cynical manipulation meant it lost its reputation and direction. 'A Human Rights Council would offer a fresh start',[73] Kofi Annan stated in his speech to the CHR back in April 2005, and indeed it has. Its emergence has been impressively speedy. However, care needs to be taken so that it is ensured that this 'fresh start' is not quickly clouded again with a calculated manipulation of its procedures and machinery. The UNHCHR wished that the new HRC be 'refined, improved and heightened in stature'.[74] It is hoped that the HRC will live up to the expectations invested in it as the UN's new central human rights body, one that has taken so much energy to forge over recent months. That ultimately depends on what Member States make of it.

NAZILA GHANEA*

II. THE ANKARA AGREEMENT, TURKEY, AND THE EU

A. Introduction

The Republic of Cyprus became independent on 16 August 1960 with the conclusion of three agreements between Cyprus, Greece, Turkey and the United Kingdom: the Treaty of Establishment,[1] the Treaty of Guarantee,[2] and the Treaty of Alliance.[3] Due to limited space, this article will not consider the troubled history of the new Republic the structures of which were literally shattered by an unworkable and dysfunctional Constitution a few years only after its establishment and which eventually led to the Turkish invasion and continuing occupation of one third of its territory.[4] Rather, this article intends to focus on recent legal developments provoked by Turkey's refusal to recognize the Republic of Cyprus, a Member State of the United Nations and as from May 2004 a Member of the European Union, in the context of Turkey's own aspirations to become an EU Member State.

B. Turkey and the EU

1. Introduction

Turkey has been linked with the EU with an Association Agreement (hereinafter the Ankara Agreement) since 1963.[5] When in May 2004 the EU expanded, welcoming ten

[73] Speech by Mr Kofi Annan, United Nations Secretary-General, 7 Apr 2005.

[74] Speech by Ms Louise Arbour, United Nations High Commissioner for Human Rights, 22 Apr 2005.

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[1] United Nations Treaty Series (1960) vol 382, 10. [2] ibid, 4.

[3] Available at <http://www.hri.org/Cyprus/Cyprus_Problem/treaty.html#C>.

[4] For a recent bibliography on the Cyprus question see K Chrysostomides *The Republic of Cyprus: A Study in International Law*, (Martinus Nijhoff Publishers/Kluwer 2000). On the recent UN initiatives to find a settlement to the Cyprus problem see C Palley *An International Relations Debacle: The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Hart Publishing Oxford and Portland, Oregon 2005).

[5] *Agreement establishing an Association between the European Economic Community and Turkey,* signed at Ankara, 12 Sept 1963, available at <http://www.deltur.cec.eu.int/kitap/e-ankara.rtf>.

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new Member States in the Union, it became necessary to accommodate the Ankara Agreement to the new developments. For this purpose, the EU Presidency and the Commission submitted an Additional Protocol for signature by Turkey, the Community and its Member States, by which the Ankara Agreement would be extended to incorporate the ten new members, including the Republic of Cyprus.[6]

2. *The Turkish declaration on Cyprus*

When the Additional Protocol was introduced for signature on 29 July 2005, the Turkish Government attached a declaration, which raises significant legal questions regarding its validity and its legal effects not only in relation to the implementation of Turkey's commitments and undertakings under EU law but also under general international law. The declaration, which was intended to form an integral part of the Protocol, reads as follows:

> 1. 'Turkey remains committed to finding a political settlement of the Cyprus issue and has clearly demonstrated its resolve in this regard. Accordingly, Turkey will continue to support the efforts of the UN Secretary-General towards achieving a comprehensive settlement which will lead to the establishment of a new bi-zonal partnership State. A just and lasting settlement would greatly contribute to peace, stability and harmonious relations in the region.
> 2. The Republic of Cyprus referred to in the Protocol is not the original partnership State established in 1960.
> 3. Turkey will thus continue to regard the Greek Cypriot authorities as exercising authority, control and jurisdiction only in the territory south of the buffer zone, as is currently the case, and as not representing the Turkish Cypriot people and will treat the acts performed by them accordingly.
> 4. Turkey declares that signature, ratification and implementation of this Protocol neither amount to any form of recognition of the Republic of Cyprus referred to in the Protocol; nor prejudice Turkey's rights and obligations emanating from the Treaty of Guarantee, the Treaty of Alliance, and the Treaty of Establishment of 1960.
> 5. Turkey reaffirms that its existing relationship with the Turkish Republic of Northern Cyprus remains unchanged by becoming a party to the Protocol.
> 6. Pending a comprehensive settlement, the position on Cyprus will remain unchanged. Turkey expresses its readiness to establish relations with the new partnership State which will emerge following a comprehensive settlement in Cyprus.'[7]

