329>> accessed 19 August 2014.

²⁰¹ Ibid.

Turkish Cypriot business and private entities, it is doing exactly what it proclaims, in the settlement guidelines, international law bans. Moreover, the relevant EU resolutions and reports make no reference to any international legal question with regards to this financial aid. Therefore, according to this argument, the EU is severely contradicting the principles it declares to uphold by giving funding to the TRNC. The settlement guidelines²⁰² aim to regulate groups based in Israel proper and go the extra mile to ensure that money is not spent in the West Bank, Golan and Gaza. Whereas the financial aid project for northern Cyprus has not come about as a result of an ‘outgrowth of standing arrangements with Turkey or Cyprus...’ it is a knowingly schemed funding program which provides assistance to ‘occupation activities.’²⁰³ Furthermore, Professor Eugene Kontorovich, insists that the settlement guidelines make an exception for activities that are directed at aiding the ‘protected persons’- which are the Palestinians according to international law; however, the northern Cyprus funding does not and cannot utilise this excuse, as the majority of the population in the north originates from Turkey, thus, the primary beneficiaries of the aid are Turkish settlers.²⁰⁴

Although the argument is strong, the EU activities have not generated an international legal outcry as the Union’s financial aid to northern Cyprus does not violate any international rules or principles. Primarily, it is important to illuminate that northern Cyprus is in a completely different position to any other third country the EU is involved with; northern Cyprus has theoretically been part of the EU since 2004 and therefore matters concerning it fall under the umbrella of internal affairs of the Union. Until 2004, the EU did not send any financial aid to northern Cyprus, since this would go against international law *per se*. The only reason the EU is providing funding to the Turkish Cypriots, is so they can prepare themselves for the EU upon the entry into force of a comprehensive settlement of the Cyprus problem. Nonetheless, it is interesting to note that some, such as Professor Ata Atun, contest that ‘[t]he majority of this aid has been spent for the salaries and the rent charges of the EU bureaucrats’ and that the funding has done nothing to contribute to peace on

²⁰² They were set in the summer of 2013.

²⁰³ Kontorovich (n 200).

²⁰⁴ Ibid.

the island.²⁰⁵ Secondly, for those such as the former Israeli ambassador to Canada, Alan Baker, who accuse the EU of ‘glaring hypocrisy’ by its ‘obsessive fixation’²⁰⁶ of the settlement issue and its refusal to punish countries such as Turkey for breaching international law, it is necessary to clarify that the Palestinian Territories represent a *sui generis*²⁰⁷ case as the occupying power in the TRNC-Turkey- has permitted the establishment of an *in loco*²⁰⁸ nominally independent State and thence is not building settlements in its occupied territory.²⁰⁹ Indeed, the EU has never recognised this self-determined State and refuses to recognise the validity of certificates of origin issued by the customs authorities of the TRNC. Therefore, there is no difference in the way that the Union treats northern Cyprus and the Israeli settlements in Palestine.²¹⁰ Thus, the accusers are basing their arguments on an incorrect comprehension of the facts.

In fact, the critics should be appreciative that the European Commission did not follow the suggestion coming from several of the Member States, which was to prohibit not only legal entities, but also individuals living in settlements from receiving grants. *Ipsa facto*, there is no valid, legal, political or logical argument to change the implementation of the guidelines. They do not negatively affect the peace negotiations between Israel and Palestine and nor do they side with the Palestinian position; they simply re-confirm the distinguished EU position concerning this issue. The EU has always stated that the borders between Israel and Palestine should be the outcome of negotiations between both States; simultaneously, it has always insisted that the starting point for those negotiations must be the pre-1967 borders and this has been the basis on which all previous negotiations have been held. Therefore, by treating Israel in this way, the EU is not disheartening the negotiators from moving forward but simply repeating the generally accepted position which was not disputed

²⁰⁵ Menekse Tokyay, ‘EU Provides Aid for Northern Cyprus’ *The Southeast European Times* (Istanbul, 29 June 2011) <http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2011/06/29/feature-02> accessed 28 August 2014.

²⁰⁶ Alan Baker, ‘The EU’s Glaring Hypocrisy Regarding Israel’ *Haaretz* (Israel, 31 July 2013) <<http://www.haaretz.com/opinion/.premium-1.538899>> accessed 22 August 2014

²⁰⁷ (Of its own kind/genus.)

²⁰⁸ (In the place of a parent.)

²⁰⁹ Lorenzo Kamel, ‘Setting the Record Straight on EU and Settlement Products’(Your *Middle East*, 8 July 2013) <http://www.yourmiddleeast.com/opinion/lorenzo-kamel-setting-the-record-straight-on-eu-and-settlement-products_16307> accessed 18 August 2014.

²¹⁰ Willem-Gert Aldershoff and Michel Waelbroeck, ‘EU Settlement Guidelines do not Victimize Israel or Endanger Peace’ *Haaretz* (Israel, 22 September 2013) <<http://www.haaretz.com/opinion/.premium-1.548244>> accessed 19 August 2014.

until Prime Minister Netanyahu branded it as a question.²¹¹ These guidelines are simply the first step taken by the EU in order to put into practice its policies that have always remained rhetorical. If the Union agrees to Israel's demands of watering down these guidelines, then it will drastically lose international credibility;²¹² furthermore, it will be in breach of Article 3(5) TEU to contribute to the 'strict observance of international law, including the principles of the United Nations Charter.'

8.10. The Infamous Direct Trade Regulation

The other unpretentious step that was going to help the Turkish side of the island develop and legalise preferential direct trade between the TRNC and the EU which has been blocked since the ECJ's ruling in 1994, remains unimplemented since the day the direct trade regulation was first proposed, as a result of Greek Cypriot intransigence;²¹³ Sarah Ludford sternly stated that the

MEPs have let down Turkish Cypriots by refusing to make a reality of a 2004 EU promise to allow them to trade directly with the EU. More trade would have helped to bridge the gap between Turkish and Greek Cypriots in terms of income and economic development.²¹⁴

In order to overcome the problem caused by the concept of origin of trade certificates, which the Greek Cypriots successfully argued in the ECJ decision of 1994,²¹⁵ the Commission proposed the idea that the Turkish Cypriot Chamber of Commerce, which enjoys international standing²¹⁶ should issue these certificates. This would have been supported by Article 133 TEC (now Article 207 TFEU),²¹⁷

²¹¹ Ibid.

²¹² Ibid.

²¹³ The direct trade regulation was initially proposed by the Commission back in April 2004, one week prior to the big-bang enlargement. It was officially presented to the Council in July 2004. European Commission, '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' COM (2004) 466.

²¹⁴ Ludford (n 190).

²¹⁵ See *Anastasiou Saga*.

²¹⁶ The Turkish Cypriot Chamber of Commerce was established under the 1960 arrangement that created the Republic of Cyprus.

²¹⁷ Article 207 TFEU (ex Article 133 TEC):

1 The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

which permits the EU to handle trade between the Union and territories that are part of the Member States but excluded from the Customs Union. Formally, the Greek Cypriots opposed the direct trade regulation's legal basis; they considered it to be a fundamental internal matter which falls under Protocol No 10 and thus requires European Council unanimity to change, with no involvement at all of the European Parliament.²¹⁸ Furthermore, they claimed that the GLR²¹⁹ states that the only certificates which can be accepted from the Turkish Cypriot Chamber of Commerce are in relation to intra-island trade. The Greek Cypriot argument was that the suspension of the *acquis* in the north simply acknowledges that the Turkish occupation does not allow the government of the RoC to exercise control in the TRNC; therefore, the suspension does not establish a new external border in Cyprus or any kind of independent area, nor does it separate a section of the territory from the island. The TRNC is definitely not a 'third country' within any meaning of the term in the Common Commercial Policy.²²⁰ So, the only national actors under the direct trade regulation are the RoC as a Member State and the other EU Member States; there is no mention of a 'third country' in the direct trade regulation. If the Common Commercial Policy were the legal basis, then the direct trade regulation would be able to amend the TFEU by ordinary legislative procedure, because the Common Commercial Policy applies only to trade between Member States and third countries.²²¹

2 The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/140

²¹⁸ Nicholas G Karambelas, 'After the Treaty of Lisbon: Cyprus and the Direct Trade Issue in the European Union'(2010)2(1) The AHIF Policy Journal, American Hellenic Institute Foundation 1, 22.

²¹⁹ Council Regulation (EC) 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession [2004] OJ L 161/128; see also Robert Ellis, 'Cyprus: Misguided Support for Direct Trade with TRNC' *New Europe* (Belgium, 2 May 2010) <<http://www.neurope.eu/article/cyprus-misguided-support-direct-trade-trnc>> accessed 18 August 2014.

²²⁰ Case C-411/06 *Commission v Parliament and Council on annulment of Regulation 1013/2006 on the shipment of waste, judgment of 8 September 2009 (Grand Chamber)* [2009] ECR I-07585; see also Case C-420/07 *Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571; *Loizidou v Turkey* (1997) 23 EHRR 513; *Cyprus v Turkey* (2002) 35 EHRR 30; *Xenides-Arestis v Turkey* App no 46347/99 (ECtHR, 22 December 2005); *Demopoulos and Others v Turkey* (2010) 50 EHRR SE14; *The Queen (on application of Kibris Turk Hava Yollari and CTA Holidays Limited) v Secretary of State for Transport and the Republic of Cyprus* (2009) EWHC 1918 (Admin); *Caglar v Billingham (Inspector of Taxes) and related appeals* (1996) STC (SCD) 150, [1996] 1 LRC 526.

²²¹ Karambelas (n 218) 23.

The Greek Cypriots also argued that the ratification of an agreement of direct trade with the Turkish Cypriots would not only reduce the latter's incentives to make concessions on a settlement, but would amount to recognising the TRNC as a separate legal entity. The government of the RoC also contested that trading with northern Cyprus would breach the duty of loyalty of the EU towards the RoC as a Member State.²²² Moreover, it claimed that if the EU decides to trade with the north, then it will be disregarding the 1974 decision of the government of the RoC to close all ports outside of its control.²²³ According to the Cyprus Ministry of Foreign Affairs, direct trade 'would help to solidify and deepen the division of the island, and would give a political message to the Turkish Cypriots that they do not need to cooperate with the Greek Cypriots.'²²⁴

In a 25 August 2004 Opinion, the European Council's Legal Service agreed with these arguments.²²⁵ The Commission's Legal Service however, forcefully disputed this argument and backed the Commission's view that Turkish Cypriot trade was based on the Common Commercial Policy of the EU; hence, it came under Article 133 TEC.²²⁶ The Commission's Legal Service also reminded the Greek Cypriots and the Council that the EU trades with other territories that are technically part of the Union but not inside its Customs Union; such as, Gibraltar, Helgoland, Busingen, Ceuta and Melilla.²²⁷

²²² Article 3 (a)(3) Treaty of Lisbon:

3 Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJC306/01.

²²³ Akgün & Tiryaki (n 5) 31.

²²⁴ Ibid.

²²⁵ Toby Vogel, 'MEPs Consider Allowing EU Trade with Northern Cyprus' *European Voice* (Brussels, 19 May 2010)

<<http://www.europeanvoice.com/article/imported/meps-consider-allowing-eu-trade-with-northern-cyprus/67996.aspx>> accessed 22 August 2014.

²²⁶ Article 133 TEC, Treaty establishing the European Community (Nice consolidated version) [2002] OJ C 325/90.

²²⁷ Council Regulation (EC) 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L 346/1 and Council Regulation (EC) 1140/2004 of 21 June 2004 suspending the autonomous Common Customs Tariff duties on certain fishery products originating in Ceuta and Melilla [2004] OJ L 222/1

'Gibraltar, formerly referred to as a crown colony, is a British Overseas Territory under the British Nationality Act of 1981.' "Ceuta and Melilla are autonomous Spanish cities on the coast of Africa

The counterargument to this is that the relationship between the RoC and the TRNC differs radically from the legal, political and historical connection of these aforementioned territories with its Member State. For instance, the U.K., Spain and Germany had a certain degree of control over the territories when the three joined the EU. Moreover, the three Member States had the power to decide whether or not and under what conditions the territories would also join the Union; whereas when the RoC became a Member State, it had no measure of control over the TRNC as a result of the Turkish occupation. The argument continues by highlighting that the governing power of the RoC was compulsorily removed by Turkey; it was Turkey who established the TRNC in order to control its occupation and thus Cyprus did not have a say in this decision:

Unlike Ceuta and Melilla as well as Gibraltar and Helgoland, the TRNC is not the remnant of a past colonial era of the Member State. Unlike Busingen, the TRNC is not administered under voluntary agreements between Cyprus and a third country.²²⁸

These are all powerful arguments; yet, they are not undefeatable. It should be reminded that the governing power of the RoC was not forcibly removed by Turkey; it was a legal consequence of the atrocities committed against the Turkish Cypriots by the Greek Cypriots.²²⁹ For instance, EOKA veteran Mr. Dimitriou admitted that EOKA worked in conjunction with the demands of the Greek Cypriot government in 1974, to murder eighty-nine Turkish Cypriots in the village of Taskent. He explained how the murders of the Turkish Cypriots were carried out by Greek Cypriots that had volunteered their services; he claimed that these men raped the Turkish Cypriot women in the village, and rounded up the Turkish Cypriot males of the village between the ages of thirteen and seventy-four, as war prisoners. Mr. Dimitriou claimed that he took part in forcing the Turkish Cypriot males who would potentially

with strong ties to Spain ... Helgoland has historically been governed by Germany. Busingen is a town which is wholly within a Swiss canton and part of the Swiss customs union but is administratively part of Germany.' Karambelas (n 218) 24. See also Vogel (n 225).

²²⁸ Karambelas (n 218) 24.

²²⁹ The aim of the EOKA group was to remove all of the Turkish Cypriots living on the island in order to annex Cyprus to Greece; this was prohibited by Article 2 of The Treaty of Guarantee 1960, which states that:

'Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution. Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.'

cause resistance to *Enosis*,²³⁰ into a coffee shop in the village; this task was carried out along with the Greek Cypriot police. These war prisoners were then taken on minibuses on behalf of the Greek Cypriot army and were brutally murdered. The bodies of these Turkish Cypriot men were buried in a mass grave found by the Turkish army after the peace operation in 1974. This is just one example of many of the evil acts committed by the EOKA group against the Turkish Cypriots.²³¹ Denktas responded to Mr. Dimitriu's statement by saying:

I want all of Europe to hear the statements of EOKA Veteran Mr Dimitriu. These shocking statements are bringing back the violent past, and it is proof that the EOKA terrorists are not at peace with themselves. These statements are a major step in the case of the Turkish Cypriots in Cyprus. We demand a formal apology by the Greek Cypriot government for the atrocities committed against the Turkish Cypriots between 1963-74.²³²

Had the Turkish army not intervened in 1974, it could be argued that there would not have been a single Turkish Cypriot left on the island and thence no Turkish Cypriots

²³⁰ Cyprus' union with Greece.

²³¹ Melek Ibrahim, an eye witness, talks about the day her two brothers were brutally murdered by the Greek Cypriots: 'It was the 14th August, 1974. All the family including brothers and sisters gathered together at my brother's, Erdogan Çakir's, home. My brothers were marked men by the Greeks. My brothers knew that they could be murdered at any time so much so that an hour before he was shot Mustafa made his last wish saying I know very well that Greeks will murder us. When I die let the inscription, Long Live the Mother-land, God Protect the Turks, be written on my tombstone. As soon the Greeks attacked the Turkish quarter. They walked directly to Erdogan Fakir's home and knocked hard at the door. The Eoka men told my brother to open the door otherwise they would use force. My younger brother Mustafa opened the door. The Eoka man at the door unloaded his gun into him. Mustafa fell down in a heap at the doorway. Erdogan who was standing behind was fired on. He did not die instantly. Other members of the family started coming out. The women hid my remaining brother, Mehmet, among themselves in order to save him. When all the Turks in Paphos were horded to the playing field Mehmet was taken prisoner. A U.N. Peace Keeping Force took my two brothers, Erdogan and Mustafa, to the Greek hospital. Erdogan was still alive. The following day when the bodies were handed in Erdogan was in an unrecognizable condition. They had tortured him to death.'

Zehra H Kiral recalls the day when her son Hasan and her grand-daughter Rahme were murdered by the Greek Cypriots: 'The barbaric Greeks encircling the Turkish quarter of Paphos entered it on the 14th August, 1974. They plunged into the streets of the Turkish quarter, gunned down the men, beat up the women and the old with the butt-ends of rifles. Faced with this situation we shut ourselves in our homes. Five or six minutes later a Greek named Ghatti having smashed the pane of the front door ordered us out. My son Hasan Kiral and myself came out into the yard to open the door. The Greek shouted out to my son, 'Come out, you dog.' 'Let me call the others inside' replied my son. But he forced my son out at gun point saying, 'Let the others come out later.' As my son stepped out he was seriously shot by the two bullets from the rifle of the barbaric Greek. Amidst the shots fired by the Greek I went to the open space, where the Turks were gradually gathering. The Greeks kept all the men there and ordered women and children to go back home. When I got back home my son was lying on the ground in a pool of blood. I then learned that my other two sons Ismail and Salih and my grandchildren Uhan and Zebra were wounded and that my grand-daughter Rahme was murdered. Thereupon I lost consciousness.' Cyprus-conflict.net, 'The Coup and its Human Toll: The Turkish Cypriot Testimonial' <<http://www.cyprus-conflict.net/birgin%20-%2074%20narratives.html>> accessed 19 August 2014; see also Harry Scott Gibbons, *The Genocide Files* (Savannah Koch 1997) 211.

²³² Sefa Karahasan, 'Greek Cypriot Atrocities' *Milliyet Newspaper* (Istanbul, 23 November 2004) <<http://www.atcanews.org/archive/gcatrocities.pdf>> accessed 19 August 2014.

for the RoC to govern. Besides, in 1970 Turkey had insisted that the island was to be reunited under the framework of the Constitution of the 1960 RoC; nonetheless, the Greek Cypriots did not permit the Turkish Cypriots to cross over to the south and assume their constitutionally indicated posts in the government institutions that they were forced to abandon.²³³

In addition, the RoC did have a ‘certain degree of control’ over northern Cyprus when it was to join the EU, as the fate of the Turkish Cypriots lay with the Greek Cypriot vote in the Annan Plan referendum. The citizens of the RoC decided to reject the terms under which the territory would join the EU by voting ‘no’ in this referendum. Furthermore, it was not Turkey, but the Turkish Cypriot community-led by Denktaş- who established the TRNC- which is an independent State with its own *modus Vivendi*,²³⁴ independent judiciary, legislature and executive. The idea of annexing Cyprus to a Guarantor State belonged to the Greek Cypriots and Greece, not the Turkish Cypriots and Turkey. It is for this reason there exists a Cyprus problem.

Furthermore, in relation to the argument that if the EU unilaterally establishes trade relations with northern Cyprus it would thereby disregard the 1974 decision of the RoC Government, it should be noted that a State does not usually interfere with a ship’s decision on which ports it shall enter and fly its flag; it can solely give it permission to call at a specific port. The prohibition of a ship’s entrance to a specific port can only be achieved via a decision based on domestic law and such decisions are of a purely political nature; for instance, the RoC may try to deter foreign ships from calling at a port in the north by denying it the right to access ports in the south.²³⁵ Thus, if a foreign ship calls at a port in northern Cyprus, this cannot be classified as a breach of any international right claimed by the RoC. The Commission also agrees with this argument. It rendered an Opinion on the legality of opening a regular ferry service between the Famagusta port, in northern Cyprus and the Latakia port, in Syria; the Opinion states that ‘...it is the Commission’s understanding that there is no prohibition under general international law to enter

²³³ Sedat Laciner, ‘Cyprus Problem and the European Union-Turkey Relations’ [2009] *The Journal of Turkish Weekly* <<http://www.turkishweekly.net/news/81109/cyprus-problem-and-the-european-union-turkey-relations.html>> accessed 22 August 2014.

²³⁴ (Manner of living.)

²³⁵ Brus et al (n 185) 45.

and leave seaports in the northern part of Cyprus.²³⁶ In addition, if a commercial ship decides to make use of the ports of an unrecognised State, it will still not be recognising that State and thus it will not be violating the policy of non-recognition.²³⁷ It is paradoxical that while the Greek Cypriots unremittingly tell the EU not to trade with northern Cyprus as this would be violating the duty of loyalty, they are in fact the principal trading partner of the Turkish Cypriots via the GLR;²³⁸ thus, it is a rather unusual demand to ask for loyalty from the EU in this regard.

With regards to the argument claiming that directly trading with northern Cyprus would be equivalent to recognising the TRNC as a legitimate State, it should be noted that recognition is about the distinguished international legal status of an entity, whilst a policy of isolation is a bullying tactic or a sanction contra an entity, aiming to change the way that entity behaves. A decision of non-recognition is solely constrained to official contacts between States and the non-recognised State, such as signing of international agreements and diplomatic representation. Only if the international community wants to go further than non-recognition will it isolate the illegal entity in accordance with Article 41 of Chapter VII of the UN Charter.²³⁹ Thus, the demand for non-recognition of the TRNC on the basis of Resolution 541²⁴⁰ does not mean isolation of the Turkish Cypriots.²⁴¹ In fact, direct trade with the TRNC and other forms of cooperation, used to take place even after Resolution 541 was declared; accordingly, if the international *fora* wanted to completely isolate the Turkish Cypriots, it would have adopted comparable measures to those adopted in the case of Southern Rhodesia. In this case, the Security Council in Resolution 216 and 217²⁴² called upon all States not to recognise the unlawful regime and asked

²³⁶ Ibid; see also Akgün and Tiryaki (n 5).

²³⁷ Brus et al (n 185) 45.

²³⁸ Akgün and Tiryaki (n 5) 26.

