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THE EUROPEAN UNION AND CYPRUS

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The current accession negotiations with the European Union (EU) would seem to provide a unique opportunity to solve the Cyprus problem. Yet the EU does not seem to be able or willing to develop a coherent strategy with respect to Cyprus. What will happen, what are the opportunities and dangers inherent in the present situation? What are the alternatives for a viable solution?

BACKGROUND

The Greek Cypriot administration's application for accession to the European Communities dates back to 1990. In 1993, the European Commission viewed Cyprus' accession positively but suggested that the question of the division of the island was to be resolved first. It was felt at that stage that, in the absence of a prior settlement, the application of Community law and respect for human rights and fundamental freedoms could not be guaranteed on the whole of the island. Also, accession without settlement would lead to inequality; although one part of the island would experience a beneficial economic effect, the economic disparity of the two parts would increase.

The European Council therefore initially agreed with the Commission that accession talks should be postponed. However, in February 1995, it changed its attitude and resolved that negotiations could begin six months after the conclusion of the 1996 Intergovernmental Conference. The Greek threat to veto EU enlargement towards Eastern Europe if Cyprus was not taken on board first brought about this change of heart. From then on, the European Council envisaged the speedy accession of the whole island and started to press for the inclusion of Turkish Cypriot representatives in the negotiations to bring it about. The Turkish Cypriots did not take up this offer. They could envisage participating in the negotiations only as the representatives of the Turkish Republic of Northern Cyprus (TRNC) and they even had difficulty assuming that the Greek Cypriot side could legitimately claim to represent any part of the island at all. In spite of this, in March 1998 the EU opened accession negotiations with the (internationally recognised) government of the Republic of Cyprus. As a result, the Turkish Cypriots have until now very much remained on the sidelines.

Perhaps accession talks were thought to contribute to a political settlement. However, so far there is no sign of success. On the contrary, there is very little scope now for the Greek and Turkish Cypriots to shift their positions. The start of accession talks hardly encourages the Greek Cypriot side to compromise in the search for a solution to the Cyprus dispute. The offer of entry negotiations enhances the economic and strategic outlook of the South as well as improving its diplomatic position. The situation suggests that what is called the Cyprus problem is about a Turkish minority challenging the authority of a legitimate Cypriot government under the protection of a neighbouring occupying force, Turkey.

In reality, the question is at least as much, if not more, about the Turkish islanders calling for the

right of self-determination and freedom from the dictates of a Greek Cypriot community. The Greek Cypriot side is conveniently legitimising itself with reference to a 1960 constitution that aimed at (but proved incapable of) protecting both communities and was sanctioned by an international community apparently more committed to territorial integrity than to security and coexistence among nations. Witness the conflict in Kosovo, which international law is ill equipped to settle. If Cyprus accedes to the EU without a settlement being reached, the international risks in the area will be increased. Neither the EU nor indeed anyone else should allow this to happen.

There is little doubt that accession to the EU would be a good development. It is broadly in conformity with the basic philosophy underlying the EU, which proclaims the integration of Europe in the interest of peaceful coexistence and welfare. But the quality of the accession will be as important as its timing. A failure by policy-makers to recognise adequately the stakes or to act accordingly - whether for lack of interest, vision or leadership - can lead to serious political errors, which may even cost lives. Are there any other options?

WHY THE CYPRUS PROBLEM NEEDS TO BE SOLVED

The EU, or rather its member states, is under an international obligation to try and bring the Cyprus problem to an end. This responsibility is not merely a legal one, i.e. one that flows from the commitment of some of member states under the Treaty of Guarantee or from the prohibition of the unilateral entry of Cyprus into any form of economic or political union with another state. The responsibility of resolving the Cyprus problem is also a moral issue with far-reaching implications.

The humanitarian and security aspects of the Cyprus issue are all too well known to be in need of much elucidation here. Cyprus never had a workable constitution capable of suppressing inequality, hatred, violence and distrust, and this has allowed inhumane treatment that any government today should deem unacceptable. While there are parallels between the crisis in Kosovo and the problem of North Cyprus, the international community has handled the two situations in quite different ways. Kosovo was met with collective intervention; North Cyprus mainly give rise to passive criticism. Both have disadvantages. In the case of Cyprus, a situation of lawlessness is among the negative side effects.