3. *The EU response*

Two days after the Turkish declaration, the European Commissioner for Enlargement Mr Olli Rehn, greeted the signature of the Protocol as allowing the extension of the EU-Turkey customs union to all new Member States, including Cyprus. While he pointed out that the EU would carefully consider the legal implications of the declaration, he pointed out that from a preliminary assessment the declaration did not call into question Turkey's obligation to implement the Protocol, which he described as essential.[8]

[6] *Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union*, available at <http://www.europa.eu.int/comm/enlargement/docs/pdf/Tur/07%20-%20EN.pdf>.

[7] Available at <http://europa.eu.int/comm/enlargement/docs/newsletter/ latest_weekly_070905.htm#a3>.

[8] 30 July 2005: Signature of the protocol to the Ankara Agreement (Brussels), available at <http://europa-eu-un.org/articles/sv/article_4966_sv.htm>.

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More significantly however, on 21 September 2005 the EU Council issued a counter-declaration according to which the 'declaration by Turkey is unilateral, does not form part of the Protocol and has no legal effect on Turkey's obligations under the Protocol', and that 'the European Community and its Member States expect full, non-discriminatory implementation of the Additional Protocol, and the removal of all obstacles to the free movement of goods, including restrictions on means of transport. Turkey must apply the Protocol fully to all EU Member States.'[9] Re-affirming the long-established position that the European Community and its Member States recognize only the Republic of Cyprus as a subject of international law, the Council stressed that compliance with the Additional Protocol and recognition of all Member States are essential conditions for Turkey's own accession to the Union.[10]

In addition to the above, in its 2005 progress report on Turkey, the Commission takes note of the fact that the free circulation of products between the EU and Turkey is not unimpeded, that the obligations arising from the customs union have not been fully complied with and that the provisions imposing obstacles towards the free circulation of goods and mutual recognition must be removed, whilst stressing that the obstacles created as a consequence of the Turkish restrictions against Cypriot vessels or aircrafts should be lifted.[11] Finally, Turkey's obligation to implement fully towards all EU Member States the Additional Protocol is also reflected in the annex attached to Council Decision of 23 January 2006 according to which Turkey must normalize its bilateral relations with all EU Member States.[12] The annex forms an integral part of the Council Decision, which according to Article 249 EC creates legally binding effects 'in its entirety upon those to whom it is addressed'.

C. The Turkish Declaration under the Microscope of International Law

1. A genuine declaration or a masked reservation?

Should the declaration of Turkey have been intended to be a mere re-affirmation of its political stance towards the Republic of Cyprus without any legal consequences towards Cyprus under either general international or European law, then any further consideration of the matter would perhaps be unnecessary. However, it appears that the

[9] *Declaration by the European Community and its Member States,* Brussels, 21 Sept 2005, paras 2 and 3, available at <http://europa-eu-un.org/articles/en/article_5045_en.htm>.

[10] ibid, paras 3–5.

[11] *Turkey,* 2005 Progress Report, COM (2005) 561 final, Brussels, 9 Nov 2005, at 58, available at <http://europa.eu.int/comm/enlargement/report_2005/pdf/package/sec_1426_final_en_progress_report_tr.pdf>.

[12] 2006/35/EC, Council Decision of 23 Jan 2006 on the principles, priorities and conditions in the Accession Partnership with Turkey, Official Journal L22, 26/1/2006, p 34–50, also available at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnum doc&lg=en&numdoc=32006D0035&model=guichett>. In a more recent development, and in particular on 12 June 2006, the EU Council considering the provisional completion of negotiations with Turkey in the areas of education and research, adopted the following position: 'The EU underlines the importance for Turkey of compliance with the Association Agreement, including its additional protocol and the customs union. Failure to implement its obligations in full will affect the overall progress in the negotiations. With this in mind, the Union underlines all relevant elements of the (EU) declaration of September 21, 2005. Available at <http://www.dw-world.de/dw/article/0,2144,2052869,00.html>.

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apparently neutral declaration was intended to carry important political and legal consequences.