²³⁹ Charter of the United Nations, (24 October 1945) 1 UNTS XVI: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

²⁴⁰ UN Security Council Resolution 541 (1983) of 18 November 1983 S/RES/541; see also UN Security Council, Resolution 550 (1984) of 11 May 1984 S/RES/550.

²⁴¹ Akgün and Tiryaki (n 5) 28.

²⁴² UN Security Council, Resolution 216 (1965) of 12 November 1965 S/RES/216; UN Security Council, Resolution 217 (1965) of 20 November 1965 S/RES/217.

them to cut all economic ties with Southern Rhodesia.²⁴³ In the case of the TRNC, the call for non-recognition was not accompanied by the call for isolation. The EU and other international organisations still have the power and the right to recommence their collaboration with the Turkish Cypriots, so long as these relations do not amount to the recognition of the entity. A similar approach has been adopted with Taiwan; just because Taiwan is not recognised as a sovereign State or its government as the legal representative of China, does not mean that it cannot have economic, trade and other relations with international organisations.²⁴⁴

Nevertheless, the point to note is that the Council's Legal Service decided that the only legal basis for the direct trade regulation derives from Protocol No 10. The sole power that the Council has to affect the trade in products from northern Cyprus directly into the Member States, other than under the GLR, is to unanimously agree to lift the suspension of the *acquis*;²⁴⁵ Protocol No 10 proclaims that 'partial lifting of the suspension of the *acquis* to the north requires unanimity.'²⁴⁶ The terms of the Suspension Protocol specify that it is not meant to 'preclude measures with a view to promoting the economic development of the TRNC';²⁴⁷ nonetheless, the measure which intends to enhance the development of the north must be taken in a manner which is in line with the legal and practical effects of Protocol No 10, based on the fact that the entire island is part of the EU. Thus, to permit products from the TRNC to enter the Member States as if those products were originating from another Member State goes against the purpose of the Treaty of Accession.²⁴⁸

8.11. The Law Making Procedure on the Direct Trade Regulation
Without a doubt, choosing the correct legal basis is necessary for the legal sufficiency of an EU law; the regulation needs to be based on the legal basis that is predominantly concerned with the main purpose of the regulation.²⁴⁹ In addition, the choice of the legal basis also creates the procedure under which the law is enacted and for this reason the Greek Cypriots and the Council's Legal Service insist that the

²⁴³ Akgün and Tiryaki (n 5) 29.

²⁴⁴ Ibid.

²⁴⁵ Karambelas (n 218) 24.

²⁴⁶ Protocol No 10 (n 160) Article 1(2).

²⁴⁷ Ibid, Article 3.

²⁴⁸ Karambelas (n 218) 25.

²⁴⁹ Case C-94/03 *Commission of the European Communities v Council of the European Union* [2006] ECR I-1; Case C-491/01 *The Queen v Secretary of State for Health, ex parte BAT and Imperial Tobacco* [2002] ECR I-11453, para 94.

legal basis for the direct trade regulation is Protocol No 10, as the Council will have to act alone as well as unanimously to enact it. The Greek Cypriots believe that a regulation as such cannot be enacted unless the RoC provides its blessing, as it did on the GLR.²⁵⁰ The affirmative vote of the RoC has been and remains a necessary means by which it can prevent any *de jure* infringement on its sovereignty over the TRNC.²⁵¹

It should be noted however, that this polemic can only be understood with reference to the changes made by the Treaty of Lisbon²⁵² and the respective law making duties of the primary institutions of the EU, since the conclusion of this kind of an international agreement under the Common Commercial Policy was not subject to the ‘Qualified Majority Voting’ rule. Article 133(5)(2) TEC states that ‘unanimity is required when unanimity is required for the adoption of internal rules on the specific subject matter’ and unanimity is also required ‘for the negotiation and conclusion of international agreements on subject matters, where internal powers have been yet exercised.’²⁵³ Thence, the second half of Article 133(5)(2) goes against the principle of parallelism by disrupting the symmetry between the internal and the external powers²⁵⁴ as a result of permitting a Member State to block international agreements on a subject matter despite the fact that it could not prevent the adoption of internal legislation in that area.²⁵⁵ So, even if it was agreed that the legal basis of the direct trade regulation was the Common Commercial Policy before the adoption of the Lisbon Treaty, it would still not have passed as it would have been vetoed by the RoC, Greece and most probably France and Austria- who oppose Turkey’s EU membership. For this reason, the polemic amplified after the Treaty of Lisbon came into force as the Treaty declared all matters concerning external commercial policy

²⁵⁰ Karambelas (n 218) 23.

²⁵¹ Ibid 25.

²⁵² Treaty of Lisbon (n 222).

²⁵³ Angelos Dimopoulos, ‘Re-thinking the European Constitution in an Enlarged European Union: Draft-The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy?’ (2008) Faculty of Law, University of Zagreb, Jean Monnet Seminar, 6th Session, 14
<https://www.pravo.unizg.hr/_download/repository/The_Common_commercial_policy_after_Lisbon.doc> accessed 22 August 2014; see also Angelos Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy?’ (2008) 4Croatian Yearbook of European Law and Policy 101.

²⁵⁴ For example, unanimity is required in the internal market for the adoption of restrictions on freedom of establishment and services, for harmonisation of indirect taxation and approximation of laws. Ibid.

²⁵⁵ Ibid.

as exclusive competences of the EU.²⁵⁶ The Commission dusted off the direct trade regulation in the aftermath of the ratification of the Treaty of Lisbon and submitted to the Parliament in an ‘omnibus communication’ its proposal for direct trade with the TRNC,²⁵⁷ as the new Treaty also modified the power balance in the EU.²⁵⁸

Increased powers have been given to the European Parliament, and it was believed that this could change the fate of the direct trade regulation if the persistent legal view of the Commission—that the regulation falls under the Common Commercial Policy, Article 207 TFEU—was eventually accepted by the Council. The Commission argues that the direct trade regulation requires co-decision by the Parliament and the qualified majority in the Council. According to the co-decision procedure, a proposal from the Commission such as the direct trade regulation is *in tandem*²⁵⁹ sent to both the Parliament and the Council and can only enter into force if it is approved by both of the institutions.²⁶⁰ As a result, it was hoped that the Greek Cypriots could be prevented from vetoing future proposals directed at the Turkish Cypriot side. This would in effect alter Protocol No 10. According to critics, if it is agreed that the Common Commercial Policy is the legal basis for the direct trade regulation, then the EU would be evading an agreement that is fundamental to the terms under which the RoC joined the Union.²⁶¹ Vital Moreira, a Portuguese centre-left MEP who chairs the international trade committee, is so against the direct trade regulation proposal that he asked the Parliament’s Conference of Presidents to think about the political consequence of this dossier if it is to be approved.²⁶² The question is; has he considered the political implications of prohibiting such a proposal?

Since the Commission re-raised the direct trade regulation issue in 2010 by passing it to the Parliament, ‘the RoC has taken up arms.’ Cirakli²⁶³ confirmed that the majority of the MEPs are rather supportive of the direct trade regulation dossier and

²⁵⁶ Godelieve Quisthoudt-Rowohl, ‘Trade Policy under the Treaty of Lisbon’ in Christoph Herrmann and Mark Bungenberg (eds), *Common Commercial Policy after Lisbon: European Yearbook of International Economic Law* (Springer 2013) 107.

²⁵⁷ Ellis (n 219).

²⁵⁸ Secondary legislation arising under the Common Commercial Policy could be adopted by a qualified majority of the Council and a majority of the European Parliament.

²⁵⁹ (At the same time.)

²⁶⁰ Tocci (n 9) 3.

²⁶¹ Karambelas (n 218) 25.

²⁶² Vogel (n 225).

²⁶³ Head of the Brussels office of the Turkish Cypriot Chamber of Commerce.

this frightens the Greek Cypriots;²⁶⁴ for instance, the Parliament's Socialist, Liberal and Green groups support the proposal, whilst on the other hand the European Conservatives and Reformists have not announced their positions.²⁶⁵ Tocci claims that the RoC 'has single-mindedly used all the political capital at its disposal to drive a wedge in the process.'²⁶⁶ She is correct; in the summer of 2010, the RoC managed to shift the file from the Trade Committee of the Parliament (INTA)-which is sympathetic to the idea of direct trade with northern Cyprus²⁶⁷- to the Legal Committee (JURI)-which is somewhat at odds with the idea favoured by the Commission and by the INTA. Ioannis Kasoulides, a centre-right Cypriot MEP, told 'European Voice' that 'It is questionable whether the Parliament has jurisdiction over the direct trade regulation.'²⁶⁸ Subsequently, the Parliament was called upon to determine whether it had the legal competence to handle such a matter.

On 18 October 2010, the RoC was victorious, as it was declared that the proper legal basis of the direct trade regulation is the Suspension Protocol; with eighteen members in favour, five against and one abstention, the JURI committee agreed with the opinion of the Parliament's Legal Service that Article 207 TFEU is not the legal basis of the regulation.²⁶⁹ On 20 October 2010, the JURI committee voted to welcome the conclusion of the Legal Service and report it to the Parliament's Conference of Presidents. Since 1 December 2010, the Conference has had the issue under advisement.²⁷⁰ As a result, the Parliament slammed the door in the

²⁶⁴ Dominic Freeman, 'European Parliament to Discuss TRNC Direct Trade on June 10' *North Cyprus Free Press* (Girne, 20 May 2010) <<http://www.northcyprusfreepress.com/2010/05/20/european-parliament-to-discuss-trnc-direct-trade-on-june-10/>> accessed 23 August 2014.

²⁶⁵ Vogel (n 225).

²⁶⁶ Tocci (n 9) 3.

²⁶⁷ On 13 March 2014, MEP Niccolo Rinaldi, member of the INTA and the *rapporteur* of the direct trade regulation, published a document stating that 'The fact that the benefits of the EU membership, including trade, do not yet apply to the citizens of North Cyprus amounts to a badly kept EU promise'. Rinaldi expressed his eagerness 'to work constructively to further the debate on the issue with a view to ensuring that the benefits of the EU's trade regime can accrue to the Turkish Cypriot Community in the same way that the Greek Cypriot Community has been able to benefit from them.' Turkish Cypriot Chamber of Commerce, 'Rinaldi Publishes its Paper on Cyprus "Direct Trade Regulation"' (*Brussels Representation Newsletter* Issue 11, 16 April 2014) <<http://www.ktto.net/brussels/april201402.html>> accessed 22 July 2014.

²⁶⁸ Vogel (n 225).

²⁶⁹ Tocci (n 9) 4.

²⁷⁰ The European Parliament has appointed a *rapporteur* to look into the direct trade regulation. Karambelas (n 217) 23. Hasan Tacoy, Member of Parliament of the TRNC, has confirmed in an informal interview that a Working Paper is currently being drafted for the direct trade regulation in Brussels. Nonetheless, he believes that it will be rejected once again. Interview with Hasan Tacoy, Member of Parliament of the TRNC (London, 8 November 2013).

Commission's face.²⁷¹ It could be argued that the Parliament completely underestimated its own new powers and also, threw away an opportunity to re-boost one of the most imperative political relationships of the Union; the accession process with Turkey.²⁷² Bernard Rapkay, a centre-left German MEP said 'I want law to be respected and [the Treaty] of Lisbon gives these issues co-decision and we are agreeing not to use this procedure, the vote was "ridiculous" '.²⁷³ Furthermore, Diana Wallis, a British Liberal MEP, claimed that, 'If we always followed our legal service, we would not be doing our jobs as politicians.'²⁷⁴ This is yet another example of how intentional literal interpretation of EU law has damaged the Turkish Cypriot community.²⁷⁵ In order to change the fate of Cyprus, the EU and the UN must approach the legal issues in a contextualised manner.

Some say that the fact that the proper legal basis of the direct trade regulation is Protocol No 10 does not mean that the Greek Cypriots are victorious and the Turkish Cypriots have been defeated; it simply means the EU is triumphant. The opinion is based on the fact that this decision verifies the fundamental legal principles on which the EU is founded and furthermore, implements the *acquis* and procedures which the Member States have taken on in an effective way.²⁷⁶ Opposing this argument is the belief that the EU has lost colossal credibility in the eyes of the Turkish community and as a conflict transformer by not unblocking the stalemate over the direct trade regulation. It should not be forgotten that EU law is not rigid, it is a matter of interpretation and a tool to achieve the political desires of the club; therefore, if it is

²⁷¹ The Parliament's Legal Service agreed with the Council's Legal Service and opined that the Suspension Protocol is the proper legal basis for the regulation. European Parliament Committee on Legal Affairs (20 October 2010), 'Opinion on the legal basis of the proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of Cyprus does not exercise effective control' COM (2004) 0466.

²⁷² Tocci (n 9) 4.

²⁷³ *Today's Zaman*, 'EU Decision on Trade Deals Further Blow to Cyprus Solution Hopes' (Istanbul, 21 October 2010) <http://www.todayszaman.com/newsDetail_openPrintPage.action?newsId=224952> accessed 23 August 2014.

²⁷⁴ Toby Vogel, 'MEPs Opt out of a Say on Trade with Northern Cyprus' *European Voice* (Brussels, 21 October 2010) 6.

²⁷⁵ Even though external trade issues come under the co-decision procedure, as stipulated in the Lisbon Treaty, and the Council shall act by a qualified majority, the RoC has contested that the direct trade regulation should not be examined as a matter of international trade with third countries since the north of Cyprus is part of the RoC, according to the 2003 Accession Treaty, despite the suspension of the *acquis*; the JURI Committee and the Parliament's Legal Service both agreed with this statement and consequently claimed that the Parliament's powers over international trade would undermine the sovereignty of the RoC.

²⁷⁶ Karambelas (n 218) 26.

for the common good, it can accommodate derogations in its body. The declaration of impossibility of direct trade with northern Cyprus has eradicated ‘the short-term hope of a rosier future for Cyprus, Turkey and the EU as a whole.’²⁷⁷ The Union’s short-sightedness with the direct trade regulation has caused it to fail to act upon the imperative of amalgamating Europe ‘as a credible pole in the emerging multipolar world.’²⁷⁸

Nevertheless, the Greek Cypriot government still fears that the regulation could be approved shortly; therefore, they have not given up the fight and threaten to challenge the direct trade regulation in the Court of Justice if it is adopted.²⁷⁹ The Greek Cypriot government spokesman has promised the Greek Cypriot community that their MEPs are doing everything possible in Brussels to stop any new trade regulation from being approved.²⁸⁰ In fact, the Greek Cypriot government has moulded the conflict into one being between the RoC and Turkey. In order to distract the EU’s attention and freeze the creation of new proposals, it has pressurised Turkey within the EU context to recognise the RoC.²⁸¹

8.12. The Turkish Ultimatum

Turkey-EU relations commenced in 1963 with the signing of the Association Agreement²⁸² establishing a Customs Union; by 1987 Turkey had applied for membership and in 2004 the Council stated that Turkey had fulfilled the Copenhagen criteria.²⁸³ The EU’s partiality re-surfaced in 2004 when the Council gave Turkey an ultimatum; Turkey was to either sign the Protocol which would extend its Customs Union with the EU to all the new Member States, including Cyprus, or postpone its accession negotiations.²⁸⁴ Even though there is logic to this demand as it ensures legal certainty, the EU conjured this ultimatum predominantly upon the RoC’s assertion.²⁸⁵ This ultimatum required Turkey to redraft the ‘historical narrative of the

²⁷⁷ Tocci (n 9) 1.

²⁷⁸ Ibid 7.

²⁷⁹ Freeman (n 264).

²⁸⁰ Akyel Collinsworth and Pope (n 8).

²⁸¹ Tocci (n 196) 75.

²⁸² Also known as the Ankara Agreement.

²⁸³ Thus, the opening of her accession negotiations were to commence in 2005.

See Deniz Sonalp, ‘Cyprus Conflict: Non Compliance with the 1960 Constitution and Treaties, Political Disagreements’ (MA Thesis, University of Maastricht 2009) 30.

²⁸⁴ Council of the European Union, Brussels European Council 16 and 17 December 2004, Presidency conclusions; see also Sonalp (n 283) 31.

²⁸⁵ Why has the EU punished Turkey after changing her attitude towards Cyprus’ reunification and being the only party to cooperate with the demands of the international actors during the Annan Plan?

conflict and its non-recognition of the TRNC.²⁸⁶ Solano²⁸⁷ warned Turkey; ‘If you want to become a part of a family, you have to recognize all members of that family...’²⁸⁸ Turkey was adamant about protecting her position in the conflict and not recognising the government of the RoC, which will never represent the Turkish Cypriots regardless of what the EU believes.²⁸⁹ Nicolai²⁹⁰ tried to explain that by signing the Protocol to the Ankara Agreement, Turkey would not be confirming that the Cyprus government in the south represents the whole island. The signature would only signify an acceptance that Cyprus is one of the member countries of the EU.²⁹¹ Moreover, with the suspension of *acquis* in the north, the government of the RoC cannot act on behalf of the TRNC in its relations with the EU and therefore, as Talmon proclaims, even if Turkey signs the Protocol, the RoC still cannot represent the entire island.²⁹²

Consequently, in 2005 Turkey signed the Protocol but renounced its implementation. Turkey continued to refuse to open her ports and airports to the RoC and defended this by claiming that these elements were not part of the Protocol.²⁹³ Once again, the EU was stuck in the middle, but with the pressure exerted by the Greek Cypriots, the implementation of the Protocol was heavily demanded in the Turkey Accession Partnership documentation.²⁹⁴ Yet, this did not change Turkey’s rightfully stubborn stance; if Turkey extended its Customs Union to the south of the island in practice, without guaranteeing that the EU would incorporate the north in the EU Customs Union and thus bring the Turkish Cypriots one step closer to European integration, the Turkish Cypriots would psychologically suffer.²⁹⁵ According to Talmon, Turkey has finally acquired a ‘bargaining chip’ to use for the advantage of the TRNC and

The answer is simple; the RoC is a Member State, whereas Turkey is an outsider, so the former’s demands take priority.

²⁸⁶ Tocci (n 196) 76.

²⁸⁷ The EU High Representative of the Common Foreign Security Policy.

²⁸⁸ Republic of Cyprus Press and Information Office: Turkish Press and Other Media No 242/0 (2004) 6

<[http://www.pio.gov.cy/moi/pio/pio.nsf/All/0FC385952E5BA00CC2256F6D0046FC3C/\\$file/041217.doc](http://www.pio.gov.cy/moi/pio/pio.nsf/All/0FC385952E5BA00CC2256F6D0046FC3C/$file/041217.doc)> accessed 23 August 2014.

²⁸⁹ Sonalp (n 283) 31.

²⁹⁰ The State Secretary for the European Affairs of the Netherlands.

²⁹¹ Republic of Cyprus Press and Information Office (n 288) 2.

²⁹² Stefan Talmon, ‘The European Union: Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations’ (2006) 5(3) *Chinese Journal of International Law* 579, 596.

²⁹³ The Turkish authorities argued that these elements fell under the services sector.

Sonalp (n 283) 31.

²⁹⁴ 2005. See Tocci (n 196) 77.

²⁹⁵ *Ibid.*

terminate the embargoes imposed by the international actors.²⁹⁶ The Turkish President at the time²⁹⁷ contested that ‘we expect the EU to do the same and help alleviate the isolation of the Turkish Cypriots.’²⁹⁸ In this context, Turkey advanced the idea of holding a summit²⁹⁹ in the aim of persuading the EU to include the Turkish Cypriots in their Customs Union in return for her to fulfil its duties to the RoC. Surprisingly, the Commission and several Member States³⁰⁰ agreed to this Turkish ultimatum.³⁰¹ But unsurprisingly, this Action Plan has remained ‘dead’ as a result of the Hellenic objections. Eight chapters of Turkey’s accession talks are frozen as a result of her barring Cypriot traffic from its ports and airports until the Turkish Cypriots are allowed to directly trade with the EU.³⁰² That being so, the negotiation process between the EU and Turkey has decelerated.³⁰³ To make matters worse, the RoC has also used its power to block Turkey-EU relations in a variety of other situations, including an effort in 2011 to veto Turkey’s participation in EU-Syrian talks over the crisis of the middle-east country which is of great importance to Turkey.³⁰⁴ These developments indicate that there is a rather brittle situation between Turkey/Turkish Cypriots and Greek Cypriots, which has in actual fact come about as a result of the RoC’s EU membership.³⁰⁵ Overall, the EU’s carrots and the Greek Cypriots’ sticks are not sufficient enough to make Turkey change its view on Cyprus³⁰⁶ after witnessing the way the Turkish Cypriots have been treated. The adoption of the direct trade regulation will evidently change the story.

²⁹⁶ Talmon (n 292) 615.

²⁹⁷ Abdullah Gul.

²⁹⁸ Association Council (26 April 2005), ‘44th Meeting of the EC-Turkey Association Council’ CE-TR 104/05; see Sonalp (n 283) 31.

²⁹⁹ In 2006, with Turkey, Greece, the UN and the two communities of Cyprus.

³⁰⁰ Such as, Italy, UK and Spain.

³⁰¹ Erol Kaymak, ‘Why the EU Catalyst Proved Insufficient to Solve the Cyprus Problem: The Politicization of European Values’ (Cyprus Policy Centre, Annual Meeting of the International Studies Association, San Diego, 22 March 2006) 11 <www.cypriuspolicycenter.org/dosyalar/may_erolkaymak.doc> accessed 24 August 2014.

³⁰² Vogel (n 225).

³⁰³ William Chislett, ‘Cyprus: A Unique Opportunity for Reunification’ (2009) Elcano Royal Institute Working Paper 61/2009 <http://www.realinstitutoelcano.org/wps/wcm/connect/3c9f84004070dea5a95cbf5e01ac4adf/WP61-2009_Cyprus_Opportunity_Reunification.pdf?MOD=AJPERES&CACHEID=3c9f84004070dea5a95cbf5e01ac4ad> accessed 24 August 2014.

³⁰⁴ Kyris (n 20) 93.