The current situation whereby the TRNC, in spite of a good claim to statehood, is denied international recognition by all states except Turkey, results not merely in problematic situations on the international plane. It sometimes leads to the impossibility of law enforcement on the (trans)national level as well. This in turn may have serious consequences of its own, as the case of the Cyprus Mining Corporation (CMC) illustrates. CMC, a Cypriot mining industry originally owned by Americans but subsequently sold on to Germans, is alleged to have engaged in activities harmful to the environment. CMC is deemed to have caused pollution in the 1970s, in violation of Turkish Cypriot environmental laws. In the event it proved impossible to enforce a penalty against the company, or to obtain reparation for damages against the shareholders who were residing abroad. Since liability for environmental damage in the TRNC normally cannot be enforced in foreign courts of countries that do not recognise that state, non-recognition is tantamount to extending a licence to pollute to private individuals and companies, and a licence to perpetrate other serious wrongs in the area as well.

Surely there is no need for policy-makers to await an irreversible environmental or other big disaster before something is done? The responsibility to prevent such things from happening is real and

incumbent morally on all of us, irrespective of nationality or status. This is a Mediterranean and even a universal problem. For several reasons, therefore, the Cyprus problem is an ethical issue that needs to be tackled sooner rather than later. An active standpoint needs to be taken by all, including the EU. The following are the main options for the future.

It might be thought that, whatever the future of the island, the Cyprus problem is not as urgent as the above analysis suggests and that non-action might be an option. Thus, the EU might consider leaving the islanders to sort out their own future. This is the attitude of many politicians in the EU. It is, however, not a realistic approach. Because accession negotiations trigger a dynamics of their own, non-action is not equal to standstill. Part of Cyprus is now firmly on its way to accession because of the EU's commitment to enlargement to the East, which a Greek veto would endanger. This puts pressure on the other member states, whose ratification of the accession treaty is needed by virtue of Article 49 of the Treaty on European Union. 'Recalcitrant' member states may perhaps be placated by downplaying the issue to facilitate accession: the extent of the territory to which the Treaties would apply could be left unclear so as not to prejudice the disputed question of territorial sovereignty and to lower the stakes of governmental action by removing offensive words in the accession documentation. This would result in the effective non-application of EU law and of European Community law to the territory of North Cyprus.

This outcome would be unacceptable. It would at best entail the continuation of the present unsatisfactory situation and at worst the escalation of it. Accession without settlement would trigger a situation of unpredictability and the prospect of terrorist activity on the island. This should be enough for all parties to take a more active interest in the solution of the issues than so far.

Even if one were to believe that life could continue peacefully, then still, there would be another reason why the EU would have a special responsibility to bring about a settlement before accession can be envisaged. It is this: if Cyprus were ever to enter the EU without solving the problem between North and South, it might result in a lack of democracy that would reflect badly on the workings of the European Union. 'Paper' European Parliament elections for the North organised by the South would be a sham, and, because the government of the Republic of Cyprus does not represent the North, the democratic content of Community law would be compromised and the quality of Community legislation could only suffer as a result. Due to the practical inapplicability of Community law to the northern part of the island, the paradigm of democracy through welfare would not work either. Any lack of democracy at grassroots level would immediately be transposed to central levels of decision-making. No European politician should entertain the proposition that laws could be made under the exclusion of the Rule of Law. Accession under these terms is clearly contrary to the Copenhagen criteria.

For all these reasons, the Cyprus issue should not be downplayed. Rather, an institutional structure needs to be thought out which can serve as a legally adequate and a politically acceptable solution to the issue. The way in which EU membership can contribute to this is considered next.

In the author's view, there are only two viable strategies for solving the Cyprus problem.

STRATEGY I: A CONFEDERATION WITHIN THE EU FRAMEWORK

The establishment of a Cyprus confederation has at least the following advantages:

1. Territorial sovereignty: both parties in Cyprus attach primary importance to their separate national

identities, existence and democratic structures. Confederations do not affect territorial sovereignty, only some aspects of independence.

2. Equality: given Cyprus' history of strife and war between peoples, political equality is the only conceivable basis for confidence building between the parties concerned. Neither the Turkish nor the Greek Cypriots would ever consent to the other dominating or governing it. Whereas the threat of Greek Cypriot domination has made territorial sovereignty a vital pillar of Turkish Cypriot security, the numerical majority of the Greek Cypriots and the international diplomatic backing they enjoy reinforces the Republic of Cyprus' intransigence. A confederation is a way out. It enables unity without submission.

3. Stability: a confederation applies best in a situation where populations are heterogeneous; where a federation or unity is much more difficult to achieve. Loyalty in confederations is primarily oriented toward the constituent entities.