Read carefully, Turkey's declaration entails general declarations of policy, interpretative declarations, declarations of non-recognition, and finally reservations, based on the legal effects intended in each instance by Turkey. This issue is thoroughly examined in the joint legal opinion of Professors Brownlie, Crawford, Pellet and Wyatt (hereinafter joint legal opinion) to the Government of Cyprus.[13] According to their conclusions, Turkey's re-affirmation to seek a political settlement to the Cyprus problem and to cooperate with the new partnership State constitutes a general declaration of policy which does not impair in any way the implementation of the Additional Protocol.[14] The statements, however, that the Republic of Cyprus is not the original partnership State which came into existence in 1960, and that the Additional Protocol is without prejudice to Turkey's obligations and rights arising from the three international agreements of 1960 are, according to the joint legal opinion, interpretative declarations. Yet again, they do not have any legal bearing on the Additional Protocol, nor do they bind either the EU or its Member States.[15] What in effect interpretative declarations aim to do is to explain how the State, which is invoking them, understands its treaty obligation. Irrespective of whether the statement, for example, that the Republic of Cyprus is not the original partnership State of 1960, is correct under international law (although the continuity of the Republic constitutes 'an indisputable legal fact'),[16] Turkey is still obliged to fulfil the Additional Protocol towards all the EU Member States, including Cyprus. Such interpretative declarations should therefore be distinguished from reservations where the intention of the State is in reality to alter the content and scope of its treaty commitments.[17]

Similarly, Turkey's refusal to recognize the Republic of Cyprus and its de jure authority over the entire island (a position not consistent with the position international bodies such as the Security Council, the General Assembly and the EU take on the matter) constitutes a unilateral statement of non-recognition. Nevertheless, whilst a declaration that participation in a treaty does not amount to recognition does not affect the legal obligations of the State making the declaration, in this case Turkey, a declaration expressive of the intention not to be bound towards the entity, which it refuses to recognize, does.[18] Hence, Turkey's declaration that it will treat the acts carried out by the 'Greek Cypriot authorities' accordingly and that it re-affirms its relationship with the 'Turkish Republic of Northern Cyprus' in reality constitute a reservation inconsistent with the object and purpose of the Additional Protocol. The purpose of this reservation is therefore to dispute the unity of one of the new EU Member States,[19] as

[13] 'Turkey's Signature of the Protocol Declaration and Exchange of Letters', 22 Aug 2005. The Opinion was obtained with the permission of the Government of the Republic of Cyprus. For an explanation of the legal effects of such various statements see the International Law Commission's Guidelines to Practice Relating to Reservations to Treaties, *Official Records of the General Assembly*, Fifty-fourth Session, Supplement No 10 (A/54/10).

[14] See joint legal opinion, 3, para 5.

[15] ibid 4, para 6.

[16] ibid 15, para 38.

[17] M Fitzmaurice 'The Practical Working of the Law of the Treaties' in M Evans (ed) *International Law* (OUP 2003) 195–6.

[18] *Official Records of the General Assembly*, Fifty-fourth Session, Supplement No 10 (A/54/10) 114.

[19] Joint legal opinion, above n 14, at 6, para 12.

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safeguarded by the act of accession of Cyprus to the EU. It accordingly needs to be emphasized that when Cyprus joined the EU, it did so in its entirety even though the application of the *acquis communautaire* would have to be suspended in relation to the occupied territories where the Government could not exercise effective control but only for as long as the situation remains unchanged.[20]

The conclusion that Turkey's objective was to place a reservation relating to the implementation of the Protocol towards Cyprus is further enhanced by its decision to make the declaration an integral part of the Protocol, revealing an intention to produce different legal results with respect to Cyprus.[21]

The right of States to make valid reservations when giving their consent to be bound by a particular treaty is well established in international law. However, this right is not unfettered. The legal rules regarding reservations to treaties are now incorporated in the 1969 Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention),[22] many of the provisions of which reflect customary norms of international law. Accordingly, Article 2 of the Vienna Convention provides that a reservation is a unilateral statement made when signing, ratifying, accepting, approving or acceding to a treaty with the purpose to 'exclude or modify the legal effect of *certain* provisions of the treaty in their application to that State' (emphasis added). However, Article 19 (c) restricts this right since a State may not make a reservation that is incompatible with the object and purpose of the treaty.

Should it be concluded that the Ankara Agreement and the Additional Protocol are multilateral agreements in view of the multiplicity of the parties participating in them, the reservation placed by Turkey would be against their objects and purposes. This is because the Additional Protocol, which under Article 12 constitutes an integral part of the Ankara Agreement, intends to extend the application of the Ankara Agreement to all the new Member States. More specifically, Article 1 provides the following:

> 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 (hereinafter referred to as 'the new Member States') *shall be Parties* to the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 . . .[23] (emphasis added).

