The Paradox of the Europeanisation of Intrastate Conflicts

Nikos Skoutaris*

ABSTRACT: It has been argued that the European Union can have a positive impact on intrastate conflicts by linking the final outcome of the conflict to a certain degree of integration of the parties involved into European structures. According to this argument, it is the impact of conditionality and socialisation that might have a 'catalytic' effect on conflict transformation. The paper does not dispute that the closer the form of association with the EU, the stronger the potential to achieve the respective conflict resolution goal. It highlights, however, that after the accession of any candidate State, the Union tends to accommodate the conflict within its political and legal order rather than mobilise its resources to resolve it. This is largely due to its very limited legal toolbox that does not allow the EU to undertake a more active role in conflict resolution within its borders.

KEYWORDS: EU Law; Europeanisation; Intrastate Conflicts; Enlargement; European Neighbourhood Policy; Conflict Resolution.

I. Introduction

The EU's historical success as a peacemaker between France and Germany has inspired many to wonder whether the EU may also bring peace to other conflict zones, especially in its immediate neighbourhood.[1] This query is even more justified given that the Union has pointed out that conflict resolution is a key foreign priority in its southern and eastern neighbourhoods, presenting it as an "essential aspect of the EU's external action."[2] In the recently published 'Global Strategy for the European Union's Foreign and Security Policy' it is underlined that "[t]he EU will engage in a practical and principled way in peacebuilding, concentrating our efforts in

* Lecturer in EU law, University of East Anglia.

[1] See generally *Emel Akçali,* The European Union's Competency in Conflict Resolution: The Cases of Bosnia, Macedonia and Cyprus, in: Thomas Diez/Nathalie Tocci (eds.), Cyprus: A Conflict at the Crossroads (2009), 180; *Elise Féron/Fatma Güven Lisaliner,* The Cyprus Conflict in a Comparative Perspective: Assessing the Impact of European Integration, in: *ibid.,* 198.

[2] See for instance European Commission, European Neighbourhood Policy Strategy Paper, COM(2004)373 final, 12 May 2004, 3.

surrounding regions to the east and south, while considering engagement further afield on a case by case basis."[3]

With regard to its immediate neighbourhood *Tocci* has pointed out that the "EU's 'structural diplomacy' ie the various forms of association and integration offered by the EU, is potentially well-tailored to induce long-run structural change both within and between countries."[4] According to that rationale, the closer the form of association is with EU, the stronger the potential to achieve the respective conflict resolution goal.

> Europeanisation in the field of secessionist conflict settlement and resolution should be understood as a process which is activated and encouraged by European institutions, primarily the European Union, by linking the final outcome of the conflict to a certain degree of integration of the parties involved in it into European structures.[5]

So, "[t]he European Union is not in itself the initiator of the peace process in any direct sense. Instead, it serves as an added factor that encourages conflict resolution to take place more quickly than might have been expected."[6] It is the impact of conditionality and socialisation that might have a positive effect on conflict transformation, thus emphasising both the direct and the indirect forms of EU impact.

However, the accession of the Republic of Cyprus (RoC) to the EU failed to 'catalyse' a settlement of the age-old dispute shedding doubts on whether the 'catalytic effect' thesis could accurately represent the reality. Equally, the minimum (if any) involvement of the Union in the settlement of other intrastate conflicts that have taken place within its borders, such as the one in Northern Ireland, pointed to the limits of the theory.

---

[3] High Representative of the Union for Foreign Affairs and Security Policy, Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy, June 2016, 28, available at: https://europa.eu/globalstrategy/sites/globalstrategy/files/about/eugs_review_web_0.pdf (accessed on 10 September 2016).

[4] *Nathalie Tocci,* EU Accession Dynamics and Conflict Resolution (2004), 173; see also *id.,* Comparing the EU's Role in Neighbourhood Conflicts, in: Marise Cremona (ed.), Developments in EU External Relations Law (2008), 216.

[5] Bruno Coppieters *et al.* (eds.), Europeanization and Conflict Resolution: Case Studies from the European Periphery (2004), 2.

[6] *James Ker-Lindsay,* The European Union as a Catalyst for Conflict Resolution: Lessons from Cyprus on the Limits of Conditionality, Working Paper Series No. 1, Helen Bamber Centre for the Study of Rights and Conflict, Kingston University London, April 2007, available at: http://eprints.kingston.ac.uk/5596/1/Ker-Lindsay-J-5596.pdf (accessed on 10 September 2016).

In other words, the empirical evidence questions (at the very least) any linear conceptualisation of a catalytic effect of EU integration on intrastate conflicts. Instead, it suggests that there is a clear 'break point' in the linearity of enhanced conflict resolution potential on the part of the EU at the moment of the accession of any given State. The EU is better equipped to 'catalyse' the resolution of a conflict before the EU accession of a candidate State rather than after. This 'break point' is what we call 'the paradox of the Europeanisation of intrastate conflicts'.