³⁰⁵ Ibid.

³⁰⁶ Semih Idiz, ‘The EU Paints itself into a Corner in Cyprus’ *Hurriyet Daily News* (Istanbul, 2 April 2010) <<http://www.hurriyetdailynews.com/n.php?n=the-eu-paints-itself-into-a-corner-in-cyprus-2010-02-04>> accessed 25 August 2014.

8.13. The Short-Sightedness

If the Parliament passes a resolution approving the direct trade regulation in the near future, the onus will be on the Council. Axiomatically, the RoC will be robustly against the regulation and most probably, so will Greece because of her support for the RoC. It could be assumed that France and Austria will also be against the regulation in view of their opposition to Turkey's EU dream.³⁰⁷ However, the other Member States will approve the regulation as they will feel subliminally pressurised by the Parliament to do so; moreover, they will not want to further disrupt the EU's relationship with Turkey. But, the hope is now lost; for as long as it is agreed that the legal basis of the regulation is Protocol No 10, the direct trade regulation will never pass. Yet, the approval of the regulation will trigger Turkey to implement the Additional Protocol to its Customs Union agreement, which will in turn unblock the aforementioned eight chapters that are frozen by the Council. So, Turkey will be able to continue to provisionally close the chapters she has already negotiated. Indeed, it cannot be guaranteed that the RoC will lift its veto over the further six chapters that it has blocked; yet the 'cause' for the vetoes will no longer be there as Turkey will have implemented the Protocol. Undeniably, 'the Gordian knots at the heart of both Turkey's accession process and the Cyprus conflict would still be there.'³⁰⁸ However, they would no longer be so unsolvable as a result of the new dynamic, which would instil a dose of optimism in the enigmatic relations between the EU, Turkey and the TRNC.³⁰⁹

It should be reminded that direct trade is definitely no substitute for a comprehensive settlement in Cyprus and nor is it tantamount to the recognition of the TRNC.³¹⁰ The real aim of the Greek Cypriot objection is to stop the upgrading of the Turkish Cypriots because the Greek Cypriots are aware that unless the EU formally declares the recognition of the TRNC, direct trade will not be tantamount to its recognition.³¹¹ Annan also confirmed that the commencement of direct trade would not violate Council Resolutions 541 and 550. He concluded by saying that the 'de facto policy of isolation of the TRNC is a political choice.'³¹² The EU denied that the

³⁰⁷ Tocci (n 9) 3.

³⁰⁸ Ibid 4.

³⁰⁹ Ibid.

³¹⁰ Akyel Collinsworth and Pope (n 8).

³¹¹ Kaymak (n 301) 9.

³¹² Brus et al (n 185) 47.

Greek Cypriots violated international agreements³¹³ when they acceded into the EU, so it should not be hard for the EU to work around the abovementioned Resolutions - which apparently are not even a problem -and other legal issues, in order to allow the TRNC to join the EU Customs Union.

Nevertheless, the Member States have in general been reluctant to challenge the RoC's non-binding opinion on the direct trade regulation and as a result accepted the legal impasse. Thence, the direct trade resolution has become stuck in a limbo.³¹⁴ Kühnhardt³¹⁵ strongly believes that '[a]s long as the Republic of Cyprus can insist on unanimity in EU foreign-policy making, the EU... can hardly become an honest broker in the process of resolving the Cyprus issue.'³¹⁶ Overall, the Union has backed itself into a corner in its handling of Cyprus because of the status it gave the RoC.³¹⁷ Albeit the opposition to the measure is comprehensible 'in the context of the old-style diplomatic trench warfare in the Cyprus dispute,' the Greek Cypriots need to halt this obstinacy, as it is also in their best interest to allow such a regulation to pass.³¹⁸

It was hoped that the EU would utilise the benefits arising out of the Treaty of Lisbon. The International Crisis Group called upon the EU to 'contribute constructively to a redefinition of the much-abused "European solution" slogan on the island'³¹⁹ and not just stop at lifting the embargoes imposed on northern Cyprus.³²⁰ Turkish authorities and the EU should also address the issue of transportation and direct flights-which are crucial for tourism, the higher education sector and the economy- separately from the direct trade regulation, as this regulation solely deals with trade. Understandably, without the implementation of the direct trade regulation and the help of the UN Security Council to lift the economic isolation of northern Cyprus, direct air flights to airports in the TRNC cannot be established. Consequently, the Member States have been reluctant to take

³¹³ Such as the 1960 Treaty of Guarantee. See chapter 3.

³¹⁴ Akyel Collinsworth and Pope (n 8).

³¹⁵ Head of the Center for European Integration Studies.

³¹⁶ Idiz (n 306).

³¹⁷ Boland and Dombey (n 184).

³¹⁸ Akyel Collinsworth and Pope (n 8).

³¹⁹ Kaymak (n 301) 13.

³²⁰ International Crisis Group, 'The Cyprus Stalemate: What Next?' (Europe Report No 171, 2006)
28 <<http://www.crisisgroup.org/en/regions/europe/turkey-cyprus/cyprus/171-the-cyprus-stalemate-what-next.aspx>> accessed 25 August 2014.

steps to create such air link with the TRNC.³²¹ Overall, the Greek Cypriots and the European Parliamentarians have the opportunity to trigger a virtuous circle which will unlock many deadlocks. If they approve the direct trade regulation,³²² they will be validating the Turkish Cypriot community's existence. As mentioned above, the approval of the regulation will force Ankara to fulfil her promise.³²³ If Turkey does open her ports to the RoC, she will be reassured about her EU membership. In turn, Turkey-RoC-Greece relations will be improved.³²⁴

As it stands, it is embarrassing for the EU to be in such a predicament; on the one hand, it desperately wants to keep its promise to the Turkish Cypriot community which will subsequently untangle many 'Gordian knots' and on the other hand, it 'finds its hands tied by legal issues'³²⁵ and guaranteed Greek Cypriot veto. The arguments against lifting the isolation of the Turkish Cypriots have no legal validity and they are simply political claims- masked by the law- devised for the subjugation of the Turkish Cypriots. In the interim, the principles of fairness and justice, which the EU takes extremely seriously, are unfulfilled according to the Turkish Cypriots, Turkey and the other Member States that want to see the Turkish Cypriots *breathe*.³²⁶

This quandary will only ever be solved via agenda setting in the EU. If the Commission and the Council insist upon addressing the Cyprus policies within the Union's legal structure, then the problem will merely be addressed as part of an ordinary agenda and will consequently come across all of the obstacles mentioned earlier on in the chapter. Without a doubt, this will please the Greek Cypriot leaders who want to make the Cyprus problem an intra-EU problem which can only ever be solved via the legal structure of the Union.

Alas, the truth remains that the Cyprus problem is both a political and legal one. For this reason, the EU's current legal framework- which overlooks the human element of the conflict- cannot address the Cyprus problem alone. Therefore, the EU should

³²¹ Yesilada (n 21) 4.

³²² Either by changing its legal basis or not vetoing it at the Council.

³²³ Turkey's ex Chief EU Negotiator, Egemen Bağış, said on 25 March 2010: 'if the EU implements the regulation, we will open our ports'; this position has been confirmed by Turkish diplomats since. Akyel Collinsworth and Pope (n 8).

³²⁴ Ibid.

³²⁵ Yesilada (n 21) 5.

³²⁶ Ibid.

handle it as an extra ordinary agenda item, at the level of the heads of States and governments.³²⁷ The political concerns of all of those involved will be heard and dealt ‘with at the highest level of political authority’³²⁸ at the European Council. This institution lays down its own extraordinary agenda by establishing special intergovernmental bodies in order to observe specific matters and subsequently report back its finding and suggestions. Understandably, this method may prove to be ineffectual as Member States such as the RoC and Greece, have veto powers at the summit meetings of the European Council.³²⁹ For that reason, it is worth re-mentioning Lord Hannay’s opinion; the UN, the U.S.A., the U.K., Turkey, Greece and Cyprus, all have to be involved in the search for a solution to the Cyprus problem, alongside the EU which needs to adopt Beran’s theory as a foundation for such cases.

The Greek Cypriot community’s presence in the Union despite their rejection of the Annan Plan, together with their veto of the long awaited and deserved direct trade regulation, simply rubs salt into the wound of the Turkish Cypriot community. Since the RoC has joined the EU, not much has changed for the Turkish Cypriot community or in the way that the politics of the world classifies the TRNC.³³⁰ What is clear is that the blame for the lack of a settlement does not fall squarely on Turkish or Turkish Cypriot shoulders. Until today, Turkey has provided her support for a solution based *mutatis mutandis*,³³¹ on the Annan Plan despite the fact that since the 2004 referendum on the island, Turkey has been ‘one step ahead of the game’ in Cyprus.³³² Nevertheless, the unyieldingness of the RoC since 2004 and the issues surrounding the claim to the natural gas reserves in Cyprus, is likely to force Turkey to push for the *de facto* ‘Taiwanization’ of northern Cyprus.³³³ It can also be assumed that, Turkey’s potential new policy will be a reaction to the EU’s Myopia; the failure of the Union to utilise the opportunity it gained as a result of the Parliament’s ‘Pontius Pilate-like abdication of powers’ over the direct trade

³²⁷ Hence, at the European Council.

³²⁸ Yesilada (n 21) 5.

³²⁹ Ibid.

³³⁰ The Green Line Regulation has not been enough to dress the wounds of the Turkish Cypriot community; it was never intended to be a permanent solution to the trade issue. See Brus et al (n 185).

³³¹ (Changing [only] those things which need to be changed.)

³³² Tocci (n 9) 6.

³³³ Ibid.

regulation, to unite Europe, including Turkey, as a believable pole in the up-and-coming multipolar world,³³⁴ will have severe consequences.

In 1999, the EU wasted its chance to act as a catalyst to a Cyprus settlement; once again, the Union has squandered an even greater opportunity to reposition itself as a reliable power in a multipolar world, by moving the direct trade regulation to the shelf.³³⁵ The post-accession era has seen even less EU-generated impetus for the termination of the Cyprus problem; indeed, the EU has helped the development of the Turkish Cypriot community and has been preparing them for implementation of the EU *acquis* in the event of a solution, yet, this will not suffice to ease the anger of the Turkish Cypriots towards the Union for leaving them out in the cold.³³⁶

8.14. A Mere Recommendation

The Union will sincerely struggle with keeping its promises to the Turkish Cypriots because it cannot stop the Greek Cypriots from using every tool at hand to ensure that the Turkish Cypriots do not gain any strength. However, it cannot be denied that the Turkish Cypriots have expected far too much from the EU in the first place; they imagined the club would solve all of the problems on the island and in the meantime better their democracy and economy.³³⁷ Perhaps the Turkish Cypriots need to help themselves and stop crying into deaf ears about forgotten promises. They should try repairing their own wounds by striving for the recognition of the TRNC, which is not impossible to attain. Legitimising Turkish Cypriot self-determination has been forbidden outside the Turkish Cypriot entity and Turkey since 1983; however, with this declaration of independence, it could be argued that the conflict has actually resolved itself. Although UN Security Council Resolutions and the RoC's network of allies, particularly the EU, will not permit the recognition of the TRNC, the world needs to come to terms with the reality that five rounds of predominantly UN-facilitated negotiations over four decades, have failed to reunify the island according to the official parameters of a bi-zonal, bi-communal federation.³³⁸

³³⁴ Ibid 7.

³³⁵ Ibid.

³³⁶ Kyris (n 20) 95.

³³⁷ Derya Beyath, 'The EU and the Turkish Cypriots' in James Ker-Lindsay, Hubert Faustmann and Fiona Mullen (eds), *An Island in Europe: The EU and the Transformation of Cyprus* (IBTauris 2011) 147.

³³⁸ International Crisis Group (n 177) i.

Since February 2014, officials involved in the new round of talks have been stipulating that they are aiming to devise a light federation; yet, public cynicism on both sides of the island is still extremely high.³³⁹ It should also be underlined that a federal government in Cyprus with unwieldy ethnic quotas will risk being knocked down by the ECtHR, which in 2009 ruled contra Bosnia's constitutional exclusion from office of several minorities.³⁴⁰ Therefore, the status quo should be appreciated as it has proved durable and serene.³⁴¹

The conflicting parties should consider the possibility of mutually agreed independence for the Turkish Cypriots within the Union. The viability of such an alternative depends on EU membership procedures, which in this scenario 'would depend on the voluntary agreement of the Greek Cypriots, whose state is already a member, so has veto rights over a new candidate.'³⁴²

If the RoC and the TRNC stand side by side in the EU, then the needs of two Cypriot communities could be fulfilled. In effect, the island would be reunified within the Union; the two communities would have a mutual currency, a mutual visa regime and mutual norms and values which consequently 'would allow the sides to reconnect with no more border than those between continental European states.'³⁴³ In fact, this would be the 'European solution' desired by the Greek Cypriots.³⁴⁴ The voluntary agreement of the Greek Cypriots would make the Turkish Cypriots feel more secure and respected, and in return they will probably offer;

[T]o return long-occupied territory like the ghost beach resort near Famagusta; pull back all or almost all of Turkey's occupation troops; give up the international guarantees that accompanied the island's independence in 1960; offer guaranteed compensation within an overall deal on property that both sides still own in each other's territory; drop demands for

³³⁹ Ibid.

³⁴⁰ Ibid 33.

The European Court of Human Rights found in *Sejdić and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR 22 December, 2009) that the Bosnia and Herzegovina constitution violated Article 1 of Protocol No 12 (general ban of discrimination) of the European Convention on Human Rights by blocking access to the presidency and upper house to any persons not declaring that they belong to one of that country's three constituent peoples (Bosnians, Serbs or Croats).

³⁴¹ Nobody has been killed on the Green Line since 1996 and only ten have died since 1974. International Crisis Group (n 177) i.

³⁴² Ibid.

³⁴³ Ibid 38.

³⁴⁴ The Greek Cypriots in general have wanted a solution to the Cyprus problem to be 'fully European' and a Turkish Cypriot state in the club would satisfy such a demand.

derogations from EU law that would block post-settlement Greek Cypriot property purchases in any future Turkish Cypriot state; and acknowledge full Greek Cypriot control of territorial waters south of the island that have proven natural gas deposits.³⁴⁵

Axiomatically, if the TRNC is recognised, it will require a lot of EU attention as it is too small, too weak and too closely linked to a complex neighbour-Turkey; however, the EU owes the Turkish Cypriots this attention. The EU has failed to make amends for the way it broke its own rules by welcoming into the Union the RoC as a Greek Cypriot monopoly State which excludes the Turkish Cypriots,³⁴⁶ and furthermore, it did not keep its post-Annan Plan referendum promises. Overall, if the Union decides to work with the TRNC in such a manner, it will be fixing the imbalance it has caused on the island.

It is difficult to imagine how;

two war-traumatised, ethnically cleansed entities that have quite different populations can somehow be put back together again because both still drive on the left, use British case law, share the same accent when they speak English and enjoy the same sense of humour.³⁴⁷

The two Cypriot communities clearly do not want a bi-zonal, bi-communal federation;³⁴⁸ they simply need certainty, a long term perspective on which to base their lives and a robust legal framework. Unfortunately, the never-ending process of UN-guided negotiations prevents the two conflicting parties from realistically discussing how they can achieve genuine peace on the island.³⁴⁹ Thus, all of the players involved in this conflict need to realise that the reunification of the island would resemble a forcefully arranged marriage and that any feasible settlement will be highly similar to today's status quo.

Hoffmeister argues that since the Turkish Cypriots are no longer an oppressed ethnicity and partition is prohibited in the 1960 Treaty of Guarantee, the TRNC fails the test of statehood in terms of the right to claim self-determination.³⁵⁰ Yet, what

³⁴⁵ International Crisis Group (n 177) ii.

³⁴⁶ Ibid 25.

³⁴⁷ Ibid 38.

³⁴⁸ The Greek Cypriots rejected this idea in 2004 and the Turkish Cypriots continuously keep voting into power leaders who support the two-state formula (except when they voted in Talat in 2005-2010).

³⁴⁹ International Crisis Group (n 177) 38.

³⁵⁰ Frank Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff Publishers 2006).

needs to be remembered is that according to Beran's theory, the right to self-determination is a liberty right and not a claim right. Thus, the right to self-determination includes the right of no-fault secession which is determined via a referendum; however, there can even be cases where the wish of the community is so clear that there is no need for a referendum.

If the Greek Cypriots agree to the separation, then the majority of the legal objections will evaporate; 'International law is at best ambivalent on the question.'³⁵¹ A mutually agreed and internationally supported solution will eradicate the conditions for a settlement dictated in existing UN Security Council Resolutions and the TRNC's test for statehood would be conducted in the context of a mutually agreed process within the Union.³⁵²

The right of peoples to self-government, particularly to representative government, has its roots in the belief repeatedly expressed in writings of John Locke and Thomas Jefferson, that the legality of government comes from the consent of the governed, and moreover, that the consent cannot be forthcoming without the enfranchisement of all segments of the population. Locke has famously argued that when sovereign power has been unlawfully exceeded, or where the legislative power has assumed an oppressive character, then by virtue of a 'law antecedent and paramount to all positive Laws of Men', an individual or a body of people, has a natural right of resistance.'³⁵³ Jefferson, who was the main drafter of the American Declaration of Independence, believed in the dignity and the intelligence of the average man; 'Every man and every body of men of earth possess the right of self-government. They receive it with their being from the hand of nature.'³⁵⁴ Lenin also advanced the same principle when Tsarist Russia was falling apart and people living under its control wanted to determine their political status. His scheme for a Proletarian Party Programme published in April 1917 and the declaration of 2 November 1917 by the Council of the People's Commissars, acknowledged 'the right of the peoples of

³⁵¹ International Crisis Group (n 177) 31. The International Court of Justice's 2010 advisory ruling on Kosovo held that general international law does not forbid declarations of independence; therefore, there is no valid legal argument prohibiting the Turkish Cypriot declaration of independence. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion) General List No 141 [2008] ICJ.

³⁵² Ibid.

³⁵³ John Locke, *Two Treatises of Government* (Peter Laslett (ed), Mentor Books, New American Library 1965).

³⁵⁴ Julian P Boyd et al (eds), *The Papers of Thomas Jefferson* (Princeton University Press 1950).

Russia to self-determination which may go as far as to include secession and the formation of an independent state.³⁵⁵

Lastly, the right to self-determination is also set out in Article 55 of the UN Charter.³⁵⁶ Large number of resolutions of the General Assembly aim to define the content of the self-determination principle; therefore, the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (clause 2) proclaims that ‘all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’³⁵⁷

The purpose of these aforementioned declarations in this context is to highlight the fact that the Turkish Cypriot people have the right to self-determination and they should continue to pursue this right. As argued by Beran, the State cannot be the ultimate right-holder; normal adults have the right of freedom of association and political association. Recent events in Europe, China, the Baltic Republics, Azerbaijan, Georgia, Kosovo, Slovenia and the Russian Federation, have drastically fortified the reliance of peoples to self-determination. Changes have occurred across the globe in the recent past, in the name of human rights, democracy and freedom, spring from the will of peoples freely to ascertain their own future.³⁵⁸

³⁵⁵ M Necati Munir Ertekun and Zaim M Necatigil, *The Right of the Turkish Cypriot People To Self-Determination* (Lefkosa 1990) 3.

³⁵⁶ Charter of the United Nations (n 238), Chapter IX: International Economic and Social Co-operation.

Article 55 of the UN Charter:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

³⁵⁷ UN General Assembly Resolution 15/1514 (14 December 1960) A/RES/15/1514(Declaration on the Granting of Independence to Colonial Countries and Peoples).

³⁵⁸ Ertekun and Necatigil (n 355) 29.

9. Conclusion: The Cyprus Experience

It would be assumed that the Cyprus experience has been agonising as well as eye opening for the EU and the other international players involved in this conflict. The handling of Cyprus by the EU has truly been very weak. Unfortunately, the ‘almighty’ bloc has managed to portray itself as an incompetent bureaucracy that makes mistake after mistake *vis-à-vis* the troublesome island. The EU Committee in the House of Lords stated in March 2013 that:

In allowing Cyprus entry into the Union before the dispute over Northern Cyprus was resolved, the EU has imported a bilateral dispute into the Union, transforming it into a dispute between the EU and one of its candidate countries. This was a grave mistake, for which both the EU and Turkey bear some responsibility, and one that has had serious negative consequences for both Turkey and the EU [...] The EU has learned some painful lessons about the problems that such disputes can throw up. The entry of Cyprus into the EU in 2004 without reconciliation between its Greek and Turkish populations has led to an entrenched dispute, diminishing the EU’s leverage in encouraging both sides to reach a settlement, and consequently interrupting Turkey’s accession process [...]¹

Whether or not it was simply a ‘grave mistake’ or a deliberate ploy is disputable. The predominant reason could be that the EU wanted to place ineradicable obstacles in front of Turkey’s European journey, as it feels that she does not belong in the *elitist* club. If this is the case, then the bloc has shot itself in the foot. The importance of Turkey’s role in resolving the Cyprus problem cannot be underestimated- as mentioned in the previous chapter- and therefore the EU Member States have to ‘adjust their sails to the wind of Turkey instead of resisting this wind’.² Hopes and efforts for a settlement based on federalism/consociationalism seem to be vanishing in Cyprus. These have been replaced by unilateral attempts to maintain the pro-resolution eagerness of the Turkish Cypriot community, while simultaneously trying to stimulate the Greek Cypriots to tone down nationalism on the Greek side.³ The

¹ *LGC News*, ‘Cyprus Entry to EU “Grave Mistake”: Say Lords’ (8 March 2013) <<http://www.lgcnews.com/cyprus-should-not-have-been-in-eu-say-lords/>> accessed 5 April 2014.