Furthermore, Article 29 of the Ankara Agreement was also amended to accommodate the new developments and it now reads as follows:

> This Agreement shall apply to the territory to which the Treaty establishing the European Community applies, under the conditions set out in that Treaty, and to the territory of the Republic of Turkey. (Art 1 (3) of Protocol)

[20] See Accession Treaty concluded between the EU and the ten new Member States, available at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12003T/htm/L2003236EN.001701.htm>
Act of Accession, available at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12003T/htm/L2003236EN.003301.htm>.
Accession Protocol No 10 on Cyprus, available at <http://europa.eu.int/comm/enlargement/turkish_cypriot_en.htm>.

[21] Joint legal opinion (n 14) 7–11, paras 17–26.

[22] Available at <http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/>.

[23] Above n 6.

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As the territory of the EC now includes the territory of the Republic of Cyprus, the suspension of the legal effects of the Ankara Agreement and the Additional Protocol against Cyprus constitutes a flagrant violation of their purposes and objects. Furthermore, implementation only towards 24 Member States would be an infringement of the stated objectives of the Ankara Agreement with Turkey, namely to establish a customs union and align the economic policies of the EEC (to which Cyprus is a Member State) and Turkey.[24] Article 7 of the Ankara Agreement also imposes an obligation upon the Contracting Parties to take all appropriate measures in order to ensure compliance with the commitments arising from the agreement and to refrain from action which may jeopardize its objectives.[25] At the same time, Articles 9 and 12 of the Ankara Agreement provide that the Contracting Parties undertake the obligation not to discriminate on grounds of nationality and not to impose obstacles on the free movement of goods and services on such grounds.

The preclusion of Cyprus from the enjoyment of rights provided under the Ankara Agreement would also go against the very object and purpose of Association Agreements concluded between the EU and third States in general. In particular, the ECJ has emphasized on several occasions the need for common action and close cooperation between the Community and its Member States when negotiating and implementing such Association Agreements—widely accepted as having mixed character—like the one concluded between the EU and Turkey. As noted, 'This duty of close cooperation, which follows from what the Court has called the "requirement of unity in the international representation of the Community", is one of the fundamental principles of the external relations of the Communities.'[26] This is founded on Article 10 EC according to which Member States 'shall' take all appropriate steps to ensure compliance with the Community's objectives and avoid any action which could imperil these objectives, but also on Article 3 TEU which states that the Council and the Commission shall ensure the consistency of the Union's external activities.[27]

Another significant question that arises in this context is whether a State may validly place a reservation which in effect aims to suspend the entire effect of a treaty—as opposed to only certain provisions of the treaty—against one State only. The wording of Article 2 of the Vienna Convention, but also the uniform stand the EU as a whole is required to take in relation to the implementation of such Agreements, seem to give a negative answer.

This brings us to the question of whether the Ankara Agreement could be seen as a bilateral and not as a multilateral agreement. This possibility is not far-fetched, especially if one considers that both the Ankara Agreement and the Additional Protocol are concluded between Turkey on the one hand, and the EU and its Member States on the other, and from the fact that such agreements establish reciprocal rights and obligations.[28] Accordingly, any reservation placed would require, if rejected, re-negotiation

[24] Above n 5.
[25] ibid.
[26] I MacLeod, ID Hendry, and S Hyett *The External Relations of the European Communities* (Clarendon Press Oxford 1996) 145.
[27] ibid 147–8.
[28] See Arts 300 and 310 EC. Opinion 1/94 of 15 Nov 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*—Art 228 (6) of the EC Treaty, ECR 1994, p I-5267, para 108 in Joint legal opinion (n 13) 9, para 21.

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of the treaty with the effect that the treaty cannot enter into force,[29] or it would constitute a proposal for the amendment of the treaty in accordance with Articles 39–41 of the Vienna Convention.[30] In the latter event, the valid submission of amendments to a treaty requires the agreement of all the Contracting Parties, a condition that is clearly lacking in this instance. Moreover, it is pointed out that partial amendment of the Additional Protocol so as to be effective only between Turkey and some but not all the EU Member States would be in violation of Article 41 (1) (b) (i) of the Vienna Convention according to which such amendment should not imperil the rights of the other parties.

The position that the reservation of Turkey with respect to the non-implementation of the Ankara Agreement and its Protocol towards Cyprus would require the unanimous acceptance of all the Contracting Parties is also reflected in Article 20(2) of the Vienna Convention. This provision precludes a reservation which is not accepted by *all* the parties to the treaty if it can be shown from the limited number of the negotiating States and the object and purpose of the treaty that its application in its entirety between all the parties constitutes an essential prerequisite of the consent of each party to be bound by such treaty. There is little doubt from the limited number of the Contracting Parties, but also from the requirement of uniform and integral implementation of both the Ankara Agreement and the Additional Protocol as analysed earlier, that they both fall within the ambit of Article 20(2).[31] Moreover, it was already shown above that the Turkish declaration was unanimously rejected by the EU before the lapse of the 12 months period within which the parties opposing such reservation must place their objection under Article 20(5) of the Vienna Convention.