4. Cohesion: Turkish and Greek Cypriots are destined to share life on one island and therefore are bound by a common responsibility for a viable future, and this implies stability and achieving or maintaining a certain quality of life. A confederation allows for the establishment of common objectives in relation to practical, political and security issues.

5. Trust: a confederation starts from a modest mandate, leaving the constituent states to exercise most powers. Whereas there is little trust between the constituent peoples, the purpose of a confederation is to generate support for common causes, infusing them with a sense of shared interests and consequent willingness to co-operate. It is a laboratory of co-operation practice and a framework of solidarity.

Not surprisingly, the option of a confederation is therefore being mentioned in the context of the search for a solution of the Cyprus conflict. In fact, it is not new, as it would be the reconstitution and reworking of the previously existing constitution that failed. The important thing to see, however, is that the framework of the EU is capable of reinforcing a confederation. Combined with the supra-national framework of the European Community, it may just about appeal enough to make it attractive for all sides. If the structure could not work, the TRNC would have the theoretical legal option of obtaining the dissolution of the confederation, but within the integrated structure of the EU this might appeal less.

Given the international status of a confederation, the European Community and EU institutions would have jurisdiction and legal authority to regulate issues arising in relations between the TRNC and Republic of Cyprus. By comparison, in a federation such as, for example, Germany, issues internal to the states are essentially matters outside the reach of EU institutions.

While co-operation at supra-national level would provide practical experience of confidence-building, there is scope for the creation of a specific confederal court, with the power to make references to the European Court of Justice (ECJ). The creation of a supreme Cyprus confederal court with the power of referral to the ECJ could help enforce the law within the scope of the Treaties, as well as enforce a substantive body of confederal law in both parts of the island.

In the context of a confederated Cyprus' accession, there would also be good reasons for negotiating the representation of the TRNC in the composition of the ECJ. By contrast, in the case of federated or unitary states acceding to the EC, there would only be one judge for each member state (if the

current practice of choosing a judge from every member state were continued). In the circumstances, it is difficult to see how the TRNC could ever be adequately represented in such a system. Given the specificity of the Turkish community, it could be argued that they should be separately represented.

It is useful to remember that the value of the ECJ is not merely based on the fact that it is a respected institution with considerable authority in the member states whose courts accept the need to enforce its judgements. The ECJ's powers have evolved beyond the notional and the declaratory. Disrespect of Community law can be punished and prevented by the attribution of liability for damages as well as by the imposition of financial sanctions. The European Commission as the guardian of the European Community Treaty would play an important role in this respect as well as private individuals.

How to configure a confederation needs to be worked out in much more detail than time and space permit in the framework of this contribution. It would require the elaboration of provisions governing the institutional set-up, democratic and judicial control, administrative structures, the division of powers between confederation and confederated states, and the granting of citizenship. Furthermore, agreement in principle regarding outstanding disputes like territorial and property settlements would be a prerequisite. The project needs to be relatively ambitious; one should not exercise too much restraint, for instance, when endowing the confederation with tasks. Tariffs and external trade, and other areas which generally would be decided at the EU level in case of membership, environmental issues, public health and combating organised crime could all be pooled. Also, property adjustments could come within the competence of the Confederation. The importance of the creation of a confederal court rather than an advisory tribunal is furthermore to be underlined.

What about the acceptability of the EU framework?

If strategy I, a confederation within the European Union, is not to be dismissed as wishful thinking, attention must now be paid to the main objections which could be raised against it. A solution combining the elements of accession and the establishment of a confederation in Cyprus may run into several difficulties. Some of these are clearly of a political nature. In the following, the political feasibility of a confederal solution will be dealt with last, after clarifying some important legal issues that are likely to be raised at the outset.

The first question follows from the nature of the EU and its powers. What would the substantive scope of EU law add to the management of relations affecting the Cyprus problem?

The hardcore of the EU is concerned with economic freedoms, many of which are likely to be restricted in Cyprus for the foreseeable future. Understandably, TRNC citizens will be wary, for instance, of the right of Greeks and Greek Cypriots to own property and businesses in North Cyprus. So, very long transition periods will be needed to allow for the necessary safeguards during a prolonged period of adjusting to inter-community dealings. During a transition period that would be as long as is needed to re-establish confidence, the wealthier Greek Cypriots would have to be prevented from buying up Turkish Cypriot territory and businesses. The free movement of persons is anyhow subject to derogations under the current treaties, but the conditions could be rendered more precise and customised by way of appropriate clauses in the act of accession. In the beginning, therefore, the benefits of membership for Cyprus would mainly consist of the free movement of goods and the structural policies accompanying EU membership, including the Common Agricultural Policy, tourism and structural policy. In a confederal setting, these sectors would bring

material benefits both to the TRNC and to the Republic of Cyprus. In addition, there would be a legalisation of relationships and the restoration of the enforceability of the law, which would take away some serious, imminent dangers of the current situation. Security would be increased and, gradually, economic welfare would be enhanced in the whole area. The supra-national structure of the EC would ensure that economic freedoms are realised and structural aid would arrive at its destination.