² *Ibid.*

³ Avrum Marco Turk, ‘Rethinking the Cyprus Problem: Are Frame-breaking Changes Still Possible through Application of Intractable Conflict Intervention Approaches to this “Hurting Stalemate”?’ (2007) 29(3) *Loyola of Los Angeles International and Comparative Law Review* 463, 465.

current period may be the last chance to marry the two sides; alternatively, in the coming years, there will be support for a negotiated separation process. Since, the natural flow of the river is separation, it seems as though it cannot be changed.⁴ Some would argue that conflict resolution is linked to the EU's very *raison d'être*⁵ and that its 'peace via membership' within its frontiers philosophy has generally worked. However, the Cyprus experience would indicate otherwise. The main objective of this conclusive chapter is to discuss the ways in which the EU can better its conflict transformation methods in general. It aims to highlight how important it is for the EU to handle the Cyprus issue as an 'extra ordinary agenda' item and to collaborate with the outside players whilst doing so. When dealing with a conflict as such, it is important to acknowledge the interrelationship of the inter-communal elements and their connection with the external powers, which irrefutably changes over time.⁶ The chapter will commence by discussing how the consociational theory has been a vital part of Cyprus' and Northern Ireland's 'meta- conflict'; hence, 'the intellectual conflict about the nature of the conflict and the appropriate prescriptions to tackle it.'⁷ It will then proceed by proposing that the Union needs to adopt a more realistic approach whilst dealing with this conflict.

The EU's strengths and weaknesses are inextricably connected to the strategies it adopts; it is crucial that the Union remains firm in reality and not only in theory to its ethos and conditionality requirements.⁸ If the Union fails to utilise its carrot of integration efficiently, it will suffer in the long-run as once the carrot has been consumed, it is extremely difficult to exercise control over troubled Member States. For example, on the one hand, the EU frantically wants to help the Turkish Cypriot community, which will consequently disentangle many 'Gordian knots' and on the other hand, its arms are fastened by legal issues and guaranteed Greek Cypriot veto; as it stands, it is shameful for the EU to be in such a quandary. The overall argument is that the EU is limited by bounded rationality and insufficient knowledge in its dealings with the Cyprus problem. Nevertheless, the Cyprus case has not set a

⁴ Ibid 499.

⁵ Nathalie Tocci, 'The EU in Conflict Resolution' in Stefan Wolff and Christalla Yakinthou (eds), *Conflict Resolution: Theories and Practice* (Routledge 2011).

⁶ Turk (n 3) 496.

⁷ John McGarry and Brendan O'Leary, 'Consociational Theory: Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland' (2006) 41(1) *Government and Opposition, An International Journal of Comparative Politics* 43, 44.

⁸ Tocci (n 5) 12.

precedent; in fact it has become a prototype of how not to handle a country in conflict.

The EU made the biggest mistake by ignoring Denktaş's very significant question which was directed at the club:

Is the recognition of any state by the Security Council the only reason why you make them candidates for membership? Haven't you got your own conditions for membership? Obviously you have, because you are asking Turkey to correct its internal affairs, human rights etc... Why are you not looking at Cyprus to find out whether from a human rights point of view, from a constitutional point of view, from a legal point of view, if it is a proper candidate for entry?... *Have you got any other country which is continuing with economic, social, political embargoes on one quarter of its people and yet claiming to be a proper government up to the standards of Europe?*⁹

9.1. The Northern Ireland Experience & Consociational Architecture

Incontestably, lessons need to be taken from the Cyprus experience in order for the EU to avoid making the mistakes it made with regards to the island, in the Balkans. Nonetheless, the EU can still apply the tactics it has picked up from other successful peace processes to the case of Cyprus; for example, the Union can use the Northern Ireland experience as a template for its future dealings with the Mediterranean island. Indeed, it is not the best model to use as there is still some way to go for the divisions in the society to be overcome; however, the experiences could be highly beneficial to the case of Cyprus. The fact that Northern Ireland has forty years of experience of handling interface areas makes it a connoisseur practitioner for other countries with societal disputes.¹⁰ The Northern Ireland Peace Process encompassed three fate changing factors, namely; inclusivity, leadership and persistence and finally the promise of economic prosperity. Jonathan Powell classifies constructive ambiguity-which falls under the leadership and persistence category- as one of the most useful tools for transforming conflicts and it did exactly that in Northern Ireland;

⁹ Emphasis added. Rauf Raif Denktaş in Michael Moran, *Cyprus: Unity and Difference: With the Rejection of the Annan Plan Can the Two Existing States in Cyprus Still Sensibly Seek to Become One? A Discussion, in a Series of Letters, between Rauf R. Denktaş and Michael Moran, Together with Various Supporting Documents* (İstanbul Kültür Üniversitesi Publications 2009) Appendix 8.

¹⁰ Jonathan Powell, *Great Hatred, Little Room: Making Peace in Northern Ireland* (Random House 2010) 27.

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In the initial stages, ambiguity is often an essential tool to bridge the gap between irreconcilable positions. The only way we could get over decommissioning at the time of the Good Friday Agreement was to make its terms ambiguous so that each side was able to interpret the Agreement as endorsing their position...¹¹

Thus, ambiguity is essential to lure in the two conflicting parties at the very beginning of the peace process. Unavoidably, the outcomes of constructive ambiguity will differ according to the conflict in question, however, it can be asserted that without persistence and optimism conflicts will never be resolved.¹² These two latter ingredients reversed the slowing down pace of the Northern Ireland Peace Process. Niall Burgess¹³ stated that ‘the process represents the triumph of optimism over experience, again and again. It represents the simple fact that persistence and optimism pays...’¹⁴ Unfortunately, the pessimistic approach adopted by the Turkish Cypriots and the lack of persistence coming from the Greek side of the island renders it impossible to reach a solution; a recent poll reveals that people on both sides of the island sincerely desire a solution,¹⁵ yet only a very few genuinely believe that a settlement would actually be achieved.¹⁶ Respectively, future talks should encompass a certain degree of constructive ambiguity, as this double-edged principle will overcome the deadlock on the island by postponing certain aspects of the peace process which are unwelcomed by either side until its actual implementation is required; this will in turn re-boost the lost optimism on the ‘*depressive island of love*.’¹⁷ The idea is that the two Cypriot parties will be committed to a signed settlement ‘following the dictum of *pacta sunt servanda*’¹⁸ and will subsequently face the painful realities they did not realise they had signed up for. Axiomatically, this ambiguity approach will create disadvantageous results in the future; for instance, it will aggravate the mistrust between the two Cypriot

¹¹ Ibid 22-23.

¹² Ibid 24.

¹³ Niall Burgess is a senior official at the Department of Foreign Affairs (Republic of Ireland).

¹⁴ Powell (n 10) 23.

¹⁵ 60-70%.

¹⁶ 15-20%; Yeshim Harris, Nikos Skoutaris and Rosemary Jackson, ‘Workshop Report: How Can an Inclusive Approach Help the Cyprus Peace Process?’ (Engi Conflict Management: Projects, Training and Parliamentary Advocacy For Conflict Management, Malta, September 2013) <<http://www.engi.org.uk/malta-report/>> accessed 25 February 2015.

¹⁷ Jacob Bercovitch, Victor Kremenyuk and I William Zartman, *The SAGE Handbook of Conflict Resolution* (SAGE 2008) 42. Aphrodite, the Greek goddess of love and beauty, is said to have risen from the waves that crash on the shores of Cyprus, and for this reason Cyprus is referred to as the island of love.

¹⁸ (Agreements must be kept.) Ibid.

communities, which will eventually lead to further antagonism. Consequently, it is more than likely that the agreement will not be fully implemented as the concept of a settlement will be highly scrutinised. Accordingly, enforcement mechanisms or even infraction procedures must be established in order to prevent the incomplete implementation of peace agreements.

Furthermore, peace processes in general require acting guardians / custodians;¹⁹ the efficiency of this can be seen in the Northern Ireland Peace Process, where the U.K. and Ireland acted as internal custodians.²⁰ Since 10 April 1998, Northern Ireland has had an agreement based on consociational architecture which was introduced to political science by Arend Lijphart.²¹ Consociationalism is habitually viewed as synonymous with power-sharing; it formed the basis of reconciling societal fragmentation along ethnic and religious lines. John McGarry and Brendan O'Leary argue quite convincingly that consociational principles form the most rational basis for understanding conflict areas such as Northern Ireland;²² however, they also assert that the traditional consociation theory is extremely endogenous and thus ignores the fact that the benign intervention of outside forces actually aids the peace process. Consociational theory was established during the Cold War period, when outside intervention for promoting power-sharing settlements was uncommon.²³ Nonetheless, albeit traditional consociational principles helped produce a settlement in Northern Ireland, it was the exogenous changes that played the main role.²⁴

Benign outside mediation has aided power-sharing agreements on many occasions; the carrots and sticks, the good offices and the military force of grand international players, such as the U.S.A., the UN, NATO and the EU, have facilitated agreements in Macedonia, Bosnia Herzegovina, Afghanistan and Iraq. Thence, the feasibility of consociational arrangements does predominantly depend on orchestrated external

¹⁹ Ibid.

²⁰ Ibid 43.

²¹ Consociational architecture was first employed in the Netherlands in 1917. It is a type of government that provides political stability in deeply divided societies through guaranteed group representation, power-sharing arrangements and functioning democratic institutions. See Siret Hursoy, 'Political Settlements in Divided Societies: Consociationalism and Cyprus. Review of the Book: C Yakinthou, *Political Settlements in Divided Societies: Consociationalism and Cyprus* (Palgrave Macmillan 2009)' (2012) 12(4) *Insight: Challenging Ideas on Turkish Politics and International Affairs* <<http://www.insightturkey.com/political-settlements-in-divided-societies-%E2%80%93-consociationalism-and-cyprus/book-reviews/100>> accessed 1 March 2015.

²² McGarry & O'Leary (n 7) 47.

²³ Ibid 53.

²⁴ Ibid 48. The UK Government was the most influential outside player in this peace process.

interventions. However, McGarry and O’Leary highlight a very valid point; ‘settlements reached primarily under exogenous pressure may have shallow endogenous foundations.’²⁵ For instance, the externally imposed Dayton Accords in Bosnia Herzegovina were loaded with political desires of the initiators of war;²⁶ Professor Nedo Milicevic argues that the articles in the Constitution of the Dayton Agreement ‘contain the open constitutional basis for discrimination that causes a large number of Bosnia Herzegovina citizens from all of its three constituent peoples, as well as all citizens who are classified under the category of “others,” to be deprived of their basic human rights.’²⁷ Unbalanced exogenous pressure also weakened the possible success of the Annan Plan for Cyprus, and previously ruined the 1960-63 power-sharing Cypriot Republic.²⁸ Nonetheless, it is hard to ignore the fact that inaction, as much as intervention, has a cost.

Without a doubt, it is not always right to intervene, and it is usually impractical to do so in any case; however, those who choose to do nothing, will pay for the consequences in the future. Ergo, the key to success is to select the correct strategy for mediation. Undeniably, it is near enough impossible for an outsider to please all of the conflicting parties;²⁹ yet, the strategy adopted for the peace process will determine the final degree of victory.³⁰

What can the traditional consociational theory do for the case of Cyprus? The answer is: in its current form, not much. The consociational theory quite overtly ignored the idiosyncrasy of self-determination as it developed from a concern with class and religious divisions in European countries such as, Belgium, Austria, the Netherlands and Switzerland. Self-determination polemics tend to be based on the *degree* of power that should be exercised by the central government and whether or not there should be multiple central governments instead of one. The focus of traditional

²⁵ Ibid 53.

²⁶ Rusmir Mahmutćehajić, ‘Bosnia after Dayton’ (2006) 1(1) Spirit of Bosnia: An International, Interdisciplinary, Bilingual, Online Journal <<http://www.spiritofbosnia.org/volume-1-no-1-2006-january/bosnia-after-dayton/>> accessed 2 March 2015.

²⁷ Mirjana Tomić Malić, *Dayton Peace Agreement: Four Years of Experience: Position of the Democratic Alternative BiH: Roundtable* (Helsinki Citizen’s Assembly 2000) 13.

²⁸ McGarry & O’Leary (n 7) 53.

²⁹ This is true of Northern Ireland too. However, it should be noted that a desire for a united Ireland has effectively been softened.

³⁰ Adriana Camisar, Boris Diechtiareff, Bartol Letica and Christine Switzer, ‘An Analysis of the Dayton Negotiations and Peace Accords’ (2005) International Multilateral Negotiation, The Fletcher School of Law and Diplomacy, Final Research Paper, 28 <<http://ocw.tufts.edu/data/12/244825.pdf>> accessed 3 March 2015.

consociational theory is *who* should exercise power at the central government level. *Ipsa facto*, even though this theory values the concept of autonomy, it merely concentrates on non-territorial or even corporate autonomy and not on territorial autonomy, which is a prerequisite for any self-determination movement.³¹ Therefore, those who utilise the consociationalist theory are incapable of addressing self-determination disputes effectively. This problem was also highlighted in Lijphart's analysis of the Northern Ireland conflict in 1975, where he argued that the main problem was the lack of support for power-sharing amongst the Protestants, who were politically dominant alone.³²

There are many self-determination disputes around the world, the most intractable ones being Cyprus, Sri Lanka, Kurdistan, Kosovo and Kashmir. These disputes are not solely about power-sharing, but in fact about sovereignty, freedom, identity, recognition and the recovery of territory culturally and historically. As a result, consociational theorists need to broaden their horizons and address these kinds of issues in order to be able to apply the theory to self-determination conflicts.³³ So, even though a consociational constitutional framework will aim to gradually erode societal frictions within multi-ethnic societies that have linguistic and religious differences, it needs to take into account that the communities in dispute may in fact function independently from one another and have their very own democratic political systems-as they do in Cyprus for the past thirty two years.³⁴

Simultaneously, it could be argued that in practice the consociational approach will simply freeze the Cyprus conflict instead of repairing it by 'building tightly-organised political structures around social institutions such as, schools, universities, hospitals and newspapers, which do not reflect changes over time and therefore, lack flexibility in domestic affairs to prevent the potential for future violence.'³⁵ Thus, without adapting the theory to the reality that the Turkish Cypriots are independent from their Greek Cypriot counterparts and that the idea of power-sharing is frowned upon by the Greek Cypriots -who habitually deny that there are two divided communities on the island and claim that the Turks have been their 'visitors' on the

³¹ McGarry & O'Leary (n 7) 55.

³² Arend Lijphart, 'The Northern Ireland Problem: Cases, Theories, and Solutions' (1975) 5(1) *British Journal of Political Science* 83, 105.

³³ McGarry & O'Leary (n 7) 58.

³⁴ Hursoy (n 21).

³⁵ *Ibid.*

island since the 1500s –it will never resolve the Cyprus problem, even though the Turkish Cypriots are willing to give up their own sovereignty and share power. The role of ethno-nationalism in the Cyprus problem is extremely prominent as historical legacies have moulded the attitudes of the public and politicians on both sides of the island; the conflict has been institutionalised by the two communities and this can be seen from the 1960 RoC Constitution and from the Annan Plan. As a result, the prospect of a power-sharing solution is deadlocked.³⁶

It must be highlighted that consociationalism and federalism are more or less synonyms in the broad sense, as they both ‘cover all situations in which ultimate governmental powers are shared between two or more levels.’³⁷ The consociational democratic model was first applied in Cyprus via the establishment of the RoC in 1960. This applied consociational democratic model failed rather quickly as a large part of the Greek Cypriot community had not warmed to the idea of sharing their supremacy with the Turkish Cypriots, who are numerically the minority on the island. The second attempt to utilise the consociational model in Cyprus was through the 2004 Annan Plan. As previously discussed, the Turkish Cypriots voted in favour of this Plan- which would have made them ‘an anonymous minority in an unbalanced power-sharing decision-making mechanism’³⁸ of the United Cyprus Republic, whilst the Greeks Cypriots voted against it as they believed that the United Cyprus Republic’s framework would be malfunctional and obdurate as a result of the veto rights, proportionality and segmental division included in the Plan.

It must be noted that any future plan will also have to incorporate such concepts and thus will fail to satisfy the Greek Cypriot political elites once again if their vision does not change. The majority of both the Greek and Turkish Cypriot political elites are nationalistic and somewhat unforgiving, as a result, they require huge domestic incentives in order to be able to compromise and reach a political agreement along consociational lines. The Annan Plan experience overtly outlines that the prospect of political legitimacy and stable domestic institutions were strong enough incentives to win over the Turkish Cypriot electorate in relation to cooperation. On the other side

³⁶ Ibid.

³⁷ Xiaokun Song, ‘Confederalism: A Review of Recent Literature’ in Bruno Coppieters, David Darchiashvili and Natella Akaba (eds), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia* (VUB Press 2000) 192.

³⁸ Hursoy (n 21).

of the island however, the idea of maintaining the Cyprus problem was more appealing than the incentive for solving the issue in a consociational way; the Greek Cypriots do not want to return to the pre-1974 scenario, since they have international recognition and they are the sole representatives of Cyprus in the EU.³⁹ The fact that reunification would have equated to bi-zonal, bi-communal federation with political equality, was a shock to the Greek Cypriot community. For this reason, since 1974,⁴⁰ the Greek Cypriot government has refrained from explaining in detail what such a federation would mean in practice to the citizens of the south. According to recent surveys, it is mostly the young Greek Cypriots who oppose the idea of reunification and returning to the north, even if it was to be under Greek Cypriot administration; this is completely reasonable as the north is the unknown for them and the people living there have always been portrayed as the enemy. So, 'if the young represent the future, the portents clearly are not positive.'⁴¹ Even if the older generation, on both sides of the island, look more warmly at the idea of returning back to pre-1974, the reality is that, the previous communities will never be recreated; for more than forty years 'home' has been on the other side of the island, thence, moving back would simply be another displacement.⁴² Since 1974, the Greek Cypriots have demanded for all the displaced persons to return to their homes; this assertion made sense in the first few years of the separation, yet today, it is not a realistic idea and this is what the EU needs to acknowledge. Most importantly, the Greek Cypriots need to admit to themselves that reunification is not what they actually desire;⁴³ once this very overt fact is accepted, the search for a settlement will be made easier.

Protracted intra-state conflicts no doubt have trans-national consequences and therefore, as mentioned earlier, it is important for the major players of the world to induce appropriate political settlements in these troublesome zones. The question is however; how can these major players ensure that they reach the point where the proposals they provide for intra-peace are actually adopted? It should be stated that the case of Cyprus is extremely enlightening in the sense that it can offer lessons to

³⁹James Ker-Lindsay, *Resolving Cyprus: New Approaches to Conflict Resolution* (IB Tauris 2014) 224.

⁴⁰ With the exception of the AKEL-led government, which published a meagre pamphlet regarding the details of such a reunification.

⁴¹ Ker-Lindsay (n 39).

⁴² Ibid 225.

⁴³ A recent survey indicates that 73% of Greek Cypriots would not return to the north under Turkish Cypriot administration. Ibid.

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those working on solving political conflicts in post-conflict or segmented societies across the globe and to academics who are trying to comprehend how such conflicts become obstinate. There is a silver lining behind every cloud; the many years of scrutiny and the numerous failed settlement efforts on the island mean that the case of Cyprus can possibly disclose a lot of information about what actually hinders and what helps progress towards a peace agreement anywhere around the world.⁴⁴ The question that needs to be asked is; whether the international key players actually have the potential to motivate the political elites of the two Cypriot states, to overcome their differences for them to be able to find a middle ground and to agree to adopt a consociational plan, or not.

Indisputably, the actions of the EU and the UN, in terms of encouraging a settlement on the island, have caused more harm than good, as their contribution has made the idea of a consociational plan less attractive for the political elites on both sides of the divided ‘pearl of the Mediterranean’; the outside players seem to lack vision for Cyprus’ reunification. The broken promises of the EU to the Turkish Cypriots and the minimal developments on the island since the accession of the RoC have disappointed the Turkish Cypriots, and as a response they have opted to be less cooperative in this field. The UN Security Council Resolution 541 is the ‘Achilles heel’ of the UN, as it has severely restricted its power over the Greek Cypriot constitutional engineers by recognising them as the sole representatives of the RoC and ‘denying the Turkish Cypriots to have a formal status’ in the TRNC.⁴⁵ As a result of the UN’s behaviour, the Turkish Cypriots are prevented from defending themselves against their Greek counterparts in the international field, as they do not have a legitimate right to be heard. Correspondingly, the EU has played a similar role in destroying the hopes of the Turkish Cypriot community and ruining the chance for a settlement by permitting the RoC to unilaterally sign the 2003 Accession Treaty in Athens without the involvement of the Turkish Cypriot politicians. The EU has quite simply decreased its leverage over the Greek Cypriot political elites by awarding them with EU membership and thus giving them *locus standi*⁴⁶ contra the Turkish Cypriots in the EU legal field. In fact, the EU has

⁴⁴ Hursoy (n 21).

⁴⁵ Ibid.

⁴⁶ (Standing to sue.)

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worsened the status of the division in Cyprus and encouraged the maintenance of the deadlock.⁴⁷

Nevertheless, ‘it’s a dirty job but someone’s gotta do it’; without external interference the prospect of a settlement would not even be on the cards in most conflict zones. Not all that the EU has done in Cyprus has had negative side-effects; in both Northern Ireland and in north Cyprus, the Union’s financial aid package has worked wonders. The EU has provided millions of Euros/pounds worth of aid for the peace projects in Northern Ireland and the importance of this cannot be underestimated. Bairbre de Brún, MEP, wrote a report for the European Parliament about the significance of this contribution; the aim of this report was to inform others in a Peace-building and Conflict Resolution Centre at the former Maze / Long Kesh prison site, of the benefits of projects and its processes. Ms de Brún stated that:

Significant improvements in thousands of ordinary people's lives across the island have been heralded by the investment provided by EU peace funds in the years since the IRA cessations. These have quite rightly been welcomed across a wide range of political and social opinion.⁴⁸

Thus, the EU’s decision in 2006 to send funding to the northern part of Cyprus should not be frowned upon as it has been the Union’s only positive contribution to the Turkish Cypriot community since its active involvement in the area. Even so, it is completely normal for the EU’s projects- which aim to help the Turkish Cypriot community -to face difficulties and to meet with disappointment.