Finally, in relation to the power of the EU to place or object reservations in mixed agreements where the Community has exclusive or shared competences with the Member States, Professor Rosas points out that whilst the Community can only place reservations for those parts of the Agreement that fall within its competences, the same distinction does not seem to apply with respect to objections to reservations. Accordingly,

> Even if a reservation relates to the 'national' part of an agreement, there are arguments for allowing a Community objection determining that the reservation is incompatible with the object and purpose of the treaty, as such a reservation may affect the entire treaty regime. Reservations, and objections to reservations, formulated by Member States to mixed agreements would be highly problematic, if no Community co-ordination has taken place', something that 'could lead to legal uncertainty and confusion'.[32]

It is therefore inferred that the Community and its Member States must act uniformly when a reservation endangers the objectives of the Union. This conclusion coincides with the European Commission's position that 'the principles of duty of co-ordination and unity of representation, as formulated by the Court of Justice, require co-ordination

[29] M Shaw *International Law* (5th edn CUP Cambridge 2003) 822.

[30] Joint legal opinion (n 13) 9, para 22 and ILC draft Guideline 1.5.1. ('Reservations to Bilateral Treaties'), A/54, 120.

[31] Joint legal opinion, above n 13, at 10, para 25.

[32] A Rosas 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds) *The General Law of E.C. External Relations (*Sweet & Maxwell London 2000) 211. See Commission Staff Working Paper 'Reservations and objections to reservations with regard to mixed agreements' SEC (1998) 2249 of 23 Dec 1998.

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between the EC and the Member States with respect to reservations and objections to reservations to mixed agreements' and that 'situations should of course be avoided where a third State refuses treaty relations with one or more Member States, while treaty relations are established between it and the EC (and the other Member States)'.[33] Similar considerations apply in relation to objections to reservations where the EU and its Member States are required to act in coordination. The Commission points out to this effect that an objection to a reservation would imply either acceptance or refusal of treaty relations with the reserving State. In the event that the objection accepts treaty relations with the reserving State, this would mean either that the reservation is invalid, or that the relevant treaty provision does not apply. In this instance, the EU made it clear that it did not accept Turkey's reservation on Cyprus, which makes the Ankara Agreement and the Additional Protocol effective towards all the EU Member States. As the Commission points out,

> if a mixed agreement is of a nature to require the participation of all Member States, co-ordination of objections is important already in order to ensure that they do not rule out treaty relations between the objecting Member State and the reserving third State, while the EC and other Member States would remain bound by the agreement in relation to the third reserving State. In any case, a disparate pattern of objections by the EC and its Member States would create confusion as to the law applicable between them and third States.[34]

2. *Questions of recognition*

Our attention is next turned to the consistency of Turkey's refusal to recognize the Republic of Cyprus with international law.

Whilst it is widely accepted that States in general do not have a duty under international law to recognize other States, Turkey's obligation to recognize the Republic of Cyprus (as a unity) arises from treaty law. More specifically, under the Treaty of Establishment, Turkey agreed that the territory of the Republic of Cyprus 'shall' comprise the island of Cyprus (not part of it), together with the islands lying off its coast with the exception of the two areas which remained under British sovereignty.[35] At the same time, under Article II of the Treaty of Guarantee Turkey (along with the UK, Greece, and Cyprus) undertook the commitment to

> 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 the Constitution

and 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.[36]

There is no doubt that these treaties are still in force and have remained intact even after the Turkish invasion, an assertion made by Turkey itself. More specifically, in paragraph 4 of the declaration, Turkey states that the Additional Protocol shall not prejudice its rights and obligations emanating from the Treaty of Guarantee, the Treaty of Alliance, and the Treaty of Establishment of 1960. In consequence, whilst Turkey

[33] Commission Staff Working Paper, ibid.
[34] ibid.
[35] (n1) 10.
[36] ibid 4.

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rejects and disregards the existence or territorial integrity of the Republic of Cyprus as safeguarded under the 1960 agreements, it attempts the selective application of these agreements by demanding its rights (however perceived) but at the same time by repudiating its duties.