Eventually, restrictions on Greeks buying TRNC property will have to go. Possibly by that time, however, animosity will have disappeared and there will be a level playing field for all, including Turks and Greeks and other Europeans. The proximity to Turkey should of course make it an attractive place for Turkish nationals to invest. To prevent this is not immediately in the island's interest.

How about the lack of EU competence concerning human rights and internal security? Would this not militate against the creation of a Cyprus confederated member of the EU? This author believes not. First, the confederal solution would allow sanction mechanisms to be built into the agreement itself. A suitable court system would be one example of this; an explicit right of secession possibly another. Of course, arrangements would have to be made for the guarantee of 'internal security', but with a basic commitment towards peaceful coexistence in place - in the form of EU membership - and with the legalisation of relationships, it may be easier to put the necessary surveillance structures in place. Given the special circumstances of the case, it might perhaps be feasible to create a tailor-made EU solution or an international treaty of guarantee. The creation of a confederation and its incorporation within a larger European context are elements of a solution that mutually reinforce each other. Therefore, there is a need to create complementary legal structures, which can provide a powerful centre and a powerful basis. An added feature of legalising relations with the TRNC would be that individuals would qualify for protection under the European Convention on Human Rights. The confederation's acceptance of the necessary instruments should be a co-requisite of membership.

Although Strategy I may be the most realistic, it could meet with objections in certain quarters. Those politicians in the Republic of Cyprus or in Greece who have always favoured a unitary state or perhaps a federation, and many of these now prefer to downplay the issue altogether, may not want to collaborate. In a situation where both parties have dug in their heels, it would take some skill to persuade everyone to desist from their positions of self-righteousness and adopt a constructive attitude, admitting that both parties might be equally right or wrong. A lack of international leadership from European politicians would not help to convince the parties involved of this and would not bring home to them the advantages of the solution presented here.

One notorious (but surmountable) obstacle is that the present international arrangements do not allow Cyprus to enter the EU without Turkey also becoming a member. Given the political will, this can be overcome with the agreement of all the interested parties.

Negotiation of a settlement is only conceivable if everyone clearly perceives that there is something to be won by adjustment.

So how would Strategy I look from the Greek Cypriot side? Even disregarding the security aspects of the problem and looking only at economic considerations, the Greek side would stand to gain through the improvement in the relations with Turkey and the elimination of all the distortions of

economic relations concomitant to the dispute. The lifting of sanctions and other obstacles to North-South trade and improvements in relations with Turkey imply new business opportunities for the whole of Cypriot shipping industry, tourism and other enterprises.

Of course, a 'European' confederation may not be without difficulty for some parties within the TRNC either. The Turkish Cypriots fear that EU membership without Turkish membership would be an empty shell, or even a deterioration of their current situation, given that protection and support from Turkey would then in all probability fall away. There are several aspects to this, but a central point here turns on the guarantees that can be given that the interests of TRNC citizens would not be compromised. There is an argument that the TRNC would need Turkey inside the EU to protect them.

Admittedly, there are many reasons why it would be good if Turkey became a member of the EU. The contribution it would make to the solution of the Cyprus problem is but one of them. However, Turkish accession is quite a few years away, whereas Cyprus accession is getting more likely every day. The question therefore arises, whether the decision-making structure of the EU is an adequate safeguard for the interest of the TRNC, that is, within a confederation as is being proposed here, and if it is not, what to do about it.

One must start by asking if there any risk that the 'Greek lobby' would veto any measures benefiting the TRNC or that it could make the European Community act in a way that would damage its interests. This question is rhetorical in the light of the Greek 'blackmail' surrounding EU enlargement. The answer is plainly, yes. Nevertheless, this is not a problem that Turkish membership can solve, as that would not take away the possibility of a member state exercising a right of veto.

It may be comforting to know that in the future, the power of individual member states in day to day EU business can only decrease, especially that of small countries, such as Luxembourg, Portugal, Greece, the new democracies in Eastern Europe and a Cyprus confederation. An enlarged Union would quickly become unmanageable if it had to bow to the whim of every tiny member state. There should, therefore, in the future be less room for purely national concerns and recourse to veto will become ever more restricted. In all likelihood, under future amendments of the Treaty on European Union, it will no longer be feasible to allow all member states to be continually represented in the Council of the EU.