Northern Ireland’s Peace Process can be likened to a rollercoaster ride that took over thirty years to complete; it definitely was not an easy ride. However, the Peace Process was achieved with the help of many different actors over the years and with the key factors of inclusivity, leadership and its persistence and the promise of economic prosperity.⁴⁹ Naturally, it would make sense to compare the Cyprus case to that of Northern Ireland- even though there is no ‘Green Line’ in the latter, and nationalist and unionist communities are geographically dispersed. Therefore, although the success of the Cyprus Peace Process cannot be measured, the hopes should not be brushed aside all because of the disappointments that have surfaced;

⁴⁷ Hursoy (n 21).

⁴⁸ Sinn Fein, ‘EU Funding: Direct Result of Developing the Peace Process’ (Sinn Fein, 9 June 2005)

<<http://www.sinnfein.ie/contents/4538>> accessed 5 March 2015.

⁴⁹ Powell (n 10) 29.

the Greek Cypriots and the Turkish Cypriots have come a long way since the division of the island by the ‘Green Line’. The prolonged negotiations have somewhat altered domestic politics on both sides of the island; the talks have helped some leaders excel on their paths and some to wither away.⁵⁰ Moreover, the local civil society activists and the political leaders have acquired various skills on this bumpy journey, including greater mutual toleration; deservedly, people who have put time and effort into resolving other domestic or international conflicts have looked to the Cyprus Peace Process for inspiration.⁵¹ Thus, albeit the Cypriots themselves have lost faith in the process, outsiders utilise the negotiation techniques adopted by the Cypriots as a source of guidance. Nevertheless, the overall lesson that should be taken from the case of Cyprus is that the process of the negotiations and the techniques adopted has not worked.

Unfortunately, the numerous leaders on both sides of the island have always taken for granted the demands of their communities; they have chosen to satisfy the needs of the outside players rather than the needs of those who actually matter throughout the process so far. As emphasised by Mark Durkan,⁵² the framework of the predicament needs to be appointed as the framework of the solution; this has not been achieved in the case of Cyprus as the root of the problem has yet to be agreed upon by any of the mediators. Tip O’Neill⁵³ has rightly stated that ‘you would never build a lasting peace process unless you built hope at the local level and in local communities’,⁵⁴ and the only way to build hope on such an island is to get the civil society involved in the story, and for the EU to be more directly involved in the peace and reconciliation process.

A workshop that took place in Malta in September 2013,⁵⁵ which aimed to discuss how an inclusive approach could aid the Cyprus Peace Process, highlighted that all efforts to reach a settlement on the island have unfortunately been guided by a top-

⁵⁰Alexandru Baltag, Veaceslav Berbeca, Christopher J Borgen, Denis Cenusă, Mete Hatay, Oazu Nantoi, Ilia Roubanis, Irina Severin, Sylvia Tiryaki, Orestis Tringides and Radu Vrabie, *Managing Intractable Conflicts: Lessons from Moldova and Cyprus* (İstanbul Kültür Üniversitesi Publications 2013) 11.

⁵¹Ibid 12.

⁵²Irish Member of the UK Parliament.

⁵³Former Speaker of the US House of Representatives.

⁵⁴Powell (n 10) 24.

⁵⁵From 18-20 September, sixty civic, business and political figures from the two communities in Cyprus gathered in Malta to discuss the following question: How can an inclusive approach help the Cyprus Peace Process?

down approach. Hence, the Cyprus Peace Process has excluded varied perspectives from the different sectors of society. The lack of Track II diplomacy⁵⁶ has seriously hindered the process on the island; there has been no ownership of a settlement by the Cypriots as the climate in which the negotiations have taken place have been cold.⁵⁷ The Malta workshop brought to light a rather interesting factor; the Turkish Cypriots and the Greek Cypriots do not completely understand each other's outlook on the Cyprus conflict and therefore do not believe that the status quo needs to change. Consequently, Cypriots urgently need to acknowledge that the peace process actually belongs to them and not to their leaders.⁵⁸ In order for the lack of transparency, lack of hope, lack of understanding and lack of ownership to be overcome, the wider Cypriot public should cease from being too deferential to their leaders.

Overall, the EU should have stepped back and let both of the conflicting Cypriot parties struggle it out in the political arena before allowing the island to join the European family. The bloc however, decided to avoid realism and instead opted for what it perceived as being the 'moral' view- which was welcoming the RoC into the European family, even though the Cyprus problem remains unresolved. In reality, this 'moral' decision has had 'immoral' consequences. For instance, as mentioned in the earlier chapter, the EU has been 'blackmailing' Turkey to recognise the government of the RoC as the sole representative of the island and to extend its Customs Union with the EU to the RoC simply because the latter is a Member State, in order to unfreeze eight chapters in her accession negotiations; hence, Turkey is having to pay the price for a major strategic error made by the Union.⁵⁹ By isolating and antagonising the Turkish Cypriots, the EU has further destabilised the already unstable island. Of course, the mistakes that have been made by the EU can be somewhat rectified- but only if the Union employs the tactics that were used in other

⁵⁶ Track II diplomacy refers to 'non-governmental, informal and unofficial contacts and activities between private citizens or groups of individuals, sometimes called "non-state actors"'. See Dalia Dassa Kaye, *Talking to the Enemy: Track Two Diplomacy in the Middle East and South Asia* (Rand Cooperation 2007).

⁵⁷ Harris et al (n 16).

⁵⁸ 'Recent polls reveal an overwhelming consensus among people in both communities (90% Greek Cypriots, 83% Turkish Cypriots) that the voice of ordinary citizens is not heard by the Leaders in the negotiation process.' Ibid.

⁵⁹ Serdar Denktaş, 'EU and Turkey versus the Turkish Republic of Northern Cyprus' (2011) 10(1) *Turkish Policy Quarterly* 55, 58
<<http://turkishpolicy.com/dosyalar/files/Serdar%20Denktas%20EU,%20Turkey,%20Northern%20Cyprus.pdf>> accessed 8 March 2015.

somewhat successful peace processes, such as Northern Ireland, to Cyprus or if it acknowledges the existence of the TRNC. However, the EU needs to clearly stipulate that the case of Cyprus has not set a precedent, as by placing accession before conflict resolution, governments dealing with secessionist entities can easily haggle; for example, Moldova is using Cyprus as an example in order to postpone resolution via accession first.

9.2. The *Strategic* Approach

Even though some would argue that enlargement has led to instability and to the rise of parties like U.K. Independence Party, ‘wideners’ would contend that the stability of Europe will be at risk if further enlargement of the EU is delayed or does not take place at all. Therefore, in accordance with the wideners argument, enlargement should be treated as a strategic issue on the EU’s current agenda and not as an isolated objective.⁶⁰ Most scholars would assert that enlargement belongs to ‘a package of the most urgent strategic issues to be solved by the EU.’⁶¹ In order to fulfil this purpose, the EU cannot firmly adhere to the principle that only those applicant members that have completely met the conditionality requirements will join the family.⁶² Indeed, in some cases, the EU has behaved in such a strategic manner; for example, even though Poland was far behind the other frontrunners, in relation to its reforms, in the first round of enlargement of the CEECs, it was unimaginable to leave her out: ‘Reconciliation between Germany and Poland is so symbolic, so central to the entire rationale for the enlargement process, that leaving Poland out is almost unimaginable as trying to halt German unification back in 1990.’⁶³ This decision would imply that the conditionality requirements were in some way brushed aside, as the EU would not make the others wait in order for Poland to catch up. Although pressure was put on Poland to meet the conditions, the idea of reconciliation was far too important to disregard.⁶⁴ The conclusion to draw from this is that decisions to conclude accession negotiations with certain countries are based on political imperatives and strategic interests and not only on the fulfilment of the conditionality requirements. Even if some would argue that this is

⁶⁰ András Inotai, ‘The “Eastern Enlargements” of the European Union’ in Marise Cremona (ed), *The Enlargement of the European Union* (OUP 2003) 90.

⁶¹ Ibid 92.

⁶² Karen E Smith, ‘The Evolution and Application of EU Membership Conditionality’ in Marise Cremona (ed), *The Enlargement of the European Union* (OUP 2003) 129.

⁶³ Ibid.

⁶⁴ Ibid.

the way it should be, indisputably, the decisions of the Union will be more contentious.

The lack of objective and uniform application of the conditionality will eventually decrease the Union's effectiveness on those countries that have been left out or still plan to apply. Moreover, the aim of the conditions is to guarantee that the EU will function efficiently and safeguard its successes; as a result, by distorting the conditions of accession, the integration process, the way that the Union functions and its credibility, will suffer considerably.⁶⁵ Axiomatically, any loss of authority of the EU in parts of Europe will also affect its credibility in other parts of the world.⁶⁶

The most harmful decision taken by the EU to disregard the fulfilment of the conditionality requirements has been the case of Cyprus; and now, in this tiny island, the EU lacks any kind of authority. Unfortunately, yet perceivably, the EU's strategic approach was not as fruitful as it had initially anticipated.⁶⁷ The requirement of good neighbourliness was not demanded from the RoC as the Union hoped that the accession carrot would be sufficient to induce a settlement on the island. The Union overtly refused to use its stick *vis-à-vis* the RoC mainly because its member, Greece, had prevented it from doing so. Several Turkish political elite⁶⁸ believe that Greece and the Greek Cypriots aim to achieve an *Enosis* like structure via the EU and thus the Union's discrimination contra Turkey⁶⁹ and its positive attitude towards the Greek Cypriot administration has fortified the position of the Hellenic community in relation to the Cyprus problem.⁷⁰ This is a valid argument as the Greek Cypriots have taken Turkish Cypriots, Cyprus and Turkey hostage by joining the Union 'unconditionally'.⁷¹ The cases of Cyprus and Turkey exemplify the types of problems that will undoubtedly arise if conditionality is not utilised consistently by the EU; what is worse is that, they have set a precedent for the future use of conditionality.⁷²

⁶⁵ Ibid 130.

⁶⁶ Inotai (n 60) 92.

⁶⁷ Smith (n 62) 133.

⁶⁸ The MHP Nationalist Movement Party is a far right political party in Turkey and is highly euro-sceptic. The general belief is that the EU has an ulterior motive for Turkey.

⁶⁹ The EU has put pressure on Turkey to contribute to a resolution of the Cyprus problem.

⁷⁰ Didem Buhari-Gulmez, 'The EU Conditionality in the Cyprus Problem: Catalyzing Euro-skepticism in Turkey?' (2008) 14 *The Journal of Cyprus Studies* 1, 26

⁷¹ Inotai (n 60) 92.

⁷² Smith (n 62) 131.

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Other membership conditions were also not applied consistently in the case of Cyprus; Jolanda van Westering states that ‘there are no stable institutions guaranteeing respect of democratic order and fundamental freedoms in Cyprus’;⁷³ furthermore, the division of the island has led to the violation of fundamental freedoms concerning the freedom of movement, freedom of establishment and freedom of travel. Thus, by welcoming a divided island in its entirety and by rendering EU legislation temporarily ineffective in the north, the Union itself allows for the continuation of numerous violations of the Four Freedoms, irrespective of the GLR.⁷⁴

Many would argue that no country- that is not yet ready- has the right to stop another-which is ready-from joining the European family; according to the EU, the RoC was ready to join despite the political conflict; thus, northern Cyprus could not stop this from happening. Yet, it could also be strongly argued that no Member State or applicant country has the right to impede another country’s development. This definitely sets up a rather perilous precedent for the EU.⁷⁵ The Turkish Cypriot side’s access to the Union’s benefits and their relation with the bloc is virtually non-existent. The Turkish Cypriot community is subject to a senseless and inhuman isolation in all fields; for instance, they cannot directly trade with the EU since 1994, they are not represented in the EU Parliament, direct communication with them is not possible,⁷⁶ international sporting events in the TRNC have been banned and Turkish Cypriots cannot take part in global sporting events,⁷⁷ they cannot travel

⁷³ Jolanda Van Westering, ‘Conditionality and EU Membership: The Cases of Turkey and Cyprus’ (2000) 5(1) European Foreign Affairs Review 95, 113.

⁷⁴ Ibid. The Fundamental Freedoms are: free movement of people, goods, capital and services. The Green Line Regulation sets out the legal framework of the crossing of goods, persons and services as of 1 May 2004 between the two sides on the island.

⁷⁵ Smith (n 62) 132.

⁷⁶ To date, North Cyprus’ postal administration has been denied any status within the Universal Postal Union and Turkish Cypriots do not have internationally recognised addresses or telephone numbers. All mail and calls to and from North Cyprus must go via Turkey. As a result, the entire 286,257 citizens of North Cyprus are relegated to a PO Box, with all mail to and from North Cyprus having to go via Mersin 10, Turkey.

⁷⁷ Turkish Cypriots are not allowed to participate or host international teams or sporting events. The extent of these embargoes are vast; no teams or individuals from North Cyprus have participated in any of the following since December 1963: Olympic and Commonwealth Games, World and European sporting tournaments such as athletics championships or football competitions. In April 2005, the (Greek) Cyprus Football Association prevented an English team, Huddersfield Town AFC, from playing a friendly football match in North Cyprus. A similar episode occurred in 2007 when the Greek Cypriot side applied to FIFA and prevented Luton Town from playing a friendly match in Lefkoşa with the then Turkish Cypriot team, Çetinkaya. This was in spite of the English Football

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freely and direct flights to them are not possible,⁷⁸ academic institutions and education are not allowed to be a part of Bologna Process, and the Turkish Cypriots cannot take part in cultural events across the world.⁷⁹ The Turkish Cypriot community should not be left at the mercy of an endless process where every single issue has been negotiated to the point of tautology for decades; ‘the guillotine must come down on the negotiation process.’⁸⁰ That is to say, everyone needs to urgently acknowledge that this is indeed the final chance to solve the Cyprus problem, as there is nothing new left to negotiate.

It goes without saying that, without a comprehensive solution to the Cyprus problem, there is no appropriate framework for the protection of the fundamental rights and freedoms of EU citizens residing in the north of Cyprus. Following more than four-decades of negotiations, the main principles of a settlement are well-established and known to all parties involved. The settlement will be a new partnership based on political equality and bi-zonality, with a federal government and two Constituent States of equal status as agreed in the 23 May 2008 Joint Statement. The Treaties of Guarantee and Alliance shall remain in force and the settlement shall become EU primary law for legal certainty and sustained stability. The united Cyprus, as a member of the EU and the UN, shall have a single international personality and a single sovereignty. Furthermore, there will be a single united Cyprus citizenship governed by federal law; all citizens of the united island will also be citizens of either the Greek Cypriot constituent State or the Turkish Cypriot constituent State. The principles upon which the EU is founded will be safeguarded and respected

Association having no objection to these games and overlooks the historical right of Turkish Cypriots to their own football federation, which dates back to 1955.

⁷⁸ Greek Cypriots insist the world must obtain permission from them to use any ports in north Cyprus and refuse permission for use of any port not under their direct control. As a result, ports and airports in north Cyprus have been closed to direct international trade and travel since 1974. Travel to North Cyprus can only take place via Turkey. The requirement of a stopover in Turkey increases the time, financial cost and environmental impact of travel, discouraging both visitors and potential business people from entering North Cyprus. Turkish Cypriot travel documents are not recognized by EU countries with the exception of the UK.

⁷⁹ Although both peoples in Cyprus have always had rights to separate educational systems under the 1960 Constitution, to ensure their distinct ethnic, religious and cultural identities are maintained, the Greek Cypriots consistently fail to honour this. As shown below, even academic institutions are prone to Greek Cypriot pressure. North Cyprus’ largest institution, the Eastern Mediterranean University (EMU) previously applied to join the European University Association and tried to obtain Erasmus University Charter status and related funding. Both were refused. EMU scholars’ requests for international research grants have also been blocked. Interview with Hasan Tacoy, Minister of Public Works and Communications, TRNC, Lefkosa on talking points on relations with the EU and the Cyprus Issue (Lefkosa, TRNC, 4 March 2014).

⁸⁰ Denktaş (n 59) 60.

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across the island.⁸¹ Unsurprisingly, the proposals on all core issues, such as the property rights, are yet to come from the Turkish Cypriot negotiating team and for this reason the negotiations cannot progress into the next phase of give and take.⁸² Nonetheless, even if the negotiations do not advance accordingly, some substantive core issues can still be resolved; for instance, with the property issue, the Turkish Cypriots simply need to ensure that the procedures of the IPC are transparent and just, whilst the Greek Cypriots make legal provisions for mutually agreed property swaps between displaced owners from both sides of the island.

The international *fora* is aware that with a bit of seriousness they can easily deliver a solution to the dilemma in the space of a few months; with the oil issue at hand, this chance should not be missed.⁸³ The hydrocarbon issue can possibly foster cross-border cooperation, just in the way coal and steel helped unite Europe's once enemies in a community of nations in 1950. By solving the Cyprus issue, no doubt new horizons will open. However, if the negotiation process is to fail one more time and if an agreement is not reached between the two parties, then it is time to declare this route as a 'dead end'; negotiations should no longer carry on as they have simply been harmful to the Turkish Cypriot community beyond calculation.⁸⁴ The passing of time has proven to be detrimental to the peace process as both sides have become even more attached to their positions and novel problems have surfaced as a result of leaving the original problem unresolved.⁸⁵ The occurrence of new enigmatic issues will inevitably continue to arise thanks to the accession of a divided island.

Overall, it could be asserted that the bloc needs to readjust its strategic role in order not to disturb the equilibrium, the way it did in Cyprus, in other conflicting territories it has influential power over; only then will it be a successful stabiliser. The moral of the story is: politics should not prevail over the objective application of membership conditionality.⁸⁶ It would be true to claim that the EU is beginning to

⁸¹ *Parikiaki Cypriot Weekly Newspaper*, 'Cyprus Joint Declaration: Full Text' (London, 11 February 2014) <<http://www.parikiaki.com/2014/02/cyprus-joint-declaration-full-text/>> accessed 10 March 2015.

⁸² Stefanos Evripidou, 'All Core Issues Must be Discussed' *Cyprus Mail* (Nicosia, 20 June 2014) <<http://cyprus-mail.com/2014/06/20/all-core-issues-must-be-discussed/>> accessed 11 March 2015.

⁸³ Turkish Republic of Northern Cyprus Ministry of Foreign Affairs, Amendment Proposals and Explanations for Turkey Report 2013 (DŞD. 0.00.642/78-1-14/53, 2013) para 22.

⁸⁴ Denktaş (n 59) 60.

⁸⁵ *Ibid.*

⁸⁶ Smith (n 62) 132.

take a clear position regarding its role and aims in the Balkans and some other regions of Southern and Eastern Europe as a result of the continuing insecurity in that region.⁸⁷

9.3. What Leverage Does The EU Have Over States Once They Accede?

Conditional membership is a delicate power resource and unfortunately once the applicant countries have passed this test and the carrot has been consumed, it is extremely hard to exercise control over them. Indeed, the infraction procedure is a way of taming the wild members who are not applying EU law appropriately; yet, this is a long process and also depends on the willingness of members to abide by the Court of Justice's rulings. Undeniably, there are also ways of dealing with Member States that are falling behind on the political conditions that are required by the Union. Given that the majority of the recent members are new democracies, the EU had to come up with a novel idea to ensure that they obey the principles of liberty and democracy, have respect for human rights, fundamental freedoms and the rule of law, once they are admitted to the club.⁸⁸ As a result, the risky 'membership suspension clause' was included in the Amsterdam Treaty. Under Article 7 TEU 'some of a Member State's rights (e.g. its voting rights in the Council) may be suspended if it seriously and persistently breaches the principles on which the Union is founded. But its obligations would still be binding.'⁸⁹

Article 7 TEU is considered to have been both a gesture prompted by the future wave of EU enlargement and an attempt to tackle the discrepancy between the democratic model promoted by the EU in its external relations and its modest capacity to intervene whenever democratic values are at risk of being violated within one of its Member States.⁹⁰

Nevertheless, it has been argued that this clause is so arduous that it will only ever be applied contra a full-blown tyranny; although the French Roma expulsions and the Romanian political struggle between President Bănescu and Prime Minister Ponta

⁸⁷ Inotai (n 60) 91.

⁸⁸ Smith (n 62) 133.

⁸⁹ The suspension clause was written into the EU Treaty (Article 7) by the Treaty of Amsterdam. Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C 115/13.

⁹⁰ Andreiaghimis, 'Article 7 TEU: A Mechanism to Protect EU Values' (European Parliamentary Research Service, 7 October 2013) <<http://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/>> accessed 9 March 2015.

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nearly triggered the use of the clause.⁹¹ In fact, there is a consultation process provided for in the Treaty of Nice for a country that is breaching these fundamental principles; this will take place before a decision is made about whether or not a suspension of membership rights will be demanded.⁹² Furthermore, Article 354 TFEU provides the voting procedures to be utilised by the European institutions when a Member State faces application of the suspension clause. Therefore, it is a rather inane clause. The political reluctance of the Union to use this clause leaves a crucial question unanswered: what are the exact EU values protected by this clause and what constitutes a serious breach?

In February 2000 a strange precedent was set with the case of Austria; when the far-right freedom party was included in a coalition government in Austria, fourteen Member States decided to impose diplomatic sanctions against her, such as bans on cultural and sports events and secondary military cooperation accords.⁹³ These Member States believed that national political processes concern the EU and even though the membership suspension clause was not invoked, they successfully gave Austria the basic message of those Amsterdam Treaty provisions.⁹⁴ Without a doubt, sanctioning Austria would have been awkward as no violations had actually taken place, but this case proved that internal EU conduct is similar to the commands made on third countries by the Union.⁹⁵

Nonetheless, this case also demonstrates the difficulty in punishing Member States. The public opinion in Austria sincerely disagreed with the sanctions and thus the Austrian leadership decided to stand by its public and threatened to hold a referendum on its relations with the Union;⁹⁶ the putative referendum question was: 'Should the federal government...ensure by all possible means that the unfairly imposed sanctions on Austria be lifted immediately?'⁹⁷ Moreover, the Austrian leadership also stated that it would disrupt EU business, such as the 2000

⁹¹David O'Keeffe and Patrick M Twomey, *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) 99.