Quite distinct from its existing treaty commitments, Turkey's refusal to recognize the Republic of Cyprus is inconsistent also with general international law. More importantly, Turkey's stance towards Cyprus seems to have graver legal consequences than just a mere question of not recognizing it.

Professor Warbrick writes on recognition:

> Recognition is a unilateral act of a State and one that has international legal consequences. While its unilateral character means that a State has discretion whether to act or not and, in making its decision, the State may take into account purely political considerations, this does not mean that its discretionary power is unfettered: a State may not use any discretionary power contrary to the rights of other States. The power might be limited by treaty but in general law, the restrictions arise in two, not wholly distinct ways. To recognise on part of the territory of an established State another State—say Quebec in Canada or Scotland in the United Kingdom—would be an act of unlawful intervention. To recognise as a State a rebel group fighting to establish statehood, while the existing sovereign is still trying to assert its authority is also an unlawful intervention . . .[37]

Accordingly, whereas Turkey does not have an obligation under general international law to recognize Cyprus—rather, such a duty of recognition derives from Turkey's specific treaty commitments—it does have a distinct obligation not to recognize the unlawfully established 'Turkish Republic of Northern Cyprus' (TRNC). Recognition of the 'TRNC' amounts to continuing unlawful intervention in the affairs and rights of another sovereign State (in addition of course to Turkey's continuing unlawful military presence on the territory of an EU Member State). More importantly, by refusing to recognize the existence of the Republic of Cyprus, Turkey attempts to place in a similar footing the non-recognition of Cyprus with the non-recognition of the 'TRNC'. Yet this position ignores that these two regimes are fundamentally distinct: the former has been the victim of a continuing unlawful acquisition of territory through the unlawful use of armed force, whilst the latter is the fruit of this illegality, and as such there is an obligation towards all States not to recognize it. Hence, the legal differences of the two situations are linked with the distinction made by Professor Warbrick regarding 'not recognizing' and 'non recognition', the latter of which falls within the sphere of State responsibility.[38]

This further invites the question as to whether a State is entitled under general international law to withdraw its recognition of another State. Professor Warbrick observes that this is not allowed, unless the circumstances under which the State recognized another have fundamentally changed.[39] This can clearly not apply to the Republic of Cyprus, which despite the Turkish invasion and occupation remains the only recognized State in the international legal arena.[40] Had the circumstances changed so funda-

[37] C Warbrick 'States and Recognition in International Law' in M Evans (ed) *International Law (*1st edn OUP Oxford 2003) 239.

[38] ibid 241–2.

[39] ibid 240.

[40] See in this regard Security Council resolutions 365 (1974); 367 (1975); 541 (1983); 544 (1983); 550 (1984); General Assembly resolution 3212 (1974); *Cyprus v Turkey* ECHR (2992) 35 EHRR 30; *Loizidou v Turkey* ECHR (1997) 23 EHRR; *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P.Anastasiou (Pissouri) Ltd and others* [1994] ECR I-3087,

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mentally to allow Turkey's withdrawal of its recognition of the Republic of Cyprus, this would also entitle termination of or withdrawal from the three international agreements of 1960 under Article 62 of the Vienna Convention, something that Turkey categorically rejects. Furthermore, it is strongly disputed that Turkey can justify the withdrawal of its recognition on the basis of fundamental change of circumstances as it bears sole responsibility for such change. In other words, the question that emerges here is whether a State can rely on such justification, if it can be shown that the fundamental change of circumstances is owed to its own wrongful acts. The question is therefore simple: can Turkey rely on its unlawful use of force in order to withdraw its recognition of the Republic of Cyprus?

3. Legal consequences arising from the prohibition of the use of force

Turkey's declaration should therefore also be assessed in the context of the principle prohibiting the use of force. That this principle is of fundamental character in contemporary international law is undisputed, whilst there is a growing opinion in support of the jus cogens character of the norm. Turkey's argument that its invasion of Cyprus was justified under the Treaty of Guarantee is flawed. Even if one were to accept that indeed the Treaty authorized military intervention in order to *restore* the Constitutional order (as opposed to continuing occupation and partition of the island for almost 32 years), this would be contrary to the UN Charter, which specifically provides in Article 103 that the obligations arising therefrom shall prevail over any other treaty obligations. It would also be in violation of a jus cogens norm, and therefore invalid. This was the position of the United States concerning the Soviet invasion of Afghanistan in December 1979 that the Soviet Union tried to justify on the basis of the 1978 Treaty of Friendship, Goodneighborliness and Cooperation between itself and Afghanistan. Under this treaty the parties undertook the obligation to protect the security, independence and territorial integrity of each other. President Jimmy Carter, referring to the Soviet intervention in Afghanistan said that:

> Such gross interference in the internal affairs of Afghanistan is in blatant violation of accepted international rules of behavior . . . Soviet efforts to justify this action on the basis of the United Nations Charter are a perversion of the United Nations . . . the Soviet action is grave breach to peace . . .[41]

With specific reference to one of the paramount principles of the Charter it was stressed that the USSR had an obligation under Article 2(4) to refrain from the use or threat of force against the territorial integrity or political independence of any State. Pointing out that no treaty could prevail over obligations arising from the Charter it was further noted that:

> 4. Nor is it clear that the treaty between the USSR and Afghanistan, concluded in 1978 between the revolutionary Taraki Government and the USSR, is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with

Judgment of 5 July 1994; *Common statement of the 10 States members of the European Community on the situation in the Republic of Cyprus issued in Athens on 16 November 1983,* S/16155, Annex, 17 Nov 1983.

[41] *Soviet invasion of Afghanistan*, Digest of US Practice in International Law (1979) 34.

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> what the Vienna Convention on the Law of Treaties describes as a 'peremptory norm of general international law' (Article 53), namely, that contained in Article 2, paragraph 4 of the Charter.
>
> 5. Moreover, the Soviet action conflicts with the terms of the Soviet-Afghan Treaty, since it is a violation of Afghanistan's national sovereignty. [42]

Contemporary international law therefore condemns in the most unequivocal terms the use of force against another State. Professor Crawford says in this regard:

> the principle that territory may not be validly acquired by the use of force is well established. The principles of State succession do not, it seems, apply to cases involving the violation of the Charter, and in particular of Article 2 paragraph 4. The protection accorded States by Article 2 paragraph 4 extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness. In summary, the prohibition of the threat or use of force in international relations is one of the most fundamental of international law rules. The international community has with considerable consistency refused to accept the legal validity of acts done or situations achieved by the illegal use of force. If ever effective territorial entities were to have their status regulated by international law, it would be so regulated by the rules relating to the use of force.[43]

Whilst Turkey's use of force against part of Cyprus's territory did not amount to annexation, the same prohibition seems to apply in cases where a foreign military power uses force in order to promote or assist the secession of part of another State, as Turkey is continuing to do. As Professor Crawford emphasizes, 'The use of force to change the legal status of territory is excluded by a peremptory norm of general international law, and applies to *all* uses of force in international relations (including in self-defence)—*a fortiori* where the use of force is of doubtful legality.'[44]

The categorization of the prohibition of the use of force as a jus cogens norm entails legal consequences not only towards the wrongdoing State, but also towards all States of the international community not to render any aid or assistance to the wrongdoer, not to recognize the unlawful situation resulted from the use of force, and to cooperate in order to bring to an end the violation. These principles are now reflected in Article 41 of the 2001 ILC Final Articles on State Responsibility, which are a reflection of customary international law. In consequence, the EU Member States have an obligation under international law not to accept Turkey's declaration, which attempts to legitimise the unlawful partition of Cyprus.[45]

D. Legal Assessment of the Turkish Declaration under EU Law

The compliance of Turkey's declaration with the purposes and objects of Association Agreements in general and of the Ankara Agreement and the Additional Protocol in particular was considered in an earlier section. What this section aims to do is to consider the consistency of the declaration and its intended legal effects with specific EU provisions.

[42] ibid 34.
[43] J Crawford *The Creation of States in International Law* (2nd edn Clarendon Press Oxford 2006) 131–2.
[44] ibid 146 and 148.
[45] Joint legal opinion, (n 13) 34, para 95.

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When Cyprus joined the EU, it undertook the obligation to accede to the agreements and conventions already in force between the Community and its Member States acting jointly on the one hand, and third States on the other, including the agreements with Turkey.[46] This clearly indicates the intention of the Community to extend the uniform application and implementation of such agreements to all the Member States of the EU, and not to selectively preclude their implementation as against Cyprus.