Moreover, in a more supra-national and less intergovernmental structure, there should of course be a greater Community concern for the protection of individuals against violations of human rights, the observance of equality and the Rule of Law. Although the precise nature of any reforms is not yet known, it is widely agreed that institutional changes of this type are necessary. If the accession of Cyprus cannot be postponed until then, interim arrangements may have to be made for the protection of this eventuality. On this account, the accession of Turkey does not appear to be a *conditio sine qua non* for entry of a Cyprus confederation. In Turkey itself, public opinion is divided on the issue of membership of the EU, which is not surprising given the EU's wavering attitude and its use, in the past, of different standards for Turkey from those applied to other countries. Because of this, Turkey might perhaps be persuaded to accept (at least temporarily) the sole entry of a Cyprus confederation into the European Community. It would be much more difficult for Turkey to accept the unilateral entry into the EU of the Greek Cypriot administration, as this would precipitate an escalation of the conflict.

A solution of the Cyprus problem is inconceivable without the co-operation of Turkey. There are a variety of reasons why this is so. On the one hand, international law endows Turkey with a role in the region and entitles it to exercise its influence there. Turkey would strive, where possible, to avoid an increase of tension on its southern border, where it exercises a foreign policy in relation to many countries of which Cyprus is only one. It is, therefore, interested in finding a workable solution. On the other hand, the existence of the Cyprus problem indirectly gives Turkey leverage in its relations with the EU. If Cyprus enters the EU without the problem being solved, then as a consequence of a perceived or real threat to security and lives, tourism will drop, the island's economy will dry out and the European dream of peace and prosperity will become an illusion. In order to achieve accession, Turkey's help is indispensable. Turkey knows that the more likely that strategy, the stronger its position becomes.

It would therefore be understandable if Turkey's acceptance of the creation of a confederation within the EU would be conditional, not only on appropriate guarantees as to security on the island, but also on reassurances as regards Turkey's own relationship with the EU. Now, since watertight promises can never be made in respect of enlargement, the only way forward would therefore be to attempt to synchronise the entry of Turkey and the Cypriot confederation. This may entail some delay in Cypriot accession, but nobody should really be too sorry for that, as without Turkey's approval, Cyprus' accession may not be worth a lot. With all of this, it may still be that Turkey will not become an EU member at the same time as a Cyprus confederation, but the relations between them would be bound to improve in the process of approximation.

One final observation needs to be made regarding the solution of a Cyprus confederation within the EU. To become part of the European Community, the North, just like the South, would need to meet the economic criteria for accession. Currently, although the EU in its report on Cyprus glosses over this issue, it is plain to see that it does not do so. To meet the criteria, a solid pre-accession strategy would have to be put in place and sustained over a prolonged period.

STRATEGY II: EU MEMBERSHIP FOR ONLY THE SOUTH OF CYPRUS

Is this however really the only alternative? If the Cyprus problem is to be solved - which it is - the recognition of the TRNC and sole membership of the South is a second best outcome, and therefore needs to be considered.

Membership of the south of the island (which is firmly on the agenda of some of the EU member states) can be achieved even without a negotiated confederal solution if it is accompanied by recognition of the TRNC. This would constitute a U-turn in the EU member states' policies of non-recognition and, although it would not be the most elegant way to proceed, it would be a way out. It would end the situation of lawlessness with respect to the North and it would prevent unrest and unpredictability. It would avoid creating a situation contrary to the Copenhagen criteria. It would safeguard accession of the South and it would effectively end the Cyprus problem.

This outcome is therefore attractive but it is difficult to orchestrate. It has been suggested that it can be brought about when the accession negotiations for Cyprus have been concluded. The TRNC could be given a (short) deadline, within which it could join the EU under the agreement reached. In the absence of joining, one or more EU member states could proceed with unilateral recognition of the TRNC. Others would follow. One danger in this context is that recognition by all EU member states, in particular Greece, would be difficult to achieve and its absence could trigger divisions and strife

within the EU and within NATO. Therefore, this outcome cannot be left to chance and should be the object of an active diplomatic strategy rather than an ad hoc reaction.

Once again, this solution does not work without careful consideration of relations with Turkey. Much of what has been stated before on the acceptability of the EU to Turkey applies to this option as well: a Cyprus policy without Turkey is unthinkable. Failure to accommodate Turkey may result in the alienation of this strategically important country.