⁹²Ibid

⁹³Ian Black and Kate Connolly, 'Austria Plays Referendum Card against EU Partners' *The Guardian* (Brussels, 5 July 2000) <<http://www.theguardian.com/world/2000/jul/05/austria.ianblack>> accessed 8 March 2015.

⁹⁴Smith (n 62) 134.

⁹⁵Ibid.

⁹⁶Ewen MacAskill, 'Austria Expects End to Isolation' *The Guardian* (Vienna, 26 June 2000) <<http://www.theguardian.com/world/2000/jun/26/austria.ewenmacaskill>> accessed 8 March 2015.

⁹⁷Black & Connolly (n 93).

intergovernmental conference, if the EU did not withdraw its sanctions. By June 2000, a settlement was made; ‘three wise men’ were appointed to examine whether or not Austria was genuinely breaching human rights. On 12 September these ‘wise men’ reported back that Austria was in fact more committed to the European values than the majority of the other Member States and that although the Freedom Party was encouraging xenophobia, it stuck to the government’s commitments.⁹⁸ Consequently, the famous fourteen were left with no other choice but to drop the sanctions against Austria.⁹⁹ The Austrian affair indirectly illustrates how higher political imperatives tend to take control of decisions in the EU *vis-à-vis* Member States. Therefore, it is not surprising that the EU does not know how to go about dealing with the Cyprus problem since 1 May 2004.

Outside the Union, the EU has external mechanisms, strategies, instruments and policies to support stability, promote human rights, and democracy; namely, it has the membership carrot, the European External Action Service, the European Neighbourhood Policy, the Enhanced Pre- Accession Partnerships, the EAs and the Stability and Association Process. For example, Accession Partnerships, which are unilateral acts based on Regulation 622/98¹⁰⁰ implemented in Specific Decisions,¹⁰¹ were made for each CEEC applicant.¹⁰² These Accession Partnerships were a form of demonstrating what the EU wanted to influence in the domestic and foreign affairs of the candidates; they were detailed agreements which established a multi-annual programme for adopting EU *acquis* and meeting the Copenhagen criteria. The objectives of the Accession Partnerships can be rather brief or extremely detailed.¹⁰³ However, as far as Cyprus was concerned, a different pre-accession strategy was crafted from that of the CEECs, since Cyprus was economically far more stable in comparison to the others.

⁹⁸ Smith (n 62) 134.

⁹⁹ *The Economist*, ‘The EU 14 Give Way to Austria’ (Brussels, 14 September 2000) <<http://www.economist.com/node/368099>> accessed 9 March 2015.

¹⁰⁰ Council Regulation (EC) 622/98 of 16 March 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 L 85/1.

¹⁰¹ Specific Decisions of 30 March 1998.

¹⁰² Stephanie Laulhé Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Martinus Nijhoff Publishers 2009) 48.

¹⁰³ Smith (n 62) 126.

Even though Cyprus had its own major problem, the political considerations relating to this issue were not the object of the proposed pre-accession strategy.¹⁰⁴ Eventually, the EU agreed to extend the Accession Partnership to the island via Regulation 555/2000 EC, and the objective of this was to focus on certain angles of Justice and Home Affairs and on the judicial and administrative capacity to deal with EU legislation. As a result of the enhanced pre-accession strategy, a specific pre-accession financial assistance was set aside for Cyprus in addition to the financial aid package allocated to the CEECs; ironically, the prime purpose of this extra financial aid was to encourage bi-communal projects that would promote the socialisation of the Turkish Cypriot community.¹⁰⁵ Yet, strangely enough, nothing was done to encourage a settlement on the island. Had the EU used its tool more wisely, by including in the Accession Partnership with Cyprus, the condition of a solution to the Cyprus problem, then the carrot of inclusion could have potentially motivated the two sides of the island to make progress in order to fulfil the terms of the Partnership. But the idea of signing a Customs Union agreement with Turkey, alongside other political factors, were deemed to be far more important for the Union at that point in time, than pressurising Cyprus to reunify before accession.

9.4. The Failure of the Catalytic Effect

The EU is gradually learning from its mistake of not utilising conditionality to force national governments to undertake certain political changes. For instance, the Union played a constructive role in resolving the 2001 crisis in Macedonia; the Ohrid Peace Agreement, which terminated the conflict between the Macedonian government and the ethnic Albanian guerrillas, was signed on 13 August 2001.¹⁰⁶ The point to note is that, although Macedonia had been open to Western interference since the 1990s, the international *fora* did not immediately resort to conditionality in order to pressure the Macedonian governments to improve the rights of the ethnic Albanians found in the country that early on; nevertheless, they eventually did. This proves that, if necessary, the EU shall deliberately attempt to influence the domestic politics in troubled countries that fall into the interest zone of the Union. The most obvious

¹⁰⁴ Shaelou (n 102) 48.

¹⁰⁵ *Ibid* 49.

¹⁰⁶ The conflict began in February 2001. The agreement stated that the Macedonian government was to pass legislation giving official recognition to the Albanian language and for the police force to include a proportion of ethnic Albanians. See Milada Anna Vachudova, 'Strategies for Democratization and European Integration in the Balkans' in Marise Cremona (ed), *The Enlargement of the European Union* (OUP 2003) 150.

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example of this was in 1999 and 2000 when the EU tried to remove Slobodan Milosevic's government from power in the Federal Republic of Yugoslavia (FRY) by not dealing with the Milosevic regime itself, but by focusing on the Serbian opposition parties; the *modus operandi* was to spell out to the electorate in the FRY that as long as the ethnic nationalists remained in power, EU membership would remain a dream and thus the country would not prosper. In the summer of 1999, the EU, alongside the other western powers, rather overtly supported the political opponent to Milosevic in every possible way; for example, in order to motivate the opposition parties of Serbia and reunite them against Milosevic, the EU and the U.S.A. provided them with significant political and economic support.¹⁰⁷ With the aim of economically destroying the Milosevic regime, the Union enforced a complete economic blockade on Serbia throughout the Kosovo crisis.¹⁰⁸ The EU went even further and froze the foreign assets of those businessmen who were working closely with the Milosevic regime and also forbade them from travelling into the EU.¹⁰⁹ The aim was to strengthen the opposition and to discourage Milosevic's economic friends from working for him.¹¹⁰ It could be argued that one of the greatest achievements of the Stability Pact and of the Union in the Balkans was making it clear to Serbia that democratic change would be encouraged and supported by generous aid.¹¹¹ The same degree of political interference should have taken place in both the TRNC and the RoC during the pre-accession phase; this would have altered the dynamics on the island.

¹⁰⁷ Máire Braniff, *Integrating the Balkans: Conflict Resolution and the Impact of EU Expansion* (IB Tauris 2011) 68. The EU also provided them with international recognition in a high-profile diplomatic relationship, referred to as 'Contract with Serbia'. Furthermore, humanitarian and democratisation aid, as well as support for the independent media, was given. In 1999, under the EC's OBNOVA-CARDS programme, democratically run municipalities within Serbia were granted assistance; this included the 'Energy for Democracy' programme that offered the municipalities, which were directed by the forces who were against the Milosevic regime, with huge amounts of heating oil in the winter of 1999-2000; European Commission, 'Federal Republic of Yugoslavia Country Strategy Paper 2002-2006' DG RELEX <http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/fry_strategy_paper_en.pdf> accessed 10 March 2015.

¹⁰⁸ Council Regulation (EC) 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr Milosevic and those persons associated with him and repealing Regulations (EC) Nos 1294/1999 and 607/2000 and Article 2 of Regulation (EC) No 926/98 [2000] OJ L 287/19.

¹⁰⁹ Robert Block and Neil King Jr, 'Milosevic's Cronies Struggle for Removal from Blacklist' *Wall Street Journal* (1 October 1999) <<http://www.wsj.com/articles/SB938733298160832605>> accessed 10 March 2015.

¹¹⁰ Vachudova (n 106) 150.

¹¹¹ EastWest Institute and the European Stability Initiative, 'Democracy, Security and the Future of the Stability Pact for South Eastern Europe Report' (2001) <http://www.esiweb.org/pdf/esi_document_id_15.pdf> accessed 11 March 2015.

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Arguably, the most efficient way for the EU to promote ethnic tolerance is through conditionality of membership and through the promise of integration. It goes without saying that it has taken the EU a very long time to acknowledge this fact and it still has not realised the importance of using this weapon uniformly. Several academics, such as Schimmelfennig, have insisted that the lack of a coherent EU foreign policy towards the former Yugoslavia has caused a lot of damage in many ways; the violence and the impoverishment in the Western Balkans could have been avoided had the Union drafted a positively interfering enlargement project for the region in 1990.¹¹² Axiomatically, this theory also applies to the case of Cyprus; the political conflict would not have been dragged into the Union and it may have even terminated as early as 2004.

Indeed, the mere *prospect* of membership is not actually powerful enough to get rid of nationalist-pattern governments; the Balladur Plan of 1993 perfectly exemplifies this. This Plan was initiated in order to modify the actions of post-communist governments- whose nationalism would endanger the ethnic minorities and the relations the FRY had with its neighbours- via the carrot of membership and the threat of exclusion from the club. The EU believed that this *modus operandi* would encourage the candidate States to eradicate all national polemics, to ensure that rights of national minorities would be protected and to agree on the existing territorial boundaries.¹¹³ The idea of a March 1995 conference did trigger the signing of a long-delayed treaty between Hungary and Slovakia based on good relations; simultaneously, it motivated Hungary and Romania to make progress in their troubled negotiation of a treaty similar to the abovementioned. Unfortunately, the nationalistic governments of both Romania and Slovakia did not domestically abide by the provisions of the treaties they signed with Hungary. Conclusively, the Balladur Plan was a clear demonstration of the pro-autonomy within countries and the weakness of the EU in relation to moulding internal politics. It was in fact the change of governments-from nationalistic to moderate reformists- in Romania and

¹¹² Timothy Garton Ash, 'Europe's Endangered Liberal Order: The Dream is Here' (1998) 77(2) *Foreign Affairs* <<http://www.foreignaffairs.com/articles/53806/timothy-garton-ash/europes-endangered-liberal-order>> accessed 11 March 2015.

¹¹³ Vachudova (n 106) 146.

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Slovakia¹¹⁴ that helped the two countries fulfil the prerequisites of membership and promote ethnic tolerance.¹¹⁵

The Dayton Peace Accords of 1995 reiterated this argument; unstable peace was established in Bosnia-Herzegovina, Croatia and the FRY as a result of the Peace Accords, however, it became increasingly evident that nationalist governments could not be tricked or coaxed into abiding by Western standards of democracy and minority rights. Despite the fact that they had backed off on the battlefield, the regimes of Milosevic in FRY and Franco Tudjman in Croatia were not willing to surrender with regards to pursuing reforms domestically.¹¹⁶

Had the domestic political stance not changed in the TRNC during 2004—from unrestrained anti-Greek chauvinism to pro-unification—then EU membership would not have been enough to encourage the Turkish Cypriot electorate to vote ‘Yes’ during the Annan Plan referendum. This indicates that even if the carrot of EU integration was used efficiently in Cyprus, the nationalistic pattern government in the south would have still prevented the reunification of the island, as the idea of power-sharing with the other ethnic community was regarded as being far worse than being left outside of a European family. Therefore, a stricter approach is needed to cajole countries in these situations and to sway nationalism; for the EU to play a role in conflict resolution beyond its borders, it needs to be able to produce incentives for conflict resolution beyond the limits of enlargement as well.¹¹⁷ Most importantly, the EU needs to acknowledge the fact that societal security, or safeguarding one’s identity, is at the top of the hierarchy for most communities. Habitually, the EU policy makers underestimate how much identity actually matters and thus they neglect the role of ethnopolitics in conflict zones. Instead, they offer an economic carrot; for instance, they believed that the catalytic effect would have worked via the prospect of economic prosperity achieved by a united island within the EU.¹¹⁸ They could not have been more wrong.

¹¹⁴ Romania 1996 and Slovakia 1998.

¹¹⁵ Vachudova (n 106) 147.

¹¹⁶ Ibid.

¹¹⁷ Tocci (n 5) 8.

¹¹⁸ Erol Kaymak, ‘Why the EU Catalyst Proved Insufficient to Solve the Cyprus Problem: The Politicization of European Values’(Cyprus Policy Center, the annual meeting of the International Studies Association, San Diego, 8 March 2006) <www.cypruspolicycenter.org/dosyalar/may_erolkaymak.doc> accessed 11 March 2015.

While some in the TRNC classify mainland Turks as occupiers and aliens, only a few dispute that without the Turkish help, Turkish Cypriots may not have continued to exist. On the one hand, a large group, on both sides of the island, label themselves as being simply ‘Cypriot’. On the other hand, some Turkish Cypriots feel as though they belong to a larger group of Turks. Here, the catalytic effect of EU membership fell into a double trap, as it ignored the various discourses on the island and chose to recognise Clerides and Denktaş-the two Cypriot leaders- as the representatives of the Cypriots.¹¹⁹ This example proves that identity issues should always be taken seriously, as they lie at the heart of ethno-national secessionist conflicts. The EU- which is characterised as a postmodern polity- will only become a catalyst in Cyprus if its discursive and institutional structure enables the re-articulation and re-presentation of identities on the island; thus, not because EU integration will automatically solve the issue.¹²⁰ As discussed in chapter 8, the Union needs to adopt a ‘public diplomacy’ approach in Cyprus and design confidence-building measures on the island. For instance, by granting the Turkish Cypriot representatives observer status in the EU Parliament, the institution will be recognising the second voice that exists on the island, which will in turn encourage dialogue.

It could be argued that the EU was left with no other choice but to avoid using the exclusion threat tactic against the Greek Cypriot administration, after having witnessed several failures in the Balkans and because of Greece’s threat to veto the Customs Union agreement with Turkey if the accession negotiations did not commence with the RoC. If anything, this behaviour encouraged Papadopoulos to further push his people towards the rejectionist approach to the Annan Plan. The Papadopoulos administration, with the ‘unintended’ help of the EU, ‘reactivated an old paradox in the Greek Cypriot soul.’¹²¹ Thus, albeit the carrot of integration would not have been enough to reunify the island due to prevailing nationalism, by lifting conditionality on the Greek side, the EU encouraged the further spread of nationalism in the south. Paradoxically, unlike the Turkish Cypriots, the Greek Cypriots have theoretically always desired the reunification of the island; however,

¹¹⁹ Thomas Diez, ‘Why the EU Can Nonetheless Be Good for Cyprus’ (2002) 2 *Journal on Ethnopolitics and Minority Issues in Europe* 5 <http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2002/nr2/Focus2-2002_Diez.pdf> accessed 11 March 2015.

¹²⁰ *Ibid* 6.

¹²¹ Harry Anastasiou, *The Broken Olive Branch: Nationalism, Ethnic Conflict, and the Quest for Peace in Cyprus, Vol 2 Nationalism versus Europeanization*, (Syracuse University Press 2008) 246.

psychologically the latter simply longs for an ethnically homogeneous island free of Turks and Turkish Cypriots. The influence of concentrated dosages of nationalism always tends to bring out this oxymoron. Thus, the ethnocentrism that actually brings about their claim for reunifying the island with the belief that it will be a Hellenic State, also brings out the hatred they have for admixtures with the Turkish Cypriot community. Ironically, it could be inferred that the Greek Cypriots actually favour ethnic division, yet, they find it hard to admit.¹²² The only thing left is for the Greek Cypriot community to openly confess that they do not want to cohabit with the Turkish Cypriots and in which case the only solution to the Cyprus problem is partition- which they have been psychologically demonstrating since the referendum- and not reunification- which they have unwillingly been demanding since 1974.

9.5. The Subconscious Truth

The failure of the Annan Plan and the accession of the RoC, has pushed the two Cypriot communities further apart, and consequently rendered separation a renewed vision.¹²³ In an alternative perspective, it could be claimed that the EU has in fact found the answer to the problem; by lifting conditionality on the Greek side, it helped the Greek Cypriots vividly demonstrate to the international community that their intention is to create a Hellenic State and that they do not want to power-share with the Turkish Cypriots. Furthermore, it has become rather evident that the Turkish Cypriots do not want to power -share with their Greek Cypriot counterparts either: 'The idea that Turkish Cypriots will instead accept minority status in a centralised Greek Cypriot state is a pipe dream.'¹²⁴ The adoption of legalistic approaches to the Cyprus problem by the Greek Cypriot leadership, who simultaneously rejects the idea of finding a lasting solution to the problem, clearly demonstrates to the world that the only alternative is to seek comfort in the status quo; it seems as though it would be less hurtful for the Greek Cypriots to leave things as they are than to have to face another proposed plan for a settlement.¹²⁵ Therefore, the sub-conscious desire to maintain the status quo only means one thing

¹²² Ibid.

¹²³ Neophytos Loizides and Eser Keskiner, 'The Aftermath of the Annan Plan Referendums: Cross-Voting Moderation for Cyprus' (2004) 2-3 Southeast European Politics 158 <http://works.bepress.com/neophytos_loizides/3> accessed 10 March 2015.

¹²⁴ Turk (n 3) 465.

¹²⁵ Anastasiou (n 121) 246.

politically, and that is an augmented acceptance of segregation. Ironically, Denktaş, who is the father of ethnic secession, was attacked in every forum for desiring something the Greek Cypriots openly demonstrated that they also subconsciously wanted in 2004- the year that Denktaş was pushed out of power.¹²⁶

Harry Anastasiou has stated that ‘If and when the noise of nationalist rationalizations subsides, April 2004 may appear, in hindsight, as the most tragic of missed opportunities for a final Cyprus settlement.’¹²⁷ He is definitely not wrong; however, there is, as mentioned earlier, a silver lining-it has brought to surface partition as a new prospect, since the issues of Turkish Cypriot trade, energy reserves and property problems of refugees, have created a new kind of alienation between the two conflicting parties. The *psychopolitical state of mind* of the two Cypriot communities, post-referendum, transformed into a rather strange type of interethnic division that stopped them from fully taking advantage of the benefits flowing from EU membership-such as free movement- which would have assisted with building bridges between the two parties.¹²⁸

With a dispirited and placated GC [Greek Cypriot], public domestic GC politics reverted to the anachronistic but familiar political rhetoric and squabbles around the old nationalist polarization of “us” versus “them,” sustaining the traditional images of the presumed moral rightness of one’s own side in juxtaposition to the presumed immoral “enemy other”—a position that in the postreferendum era came to exist solely in the minds of GC nationalists and domestic opportunists but was nowhere to be found in the EU or the UN.¹²⁹

In this sense, the EU is an effective conflict transformer; it has proven that the Greek Cypriot *psychopolitical* stance is against reunification and that nationalist forces have regained the upper hand; which means that the solution to the problem is, more specifically, the ‘Taiwanisation’ of the TRNC- hence, giving the TRNC everything short of diplomatic recognition, if not recognition. According to Serdar Denktaş; ‘Opinion polls conducted in both sides demonstrate that Turkish Cypriots and Greek Cypriots prefer to rule themselves in their own areas with only necessary cooperation and minimum involvement in each other’s affairs.’¹³⁰ The international community

¹²⁶ Ibid 247.

¹²⁷ Ibid 243.

¹²⁸ Ibid 244.

¹²⁹ Ibid 244.

¹³⁰ Denktaş (n 59) 60.

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will only have to deal with a couple of issues if this is the case, such as the property and returns problems and the status of the Turkish Cypriot community who are EU citizens, even though the *acquis* is suspended in the north of the island.¹³¹

Despite its strong opposition to the philosophy of separation, the Union has provided its support to secession in a few cases; the Western Balkans and the Middle East are strong examples. The EU could not prevent the breakup of Yugoslavia in the early 1990s, which eventually resulted in Kosovo's independence in 2008. Albeit the Union unsuccessfully tried to avert separation in the area- for instance, it supported the State Union of Serbia and Montenegro between 2001-2006- it had no other choice but to come to terms with the inexorable truth: secession.¹³² In the case of the Middle East, the EU has had an unflinching commitment to Israeli self-determination since the late 1990s and insists that there should be a two-state solution along the 1967 borders in Israel-Palestine; the Union maintains that it appreciates the collective and individual rights of the Palestinians.¹³³ So why can the EU not impress again and show its respect for the rights of the Turkish Cypriot community? The way in which Kosovo has been treated by the international *fora* has frightened the Greek Cypriot administration in Cyprus, and they are becoming increasingly worried that such a precedent may in fact help the Turkish Cypriots; 'In the event of a similar occurrence, a *de jure* partition of Cyprus may be the likely solution.'¹³⁴

Nevertheless, had the EU actually stood up to Greece's pragmatic policies toward the Turkey- EC Customs Union in 1995, prior to deciding to lift conditionality on the Greek side of the island, then the situation in Cyprus would not have become so knotted. Greece withdrew its threat of vetoing the Customs Union agreement with Turkey-which required unanimity in the Council- and in return, Turkey did not act against the decision of the Union to plan the accession negotiations with the RoC.¹³⁵ Yet, for the sake of completing the Customs Union negotiations in March 1995, Ecevit¹³⁶ and Ciler¹³⁷ should not have kept quiet about the EU decision to start

¹³¹ Jan Asmussen, 'Cyprus after the Failure of the Annan-Plan'(2004) 11 European Centre for Minority Issues <http://www.ecmi.de/uploads/tx_lfpubdb/brief_11.pdf> accessed 11 March 2015.