Furthermore, by-passing the peculiarity of Turkey's refusal to recognize the existence of a State Member of an international organization to which it wants to become a Member, one question requiring consideration is whether the implementation, or rather non-implementation, of these Agreements in relation to Cyprus is compatible with specific Community provisions. It seems that the discriminatory preclusion of Cypriot vessels and aircrafts from using Turkish ports and airports is in contravention with Article 58 of the 1970 Additional Protocol to the Ankara Agreement which constitutes an integral part of Community law and which unconditionally prohibits discriminatory practice as against one Member State or its nationals.[47] This prohibition effectively places Cyprus in a disadvantageous position which was not intended by the EU or its Member States neither when Cyprus acceded the EU, nor when concluding the 2005 Protocol.[48] These restrictions, which in practice do not just affect the free movement of goods and services of Cypriot nationals but also the free movement of goods and services of other European citizens, contravene Decision No 1/95 that establishes a customs union with Turkey and prohibits any impediment on the imports and exports. This is confirmed by the Commission's position on April 26, 2005 that it is

> important that Turkey finds a *modus vivendi* with the Republic of Cyprus, which means allowing the free circulation of goods. This applies in particular to the embargo against vessels with Cypriot flag docking Turkish ports. In any case this is a long standing obligation under the customs union.[49]

Professors Crawford, Schermers and Wyatt also point out that Turkey's failure to cooperate with Cyprus and to recognize its competences and responsibilities is inconsistent with the Copenhagen criteria and reveals its unwillingness to accept the principles on which the Union is founded.[50]

In addition to Turkey's obligations towards the Community and all its Member States, the EU has itself a duty towards Cyprus to ensure the uniform application of the principles on which it is established and to act in compliance with the objectives set out in its constituent treaties.[51] Accordingly, the EU institutions must cooperate closely in

[46] See Art 6, paras 2 and 6 of the Act of Accession (n 20).

[47] Additional Protocol and Financial Protocol signed on 23 Nov 1970, Official Journal L 293, at 4–56.

[48] Above n 20.

[49] Council of the European Union, 8317/05, Brussels, 21 Apr 2005, 28 in *Turkey's Signature of the Protocol Declaration and Exchange of Letters,* Joint Opinion by I Brownlie, I Crawford, A Pellet, and D Wyatt, 25–5, para 70.

[50] *International and European Legal Issues arising from Turkish Non-recognition of the Republic of Cyprus,* Joint Opinion of Professors Crawford, Schermers and Wyatt, 20 Oct 2004, 22, para 47. The opinion was obtained with permission of the Government of the Republic of Cyprus. One of the conditions set out in the Copenhagen criteria is the ability of the candidate State to 'take on the obligations of membership, including adherence to the aims of political, economic and monetary union'.

[51] Art 5 and 48 EC. Also see A Dashwood 'The Attribution of External Relations Competence' in A Dashwood and C Hillion (eds) *The General Law of E.C. External Relations* (Sweet & Maxwell London 2000) 116.

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order to safeguard the rights of Cyprus regarding the free movement of goods and services and the other rights arising from the Ankara Agreement, and not to permit any discrimination against Cyprus based on grounds of nationality. At the same time, Articles 6(3) and 11 (2) TEU provide that the States participating to the EU have a duty to work together 'to enhance and develop their mutual political solidarity' and to refrain from any action which is contrary to the interests of the EU. Finally, the ECJ itself emphasized in *Kupferberg* that both the Community and its Member States bear a duty not only towards the third State, but also towards each other to ensure compliance with Association Agreements that constitute an integral part of Community law.[52]

It becomes evident from the above analysis that Turkey's declaration may not impair Cyprus' rights as safeguarded by its participation to the EU, but also under the objects and purposes of the Ankara Agreement and its Additional Protocols.

E. Conclusion

The Turkish declaration on Cyprus did not intend to be a statement expressive of political positions without legal effects. Quite on the contrary, the intention behind it was to restrict the implementation of the Ankara Agreement and its Protocols against Cyprus. The multiple implications arising from this declaration under both international and European law were outside the scope of this paper. It was accordingly showed that the reservation expressed by Turkey to treat accordingly the acts of the 'Greek Cypriot authorities' is incompatible with the purposes and the objects of the abovementioned agreements, and therefore without legal effects. Both the Ankara Agreement and its Protocols were concluded with the intention to establish a legal relationship between the Community in its entirety and Turkey, and not to create a privileged regime within which a certain Member State, in this instance Cyprus, would be precluded from participating. Moreover, the firm and unequivocal EU reply to Turkey's declaration makes it clear that Turkey remains fully committed to implement its treaty obligations towards all the Members of the EU without discrimination on nationality grounds. Capability to respect its commitments towards all the EU Member States is fundamental for Turkey's own European aspirations. Finally, it was shown that Turkey's declaration is a re-affirmation of its intransigence and continuing violation of conventional and general international law at the basis of which lies the principle of prohibition of the use of force against the territorial integrity of another State.

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[52] Case 104/81 (1982) ECR 3641, (1983) 1 CMLR 1, para 11.

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