¹³² Tocci (n 5) 3.

¹³³ Ibid.

¹³⁴ Turk (n 3) 501.

¹³⁵ Andreas Theophanous, 'Cyprus, the European Union and the Search for a New Constitution' (2000) 2(2) Journal of Southern Europe and the Balkans 213, 223.

¹³⁶ Bülent Ecevit served as Turkey's Prime Minister four times between 1974-2002.

negotiations with the RoC, which applied for membership in the name of the whole island;¹³⁸ this issue should not have been up for negotiation and the Turkish leader should have shown more of a reaction to such bargaining.¹³⁹ As mentioned earlier on, the EU assistance to the Turkish side of Cyprus is undeniably complicated by legal obstacles as a result of the RoC's membership.

In a rational choice institutionalists point of view, the EU's ideology is constrained by 'insufficient knowledge, bounded rationality and institutional tension.'¹⁴⁰The unalterable quandary of the EU since the membership of the RoC is that, if it follows the law in a depoliticised and literal manner, it cannot efficiently take into consideration the ontology of the Cyprus problem; however, if it tries to address the political issues-which requires it to brush aside the RoC- then it will collide with the law.¹⁴¹It has been acknowledged that the Cyprus problem is also a unique EU problem since 2004, however, what has been ignored or perhaps forgotten, is that the multifaceted range of EU anomalies has also become a new feature of the Cyprus problem.¹⁴²

9.6. Reconceptualising the Parameters of the Cyprus Problem within the EU Framework

In order to move the Cyprus problem towards a final resolution, the EU needs to be more involved, especially since this problem is affecting the inner functionality of the Union. The EU's approach of leaving everything to the Cypriot leaders is clearly not working. The underlying argument throughout this thesis is that the structure of the EU needs to encourage the 'reconceptualisation of territorial borders' in order to generate a 'postmodernisation' of ethno-national secessionist conflicts. The EU's decision to recognise the RoC as the sole legal government of Cyprus was a decision that was completely in line with EU *acquis* and above all, the UN

¹³⁷ Tansu Ciler was the Prime Minister of Turkey from 1993-1995. She is Turkey's first and only female Prime Minister to date.

¹³⁸ Nasuh Uslu, *The Cyprus Question as an Issue of Turkish Foreign Policy and Turkish-American Relations, 1959-2003* (Nova Publishers 2003) 182.

¹³⁹ Ibid. As a reminder, according to the 1960 Guarantee Agreement, Cyprus is not allowed to join a union if all three of the guarantor states are not members to it, or unless all three provide their blessing for Cyprus to join. Hence, if Turkey had not allowed the RoC to start the accession negotiations in the name of the entire island, then the RoC would not have been allowed to join the club.

¹⁴⁰ Joseph M Ellis, 'Neoliberal Institutionalism: A Summary and Critique' (*Political Science Resource Blog*, 17 March 2006) <<http://polisciprof.blogspot.com/2006/03/short-review-of-neoliberal.html>> accessed 4 March 2015.

¹⁴¹ Harry Anastasiou, 'Cyprus as the EU Anomaly' (2009) 23(2) *Global Society* 129, 136.

¹⁴² Ibid 145.

stance.¹⁴³ Nonetheless, the extra-legal element the Union must acknowledge is that, albeit the RoC is the only recognised administration on the island, the constitutional framework of the RoC does not encompass the ‘final settlement of the Cyprus problem.’¹⁴⁴ Unfortunately, even though the EU leaders agree with this aforementioned issue, the Union has yet to find an efficient way to turn this standpoint into substantial policy decisions and political actions that will not breach EU law. Since 2004, the EU has persistently argued that the status quo in Cyprus is utterly unacceptable and that a solution founded on bi-zonal, bi-communal federalism is needed on the island; but, it has rarely mentioned the fact that the framework of the RoC is not the foundation for a settlement. The Turkish Cypriots and Turkey- since the reign of Erdogan- have acknowledged the fact that as a result of the RoC’s membership, the non-recognition of the TRNC and the continual presence of the Turkish army in Cyprus is unsustainable; however, the Greek Cypriot administration has not completely understood that without a solution, the RoC, as a Member State, will never be reinstated its original status or have control over the northern part, as it will never acquire the institutional power to implement the *acquis* on that side of the island. In order to lift the suspension of EU law in the north, a unanimous decision is required within the Council; axiomatically, the RoC will always use their legal veto right to prevent this from happening. Thus, the RoC does not have the legal instrument to implement EU law in the north; it can only prevent its extension.¹⁴⁵

The EU leaders were obviously aware of this rather overt fact; however, they must have intentionally chosen to ignore it. In hindsight, it would seem as though such a choice was a consequence of the fear that by acting on such a fact, they would empower the Turkish Cypriot nationalists and encourage the Turkish Cypriots to agree to nothing other than the recognition of the TRNC. Needless to say, if a settlement is not reached, then the eventual status of the RoC will become sincerely enigmatic, especially if the international players blame the Greek Cypriot side for being stubborn for a second time. If the Greek Cypriot side votes against the

¹⁴³ Emel Akçali, ‘EU’s Competency in Conflict Resolution: The Cases of Bosnia, Macedonia (FYROM) and Cyprus Examined’ (ECPR Joint Session Workshop, Cyprus: A Conflict at the Crossroads, Nicosia, 24-28 April 2006) 22

<<http://ecpr.eu/Filestore/PaperProposal/b9b25f68-6bff-4879-b572-4611edd932e2.pdf>> accessed 14 May 2015.

¹⁴⁴ Anastasiou (n 141) 143.

¹⁴⁵ Ibid 144.

adoption of another settlement plan-as they did in 2004- then they will have to come to terms with the possibility that northern Cyprus will follow in the footsteps of Kosovo, but this time having acquired the blessing of the EU family. Therefore, until the Cyprus problem is resolved, in the same way that the EU has suspended the implementation of the *acquis* in the north due to the fact that the TRNC is an unrecognised State, it should stop portraying the idea that the RoC will forever be the recognised State in Cyprus.¹⁴⁶

Unfortunately, it is not hard to predict that the RoC will veto any such thing; but such a prediction is not a good enough reason for the EU to not attempt such a manoeuvre. If the Union can suspend the implementation of *acquis* in the north due to the fact that the TRNC is a diplomatically unrecognised entity, then surely it can enforce the abovementioned idea and work around the RoC veto in a political manner.¹⁴⁷ Duly, the Union needs to tackle the EU specific parameters of the Cyprus issue 'at the highest level of its deliberations' and illuminate all the irregularities the troubled island has instilled into the Union; subsequently, the EU needs to acknowledge that these anomalies and features of the Cyprus problem, have now fallen on to the shoulders of the Union, as it is no longer a third party in the conflict but a second party, and it will require the assistance of the two Cypriot communities, Turkey, Greece, U.K. and the UN, in order to carry them.¹⁴⁸

The Cyprus problem is a political problem and the fact that the UN Secretary General continues to oversee international mediation efforts, proves this point; thus, the EU Council should not simply address the Cyprus problem under its routine institutionalised deliberations, but also under its extraordinary agenda, at the level of the heads of states and governments, since this is the only institutional avenue which permits the Union to tackle not only the legal, but also the political factors of the problem that has, in some way, disfigured the EU.¹⁴⁹ The disappearance of the Cyprus issue would simultaneously mean that all of the EU abnormalities that have

¹⁴⁶ 'The European Union always claimed full alignment with all the UN resolutions, which affirmed that the solution to the Cyprus problem will be based on a bi-zonal, bi-communal federation. Moreover, according to the top-level agreements of 1977 and 1979, the two Cypriot communities have formally accepted the UN directive for a federal settlement by the signature of their respective leaders.' Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 145.

¹⁴⁹ Ibid.

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been embedded in the Union as a result of the accession of a divided island will also cease to exist. Ergo, the EU will need to place a degree of political responsibility on the parties involved in the conflict, in relation to the European features of the Cyprus issue. Furthermore, the Council should establish a systematic process of liability on the advancement towards a settlement; hence, a similar process of accountability that it has applied to candidate countries in order to oversee the harmonisation progress.¹⁵⁰ In any case, by harmonising Cyprus to the EU regime, even if it is after its accession, is tantamount to solving the Cyprus problem.

In the interim phase, there are confidence-building measures that the EU can implement; the Union could be included in the new Plan as an additional Guarantor and it can juxtapose the implementation of an agreed Cyprus settlement to Turkey's accession progress in order to alleviate Greek Cypriot fears of Turkey's motives; the EU, alongside Greece and Turkey, can assume the costs of a future settlement; it can initiate a Greek-Turkish Cypriot rapprochement process by pursuing a policy that introduces a framework of qualifiers, set up by the Commission, which connects all confidence-building measures to the final settlement *sans* recognising the TRNC and *sans* imposing the legality of the RoC on the Turkish Cypriot community; the Commission can establish a Rapprochement Council to commence confidence-building projects-the Council could be made up of relevant authorities from both sides of the island, NGOs and civil society organisations; the Commission will assume all of the government and State functions that relate to north Cyprus when it comes to managing EU funds, signing agreements and creating projects in the process of encouraging rapprochement between the two communities via the provisions of the framework of qualifiers,-hence, the Greek Cypriots will not be liaising with the TRNC but with the European Commission and the Turkish Cypriot efforts to partake in the EU will not be stopped as a result of the status of the TRNC; the qualifiers will encourage the Greek Cypriots to use the IPC as it would no longer be equivalent to the recognition of the TRNC and the Turkish Cypriots will feel more at ease whilst trading with the south as the qualifiers would ensure that the structure of the RoC will not be imposed on them; under the same arrangement, the Turkish Cypriots will be allowed to take part in sporting events, university programmes and cultural events within the Union without it being tantamount to the

¹⁵⁰ Indeed, this may also face the RoC veto.

recognition of the TRNC; the Commission can try and convince Turkey to open its air and sea ports to the RoC in return for opening the port city of Famagusta in the north for Turkish Cypriot and Greek Cypriot exports to the Single Market-with the framework of qualifiers in place and the control of the port city under the transitory authority of the Commission, the structure of the RoC will not be imposed on the Turkish Cypriots and the Greek Cypriots will be guaranteed that the Turkish Cypriot trade with the EU will definitely not mean the recognition of the TRNC; the EU can annex to Turkey's accession pre-conditions the return of Varosha in place to reassure that the RoC will not veto a future direct trade regulation with the Turkish Cypriots even if Protocol 10 remains its legal basis; a final rapprochement idea for the Commission to initiate would be to put on hold the votes and seats in the EU institutions that would be allocated to the Turkish Cypriots once the Cyprus problem is resolved and introduce Turkish as an EU language.¹⁵¹

9.7. A New Beginning...And Still No Hope!

We should bear in mind that a peace process is simply a balancing act between the divergent concerns, demands and mental states of the leaders of the main parties involved in the conflict-in this case, Greece, Turkey and Cyprus- and the third parties that have some kind of an interest in the issue, such as the international organisations, U.S.A., U.K. and Israel. It can be argued that the timing has never been right to conclude a settlement in Cyprus as the parties involved have not been put under the same amount of political and legal pressure at the same time to seal the deal.

A Joint Declaration was signed on 11 February 2014 by the two leaders of Cyprus - Anastasiades and Eroglu- as a result of all the pressure that has been exerted on them by the third parties. This declaration has set out the framework of the future negotiations and has laid a solid foundation for the resumption of the talks. Barroso and Van Rompuy have congratulated and saluted 'the courage the two leaders have shown in agreeing it.'¹⁵² Since the signing of this declaration, the chief negotiators- Kudret Ozersay (TRNC) and Andreas Mavroyiannis (RoC) have commenced substantive discussions on matters linked to different chapters. For the first time in

¹⁵¹ Ibid.

¹⁵² *Cyprus Mail*, 'International Community Welcomes Resumption of Talks (Updated: adds David Cameron)' (Nicosia, 11 February 2014) <<http://cyprus-mail.com/2014/02/11/international-community-welcomes-resumption-of-talks/>> accessed 7 March 2015.

the history of the negotiations in Cyprus, the Greek Cypriot negotiator travelled to Ankara and the Turkish Cypriot negotiator travelled to Athens on the 27 February 2014, for high-level meetings with the Turkish and Greek leadership respectively.¹⁵³ The progress that has been made cannot be measured since the ‘constructive ambiguity strategy’- that was previously employed in Northern Ireland-is being used by the chief negotiators in Cyprus. The two leaders of Cyprus agreed to only meet when utterly necessary and thus everything else is being conducted by the chief negotiators. This strategy could in fact backfire, just the way it did in Northern Ireland later on in the peace process;

...later in the process, ambiguity ceased to be constructive and became the enemy of progress. Each side began to distrust the other because it had not implemented the Agreement in accordance with their own interpretation of it ... The ambiguity that had been essential at the beginning began to undermine the Agreement and discredit the government – the referee for its implementation. We then had to drive ambiguity out of the process ... [because] a durable peace cannot rest on an ambiguous understanding.¹⁵⁴

Unfortunately, it seems as though the importance of public-diplomacy is being ignored once again. President Anastasiades is unsurprisingly, treating the Cyprus problem and the commencement of the negotiations as a technical matter and not a political matter; he claims that the Joint Declaration does not constitute a solution to the Cyprus problem. This is highly satisfying for his political enemies, as he is ‘playing the game according to their petty rules and prejudices.’¹⁵⁵ As a result, the negativity on the Greek side of the island has already resurfaced; for example, the former President of the TRNC, Mehmet Ali Talat, was attacked on the 26 March 2014 by a far-right nationalist group called ELAM on the Greek side of Cyprus, as he attended a conference over the solution process on the island.¹⁵⁶ So, this raises the question: will this be a forced marriage that will end in an ugly divorce? Some would argue that nationalists groups do not represent the entire community; indeed this is

¹⁵³ Jean Christou, ‘Negotiators Move on with Concrete Issues’ *Cyprus Mail* (Nicosia, 25 February 2014) <<http://cyprus-mail.com/2014/02/25/negotiators-move-on-with-concrete-issues/>> accessed 5 March 2015.

¹⁵⁴ Powell (n 10) 22-23.

¹⁵⁵ *Cyprus Mail*, ‘Our View: Who Really Cares about “Residual Powers” and “Internal Citizenship”?’ (Nicosia, 16 February 2014) <<http://cyprus-mail.com/2014/02/16/our-view-who-really-cares-about-residual-powers-and-internal-citizenship/>> accessed 5 March 2015.

¹⁵⁶ Ömer Bilge, ‘Former Turkish Cypriot President Attacked by Nationalists in Greek Cyprus’ *Hurriyet Daily News* (Nicosia, 27 March 2014) <<http://www.hurriyetdailynews.com/former-turkish-cypriot-president-attacked-by-nationalists-in-greek-cyprus-.aspx?pageID=238&nID=64174&NewsCatID=359>> accessed 7 March 2015.

undeniable, however, the two Cypriot communities are both strongly attached to their ethnic identities and it only took a fascist group with three hundred and fifty members¹⁵⁷ in the 1960s, to trigger the commencement of the Cyprus problem.

According to a survey conducted by the Centre for Sustainable Peace and Democratic Development, in order for the two communities on the island to come closer, a great deal of work needs to be conducted since the levels of distrust and lack of consensus on major issues surrounding the Cyprus problem are extremely high.¹⁵⁸ Furthermore, a survey was carried out by Insights Market Research and the University of Nicosia to clarify matters pertaining to national identity in Cyprus.¹⁵⁹ It was found that the majority of the Greek Cypriots desire a unitary state, whilst only twenty-four percent preferred a bi-communal, bi-zonal federation as a solution to the never ending problem on the island. On the other hand, the survey results indicated that only one third of the Turkish Cypriots look warmly at a federation since the rejection of the Annan Plan; twenty-nine percent of them favour a two-state solution.¹⁶⁰ Identifiably, each side of the island has a different perception as to what the Cyprus problem is and what the solution should be; unfathomably, this factor is not being incorporated into the strategy adopted by the EU or the other third party mediators for Cyprus. The readiness for political compromise and social cohesion is virtually non-existent on the island and the enthusiasm that surrounded the signing of the Joint Statement has largely dissipated;¹⁶¹ surely, should this not be the starting point of any future settlement/solution arrangement?

Although the EU and the Member States were unenthusiastic about getting involved in the Cyprus problem, the moment the RoC applied for membership, the Union was directly sucked into the dilemma. The process of enlargement- as mentioned in the earlier chapters- is not black and white; meaning, the Member States were capable of shaping their involvement in this dilemma in a more strategic manner than they did.

¹⁵⁷ EOKA was a Greek Cypriot underground nationalist paramilitary organisation that fought a campaign for the end of British rule of Cyprus, as well as for self-determination and for union with Greece (Enosis).

¹⁵⁸ Evie Andreou, 'Settlement is a Distant Concern in Bi-communal Survey' *Cyprus Mail* (Nicosia, 27 February 2015) <<http://cyprus-mail.com/2015/02/27/settlement-is-a-distant-concern-in-bi-communal-survey/>> accessed 13 March 2015.

¹⁵⁹ It consisted of five hundred telephone interviews in each of the two communities.

¹⁶⁰ Evie Andreou, 'Favouring a "Cypriot" Identity but Differing on What it Means' *Cyprus Mail* (Nicosia, 25 February 2015) <<http://cyprus-mail.com/2015/02/25/favouring-a-cypriot-identity-but-differing-on-what-it-means/>> accessed 12 March 2015.

¹⁶¹ Andreou (n 158).

Indeed, the subversive framework of the EU can still provide a catalytic function and a positive structure for a solution of the Cyprus problem, but the Union only has one bite of the cherry left to promote the reunification of the island and to prove that it is a globally significant conflict transformer, before the Turkish Cypriot community walks away.

9.8. The Verdict

As previously argued, the Turkish Cypriot community has always possessed the right to self-determination. The very fact that the Greek Cypriot administration will be negotiating a federal style agreement indicates that it will legally grant powers to the Turkish Cypriot community;¹⁶² thence, by participating in the settlement negotiations the two parties are further exercising their right of self-determination. This right should not be restricted in any way; so if the settlement negotiations collapse one more time, the outside players should consider allowing the north to declare its ultimate independence from the south. It must be recalled that the emergence of the RoC in 1960 was also an act of self-determination. In 1956 the British Colonial Secretary, Mr. Lennox-Boyd, described this occurrence:

...It will be the purpose of Her Majesty's Government to ensure that any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community, no less than the Greek Cypriot community, shall in the special circumstances of Cyprus, be given freedom to decide for themselves their future status. In other words, Her Majesty's Government recognise that the exercise of self-determination in such a mixed population must include partition among the eventual options.¹⁶³

The 1960 act of self-determination is highly exclusive in character; the termination of a colonial situation has never been preserved -other than in the case of Cyprus- in a constitution which was safeguarded in the form of a treaty as a result of an international demand by three members of the U.N., which are Guarantors of the State directly affected, and countersigned and adopted by the two leaders of the two communities concerned. This directly indicated that there existed a seriously troubled relationship between the two communities on the island which were divided by religion, culture and language. Similarly, it was also a reflection that each

¹⁶² Elihu Lauteracht, 'The Right of Self-Determination of the Turkish Cypriots: Turkish Republic of Northern Cyprus Opinion' Document of the UN General Assembly and of the Security Council (A/44/928 and S/21190, 14 March 1996) <<http://www.mfa.gov.tr/chapter1.en.mfa>> accessed 14 March 2015.

¹⁶³ *HC Deb 19 December 1956, vol 562, col 1268-79*. This statement was confirmed by the Prime Minister, Mr Macmillan, *HC Deb 26 June 1958 vol 590 cols 611-731*.

community required a closer alliance with the country it felt it was connected to at some level.¹⁶⁴

As a result, it can be argued that the disapproval in the Security Council Resolution 541 of the exercise of this right by the establishment of the TRNC as a 'statal entity in Northern Cyprus responding to the factual division of the country and parallel to the one existing in Southern Cyprus',¹⁶⁵ is lawfully puzzling. In this context, it should be underlined that the UN has 'not enacted or proclaimed a legal obligation of relevant governments not to recognize' the TRNC. The recommendation of non-recognition found in the Resolutions of the Security Council is not overtly founded on Chapter VII of Article 41 of the UN Charter; ¹⁶⁶*ipso facto*, they have no legally binding effect. Thus, the EU needs to act upon the fact that the two communities on the island are equal in status; it needs to stop classifying the administration of the RoC as the sole legal government of Cyprus. The Greek Cypriot administration is not legally superior or inferior to the Turkish Cypriot administration in any way.

By researching the case of Cyprus and more specifically the effects that the EU has had on the Turkish Cypriot community as a result of Europeanisation, this thesis aspires to offer important insights regarding the Union's influence on States with 'limited external projection'. Simultaneously, it has highlighted the consequences of the choices made by the Union in the case of Cyprus and the corollaries these choices have had on the relationship between the Union and the Turkish Cypriot community; identified the advantages and limitations of the power of the EU as a conflict transformer and as a normative power; and the methods the Union uses to deal with a 'limited external projection'.¹⁶⁷

It is no secret that the EU 'is not an actor in international affairs, and does not seem likely to become one...'¹⁶⁸ Yet, it cannot be denied that the Union has ideological power and this power is certainly forceful as 'the power-sender's ideas penetrate and

¹⁶⁴ Lauteracht(n 162).

¹⁶⁵ Ibid.

¹⁶⁶ United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.

¹⁶⁷ George Kyris, 'Europeanisation, EU Enlargement and the Turkish Cypriot Community: Developing a Conceptual Framework' (European Institute Research Paper 2009) <http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/4th_%20Symposium/PAPERS_PPS/CYPRUS_EU/KYRIS.pdf> accessed 14 March 2015.

¹⁶⁸ Hedley Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21(2) *Journal of Common Market Studies* 149, 151.

shape the will of the power-recipient.’¹⁶⁹ Galtung’s argument in 1973 that the EC had strong resource and structural power¹⁷⁰ is by all means still valid today. The EU is a mixture of supra-national and international methods of governance which goes beyond Westphalian norms;¹⁷¹ as a result, it has the capacity to have ‘actor’ qualities. So, due to its hybrid frame, historical impact and its constitutional configuration, the EU is a normative power and it acts in a normative way in world politics;¹⁷² unfortunately, this characteristic has not come across sufficiently in the case of Cyprus. Indeed, it cannot be disputed that the EU’s effectiveness and impact on a Member State or a third State will depend upon the domestic aspect of the State in question; however, the Cyprus paradigm has proven that the limitations, failures and standstills of the EU effect are due to the Union’s institutional strategic approach *vis-à-vis* Cyprus. This thesis has re-emphasised that the Union has a weakness in conflict transformation which is due to its lack of promoting unvarnished communication between the conflicting Cypriot parties and in eradicating socio-economic inequalities.¹⁷³ The Union is evidently not investing sufficient amount of interest, or is rather puzzled about how to use conflict transformation mechanisms in Cyprus.

According to Fetherson, conflict resolution cannot be tackled without the inclusion of a critical-theoretical approach; alternatively, ‘attempts will once again simply reinforce the unchallenged order which generated the conflict in the first place.’¹⁷⁴ Without a doubt, as argued by the supporters of Marxism, economic disparities and exclusion trigger identity conflicts; therefore, if such issues are not eradicated, then the source of conflicts continues to exist. The EU has not entirely ignored this Marxist ideology; it has provided financial aid to troublesome regions,¹⁷⁵ such as Northern Ireland and northern Cyprus. Nonetheless, these funds are incapable of

¹⁶⁹ Johan Galtung, *The European Community: A Superpower in the Making?* (Allen and Unwin Ltd 1973) 33.

¹⁷⁰ *Ibid* 36.

¹⁷¹ Toby King, ‘Human Rights in European Foreign Policy: Success or Failure for Post-modern Diplomacy?’ (1999) 19(2) *European Journal of International Law* 313, 313
<<http://www.ejil.org/pdfs/10/2/583.pdf>> accessed 14 March 2015.

¹⁷² Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40(2) *Journal of Common Market Studies* 235 <<http://onlinelibrary.wiley.com/doi/10.1111/1468-5965.00353/pdf>> accessed 13 March 2015.

¹⁷³ Akçali (n 143) 4.

¹⁷⁴ *Ibid* 34.

¹⁷⁵ The Union has financially contributed in Bosnia and Macedonia to reconstruct and develop projects.

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reconstructing the economy in such a way as to enable all of the societies in these countries to benefit from them.¹⁷⁶ The continuance of the embargoes imposed on northern Cyprus means the efforts of the EU towards conflict resolution have been utterly unsuccessful.

Marxism however, does not take into consideration exclusion due to nationalism, cultural identity and ethnicity.¹⁷⁷ This is where the communicative action theory can be of assistance. Habermas' consent-orientated theory can provide a post-hegemonic perspective to conflicts and their resolution by establishing opportunities for the creation of a novel 'meaning inherent in the encounter between the Self and the Other.'¹⁷⁸ When institutions give citizens the opportunity to discuss issues which are of public importance, communicative action will flourish. Obviously, the participants in such discourse should be capable of acknowledging the other side's equality and steering away from affixed ideology during the discussion. This opportunity is 'a means of intersubjective dialogue between a community of actors which enables them to reconstruct common understandings of their lifeworld and, therefore, renew the shared basis for culture, social integration and socialization that underlie a mutual existence.'¹⁷⁹

Discourse ethics, which is a concept belonging to the communicative action theory, offers a way to solve social conflicts in an unbiased manner. It provides a means for launching the moral point of view in conflicts which ideally results in the creation of new ideas for institutional arrangements and principles, once an agreement is reached. Eventually, this method will lead to solutions that are welcomed by the conflicting parties.

According to the Habermasian perspective, the third party facilitator plays a crucial role. It needs to decrease injustice, guarantee the liberation of the communities, prevent the domination of one party over the other and most importantly, it needs to ensure that it remains neutral itself. Thus, the predominant aim is to produce a non-

¹⁷⁶ Akçali (n 143) 34.

¹⁷⁷ Ibid 35.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid 36. See Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason* (Beacon Press 1985).

hierarchical, self-generated solution to the conflict via equal communication.¹⁸⁰ This solution needs to be self-sustaining and purely determined by those who suffer from the consequences of the conflict; hence, the public. As a result, the EU's facilitation in the Cyprus conflict should be the encouragement of a truthful communication between the two parties which leads to a consensual and unaltered resolution.¹⁸¹ But, how well does the Union actually understand the dynamics of the conflict and the forces driving the conflict?

Unfortunately, even if the EU plays its role correctly, the nationalistic views coming from both sides of the island and the international general consensus based on the ideology of Turkish Cypriot exclusion, prevents any form of success.

It is also important to consider the exclusivist approach of the EU to outsiders. Even though many academics and EU leaders have spoken about the welcoming of cross-border identities by the Union,¹⁸² the EU borders are actually exceptionally exclusive to the 'other'. Böröcz, a Hungarian academic, quite rightfully argues that:

In the enlargement scheme, identities that posture themselves as less Oriental than a chosen Other have systematically latched onto the synecdoche notion of 'Europe equals EU' and perpetuate that schema as a core element of their identity focus. Acceptance vs. Postponement for accession to the EU is read, in this frame as reinforcement or rejection of Europeaness (i.e non Orientalness) and hence ultimately of 'whiteness' ... The diversity and multi-culturality stressed by the plurilingual label 'Europa, Europa' is also strictly internal to EU.¹⁸³

Undeniably, there is an anti-Islamic sentiment across the EU in almost every political class, especially since the 9/11 attacks; the western societies in the Union are yet to fully welcome Islamic countries into the European family.¹⁸⁴ For instance, Frits Bolkenstein believes that if Turkey is awarded membership then 'the liberation of Vienna in 1683 would be in vain.'¹⁸⁵ Such exclusivist approaches within the Union

¹⁸⁰ Mark Hoffman, 'Third-Party Mediation and Conflict Resolution in the Post-world War World' in John Bayliss and Nicholas J Rengger (eds), *Dilemmas of World Politics* (OUP) 265.

¹⁸¹ Ibid 270.

¹⁸² See John Borland, Graham Day and Kazimierz Z Sowa, *Political Borders and Cross-border Identities at the Boundaries of Europe* (Wydawn.Uniwersytetu Rzeszowskiego 2002).

¹⁸³ József Böröcz, 'Empire and Coloniality in the Eastern Enlargement of the EU' in József Böröcz and Melinda Kovács (eds), *Empire's New Clothes* (Central European Review 2001) 6.

¹⁸⁴ Ignacio Ramonet, 'Turkey, Welcome to Europe' *Le Monde Diplomatique* (Paris, November 2004) <<http://mondediplo.com/2004/11/01ramonet>> accessed 15 May 2015.

¹⁸⁵ Daniel Dombey, Tobias Buck and Vincent Boland, "'Islamisation' Warning Clouds Turks' EU drive' *Financial Times* (Brussels and Ankara, 8 September 2004)

do not help the club's role as a conflict transformer; how can it be expected of the EU to persuade the Greek Orthodox Christian partners to resolve their political, social or economical differences with their Muslim Turkish Cypriot compatriots? Reconciliation will not be achieved via financial aid and investments, nor will it come about as a result of conditionalities; the key is inclusion. By helping with the 'Other's' inclusion, the EU can gradually transform the relationships between the conflicting parties. It must be noted that such attempts, despite being subtle, have been made; for instance, '[d]uring the Track II diplomacy efforts, Turkish Cypriots were informed that they could possibly be the Islamized Greek Cypriot or the Venetian or Lusignan descendants.'¹⁸⁶ Thus, so long as socio-economic development is not encouraged in the societies of Cyprus and unconstructed communicative action is not launched between the parties, the Union will be an inadequate conflict transformer in that region. Without such development constructed via critical thinking, the President of the RoC will continuously prevent the bridging of the gap between the two communities on the island by ensuring that the other Member States' parliaments do not take decisions pertaining to Cyprus' history; yet, ironically, the RoC Parliament will provide its support to other parliamentary decisions which refer to the history of other countries, such as the recognition of the Armenian genocide.¹⁸⁷

Since the Turkish Cypriot community cannot be directly classified as being part of a Member State and the north cannot be regarded as a third State, the Turkish Cypriot community can be categorised as an enlargement driven case (as they need to be prepared to adopt EU *acquis* upon reunification.) However, if this so called reunification does not take place-which seems to be the ultimate case, without sounding too pessimistic- the situation becomes even more complicated. It is at this very point that the Union needs to change its strategy and regain its title as a successful mediator. Even though the Turkish Cypriot community is exclusive, in the sense that it is an internationally unrecognised entity, the Union cannot simply ignore it. The EU needs to either promote its recognition / 'Taiwanisation' or at the

<<http://www.ft.com/cms/s/0/d0e6c37e-0134-11d9-9d96-00000e2511c8.html#axzz3c0YgGrm9>>
accessed 18 May 2015.

¹⁸⁶ The French crusading dynasty which ruled in Cyprus from 1192 until 1474. Akçali (n 143) 38.

¹⁸⁷ The RoC was the first European country to recognise the Armenian genocide that took place in 1915-1923 and which was perpetrated by the Ottoman Empire and resulted in the death of one million Armenians. Ibid.

very least overcome the legal barriers that prevent it from exercising enhanced cooperation with the community. As a result, the Union needs to adopt Beran's theory as the foundation of its conception of self-determination/secession in order to be able to adapt its legal and political approach towards the issues arising out of the Cyprus problem.

The lack of ECJ contextualised juristocracy in cases concerning Cyprus, and the depoliticisation of the legal issues arising out of this political anomaly by the Union institutions and its Member States, have caused the EU to fail as a conflict transformer in Cyprus. Hence, the EU needs to focus on building a relationship with the Turkish Cypriot community -even if it is beyond the membership / enlargement framework -as soon as possible. For instance, it can selectively extend the *acquis* to the north whilst precluding membership (similar to what is offered in the European Neighbourhood Policy); this will promote the deepening and widening of the relationship between the community and the Union, but without the promise of membership. Another plausible framework would be the one offered by the Euro-Mediterranean Partnership, which aims at political, economical and cultural partnership between the Union and the countries involved. Even the European Economic Area could be a possible cooperation method between the Turkish Cypriots and the EU. At the very least, the Union could commence multiple trade and economic / political assistance programmes with the isolated community that technically belongs to the family. All of these forms of EU involvement can have a huge impact on the domestic front of the exclusive parties concerned.¹⁸⁸ Moreover, for 'outsiders' like northern Cyprus, interaction with one of the world's largest powers is invaluable, as the community's profile has a chance to be improved internationally.¹⁸⁹

Even though Europeanisation is a typical theory of EU integration and conflict resolution, it has never actually dealt with the external projection of 'outsiders', especially those which suffer from international presence.¹⁹⁰ Perhaps this is because the Union itself has not used its power for this cause, as proven by this thesis. In this

¹⁸⁸ See Alex Fischer, Sarah Nicolet and Pascal Sciarini, 'Europeanisation of a Non-EU Country: The Case of Swiss Immigration Policy' (2002) 25(4) West European Politics 143.

¹⁸⁹ Kyris (n 167) 7.

¹⁹⁰ 'Caucasus with the "frozen conflicts" of South Ossetia, Abkhazia and Nagorno-Karabakh along with Balkan cases of Kosovo and Transnistria are all paradigms largely relevant both to the example of the Turkish Cypriot Community and to the question of external projection.' Ibid.

context, the case of Cyprus and more specifically the Turkish Cypriot community, adds a new element to the study of Europeanisation. This work bares hope to contribute to the debate on the EU's power as a conflict transformer by introducing a new element which will be proven useful tool towards researching similar cases and will offer valuable insights to the debate of EU integration and self-determination in general.

Overall, the Union needs to realise that the only way the Cyprus problem will cease to exist, is if the Greek Cypriots agree to recognise the Turkish Cypriot self-determination in Cyprus or are forced to accept partition. There are two types of people in the world; one who will place freedom above all other earthly possessions, and the others. The majority of the Greek and Turkish Cypriots belong to the former and this is definitely not the worst prerequisite for an improvement 'at the top of which the events in Cyprus from 1963/64, 1967 and 1974 might appear as stages of path-finding towards a common and friendly destiny.'¹⁹¹ Undeniably, the Greek and Turkish Cypriot communities have agreed for years that a federation on the island is a plausible solution; however, a genuine federation in a sociological as well as a legal sense, will only surface as a result of free self-determination of two partners

who hold an equal status at least as far as this freedom and power of self-determination is concerned. A federation, as a form of contract, cannot be otherwise envisaged than as consent of partners who are considered able and entitled to decide and speak freely for themselves.¹⁹²

History and pride counts here; they need to be overcome for any achievement to surface. Of course, the years of division render it near enough impossible for both sides of the island to recognise a shared past and anticipate a united future; but nonetheless, a federation cannot be concluded by two parties that are not on equal footing and especially if one is indirectly oppressing and governing the other via the EU. It cannot be denied that until today, the peace talks have been viewed as a vehicle by the two leaders of Cyprus to carry their version of the story; this is why the deadlock tends to be due to the Greek Cypriot 'single sovereignty' formation and the Turkish Cypriot 'joint sovereignty' claim. So the issue is: which conception of Cyprus will prevail? Unless, the two leaders of Cyprus simultaneously decide to cease from asserting these aforementioned views and start with a clean slate, the island will

¹⁹¹ Christian Heinze, *Cyprus Conflict* (K Rustem & Brother 1986) 35.

¹⁹² *Ibid* 34.

not reunite.¹⁹³ For the time being, it does not seem as though this is plausible. Duly, the establishment of the TRNC has provided a crucial precondition for what is considered by both parties of the conflict as the solution to the Cyprus problem. This should be acknowledged, welcomed and recognised by all that is interested in a solution to such a prolonged problem.¹⁹⁴

Realistically, the Greek Cypriot administration will never accept Turkish Cypriot self-government in part of Cyprus' territory; however, if the UN, the EU and several other relevant governments recognise the TRNC, without the consent of the Greek Cypriot conflicting party, then the conflict on the island will end as it will terminate the chance for the Greek Cypriot administration of acquiring supremacy over the entire island and would subsequently dissolve the substance of the conflict. Without a doubt, permanent peace necessitates at the very least, independent Turkish executive power and court jurisdiction free from any Greek Cypriot influence. Peace plans resembling the Annan Plan simply augment instead of ending the conflict. Even if the Turkish Cypriot community and the Greek Cypriot community agree upon such a plan, their accord serves only to delay the renewed outbreak of dispute into the future.¹⁹⁵ Professor Christian Heinze rather interestingly stipulated that:

An attempt at a voluminous and vast regulation of a great number of conceivable individual conflicts as forms the substance of this plan creates additional food for dispute without deciding the underlying basic conflict. It puts the Greek party in a position enabling it to pursue further their claim for supremacy by diligently utilizing powers and plan-positions.¹⁹⁶

Indeed, partition will also come with political and legal problems; for instance, it will result in the destruction of rights of residence and property of Greek and Turkish Cypriots. However, rights as such can be sacrificed or compensated via alternative means in the name of permanent peace; justified mutual claims for compensation can be raised following the recognition of the TRNC for example. Undeniably, the partition of the island will result in a greater personal loss of property for the Greek Cypriots than the Turkish Cypriots; nevertheless, if the predominant aim is to

¹⁹³ Charlie Askew, 'Cyprus: A Real Chance at Unification?' (*Prospect*, 19 March 2014) <<http://www.prospectmagazine.co.uk/world/cyprus-a-real-chance-at-unification>> accessed 23 May 2015.

¹⁹⁴ Ibid.

¹⁹⁵ Christian Heinze, 'Cyprus Conflict in a Nutshell' (*Cyprusscene*, 20 January 2015) <<http://cyprusscene.com/2015/01/20/cyprus-conflict-in-a-nutshell-by-dr-christian-heinze/>> accessed 27 July 2015.

¹⁹⁶ Ibid.

Conclusion: The Cyprus Experience

achieve peace, then this property loss, as argued by Professor Heinze, ‘constitutes a compensation justified by the responsibility of the Greek community for its violent aggression and breach of confidence in the course of the attempt at founding a Republic of Cyprus in 1960 and for its failure.’¹⁹⁷

Unfortunately, there is a gap in the literature as regards the reasons on which the international policy *vis-à-vis* the Cyprus problem is founded. The opinions that can be found in the literature regarding this issue lack authority since they are subject to dispute. However, one thing is certain; the Resolutions of the Security Council concerning Cyprus have shaped the international *fora*’s policy. The EU limits itself to adopting the contents of these Resolutions and stays well within their meaning. The international organisations, such as the Union, believe that the 1960 RoC is still in existence and thus it enjoys the protection awarded to States by international public law. Furthermore, they contend that the TRNC is not compatible with this protection since it was established via violence.¹⁹⁸ Consequently, this creates a duty to not recognise this Turkish Cypriot State in the north. This simply means that international politics is obstructing the possibility of permanent peace on the island, as no international law actually prevents the establishment of States or the changing of State territory,¹⁹⁹ if it is the sole solution for the conservation of lasting peace. According to Professor Heinze, ‘international law enjoys no other legitimacy than the service it renders to peace.’²⁰⁰

Understandably, an encroachment on an existing State for the purpose of establishing a novel State, utterly disregards the principle of peace; thus, that novel State does not necessarily deserve recognition. The non-recognition could potentially act as a means of fixing the encroachment and restoring peace. However, non-recognition will only serve the principle of peace if there is a genuine possibility that the previous state of affairs will be restored and if the ‘peace providing effects clearly outweigh the disturbance of peace connected with it.’²⁰¹ As it stands, peace in

¹⁹⁷ Ibid.

¹⁹⁸ ‘As no “Republic of Cyprus” existed during the steps taken between 1964 and 1984 towards the establishment of a Turkish Republic of North Cyprus and as boundaries of the Greek State of Cyprus in being from 1964 onwards were not established before its delimitation in 1974, the powerful help rendered by Turkey to the establishment of the Turkish Cypriot State could not contradict any right of a Cypriot State.’ Ibid.

¹⁹⁹ Even if violently performed.

²⁰⁰ Heinze (n 195).

²⁰¹ Ibid.

Conclusion: The Cyprus Experience

Cyprus is blocked by the non-recognition of the TRNC; the UN's call for non-recognition as a punishment for the foundation of the Turkish Cypriot State, can no longer enforce its aim.²⁰² Furthermore, the democratic theory of political self-determination claims that the rightfulness of political borders can solely be determined via democratic means; thence, the abovementioned argumentation is void. If the Turkish Cypriot community want to secede, then despite what the principle of peace dictates, they have a democratic right to do so.

Overall, the power to terminate the Cyprus conflict is solely in the hands of those organisations which possess the ability to recognise the TRNC-such as the UN and the EU. The UN's call to respect the border of the TRNC-which is in direct contradiction with its call for non-recognition and prevents the realisation of rights of the Greek Cypriot community-indicates that it has acknowledged the importance of maintaining the division for the purpose of peace.²⁰³

In sum, despite the continuation of the Cyprus problem, the EU has definitely learnt a lesson from its involvement in this case.

'You have many habits that weaken you. The secret of change is to focus all your energy not on fighting the old, but on building the new.'²⁰⁴

²⁰² Ibid.

²⁰³ 'State practice, especially within the UN, clearly proves that the cease-fire line of 1974 has developed into an international line of demarcation, established by an international agreement to which the North and South of Cyprus are parties or which they are otherwise bound to respect.' Dieter Blumenwitz, 'Cyprus: Political and Legal Realities' (1999) 4(3) *Perceptions: Journal of International Affairs* <<http://sam.gov.tr/wp-content/uploads/2012/01/DIETER-BLUMENWITZ.pdf>> accessed 27 July 2015. According to the Friendly Relations Declaration of the United Nations General Assembly, 'every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation.' UN General Assembly Resolution 25/2625 (25 October 1970) A/RES/25/2625.

²⁰⁴ Dan Millman, *Way of the Peaceful Warrior: A Book that Changes Lives* (HJ Kramer Inc 1984) 113.

Annex

Protocol No 10 on Cyprus of the Act of Accession 2003

Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 10 on Cyprus.

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THE HIGH CONTRACTING PARTIES,

REAFFIRMING their commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council Resolutions, and their strong support for the efforts of the United Nations Secretary General to that end,

CONSIDERING that such a comprehensive settlement to the Cyprus problem has not yet been reached,

CONSIDERING that it is, therefore, necessary to provide for the suspension of the application of the *acquis* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control,

CONSIDERING that, in the event of a solution to the Cyprus problem this suspension shall be lifted,

CONSIDERING that the European Union is ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded,

CONSIDERING that it is necessary to provide for the terms under which the relevant provisions of EU law will apply to the line between the abovementioned areas and both those areas in which the Government of the Republic of Cyprus exercises effective control and the Eastern Sovereign Base Area of the United Kingdom of Great Britain and Northern Ireland,

DESIRING that the accession of Cyprus to the European Union shall benefit all Cypriot citizens and promote civil peace and reconciliation,

CONSIDERING, therefore, that nothing in this Protocol shall preclude measures with this end in view,

CONSIDERING that such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus,

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

Article 1

1. The application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.
2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1.

Article 2

1. 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 line between those areas referred to in Article 1 and the areas in which the Government of the Republic of Cyprus exercises effective control.
2. The boundary between the Eastern Sovereign Base Area and those areas referred to in Article 1 shall be treated as part of the external borders of the Sovereign Base Areas for the purpose of Part IV of the Annex to the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus for the duration of the suspension of the application of the *acquis* according to Article 1.

Article 3

1. Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.

2. Such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus.

Article 4

In the event of a settlement, the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community.

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