So, the present paper does not dispute *per se* the argument according to which the closer the form of association with the EU, the stronger the potential to achieve the respective conflict resolution goal. It highlights, however, that after the accession of any candidate State, the Union tends to accommodate the conflict within its political and legal order rather than mobilise its resources to resolve it. This is not just because the conditionality 'carrot' disappears but is also due to endemic characteristics of the Union legal order.

The paper compares the toolbox that is available to the EU in the context of the European Neighbourhood Policy (ENP) and the accession negotiations (II.). The analysis points to the many ways that the Union approach towards intrastate conflicts in its neighbourhood is conditioned upon the different contractual relationships between the EU and the relevant States. It shows that the instruments available to the Union in the context of the enlargement process can be deemed more effective in 'catalysing' the settlement of an intrastate conflict than the ENP ones. Having noted that, section III. explains the reasons why those enhanced pre-accession instruments did not prove sufficient to 'catalyse' the settlement of the Cyprus issue. Instead, it seems that after the RoC's accession, the Union has mainly focused on accommodating rather than resolving the age-old dispute. The paper suggests that it is the very architecture of the Union constitutional order that does not allow the EU to undertake a more active role in the resolution of conflicts within its borders other than accommodating them (IV.). Of course, this does not mean that the Europeanisation of a given intrastate conflict may not indirectly contribute to its resolution by using the EU framework as an inspiration and a paradigm of peaceful cooperation (V.).

II. The Closer the Association with the EU, the Stronger the Potential for Conflict Resolution

According to the 'catalytic effect' thesis, the closer the form of association with the EU, the stronger the potential to achieve the respective conflict resolution goal. This is generally true if one assesses and compares the policy and legal instruments available to the Union with regard to conflicts that take place in ENP countries and EU candidate States. The ENP 'soft law' framework prevents the EU from being active in 'catalysing' the resolution of a conflict. On the other hand, the accession negotiations allow the EU to set strict conditions relating to the settlement of a given conflict in order for the candidate State to accede.

A. European Neighbourhood Policy

The EU officially launched the European Neighbourhood Policy in 2003 as a new framework for its relations with sixteen neighbouring countries, twelve of which are already fully participating.[7] Its genesis, however, could be traced back to the later stages of the 'Big Bang' enlargement process. References to a more substantive 'proximity policy' were contained in Strategy Papers attached to the pre-accession country reports in 2001 and 2002, in a joint position paper in the form of a letter from *Javier Solana* and *Chris Patten*[8] and in a speech made in December 2002 by the then President of the Commission, *Romano Prodi.* In this speech *Prodi* referred to a proximity policy based on "mutual benefits and obligations, which is a substantial contribution by the EU to global governance."[9] He also underlined the link between enlargement and ENP by mentioning that the new policy was to be based on the idea that "accession was not the only game in town." "We have to be prepared to offer more than partnership and less than the membership". The overall long-term goal of this new policy is to create a 'ring of friends' in the periphery of the enlarged Union by incorporating the neighbours into an EU-led economic region.[10] More importantly

[7] The twelve countries are Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia, and Ukraine. Algeria is currently negotiating an ENP Action Plan. Belarus, Libya, and Syria remain outside most of the structures of ENP.
[8] *Javier Solana/Christopher Patten,* Joint Letter on Wider Europe, 7 August 2002 cited in *Bart Van Vooren/Ramses A. Wessel,* EU External Relations Law: Text, Cases and Materials (2014), 541.
[9] *Romano Prodi,* A Wider Europe: A Proximity Policy as the Key to Stability, Brussels, 5-6 December 2002, SPEECH/02/619.
[10] *Michelle Pace,* The Politics of Regional Identity: Meddling with the Mediterranean (2006), 106.

for the purposes of the current paper, Article 8 Treaty of European Union (TEU)[11] provides that the special relationship of the EU with its neighbours should be "characterised by close and peaceful relations". In that sense, the General Affairs and External Relations Council highlighted the importance of "shared responsibility for conflict prevention and conflict resolution" among ENP partners and the EU and it prioritised greater cooperation in conflict prevention and crisis management.[12]

Despite the existence of these ambitious objectives, the EU has not managed to "achieve a great deal in its neighbourhood in the sphere of sustainable conflict resolution."[13] This is largely due to the limited legal toolbox that is available to the Union in order to realise the vision of an increasingly closer relationship with the neighbouring countries and a zone of stability, security, and prosperity for all.

The ENP is chiefly a bilateral process that involves the EU on the one side and the relevant partner country on the other. At the outset of the process, the Commission had to prepare Country Reports analysing the political and economic situation in every partner State as well as institutional and sectoral aspects. It did so in order to assess when and how it was possible to deepen relations with the relevant country.

The next stage was the development of ENP Action Plans with each country. Those are non-binding instruments that are agreed on between the EU and the ENP States. They are tailor-made for each country based on the country's needs and capacities as well as their and the EU's interests. In those Action Plans, the EU and the partner States jointly define an agenda of political and economic reforms by means of short- and medium-term priorities pointing to the 'joint ownership' character of the ENP. The incentives on offer in return for progress on relevant reforms are greater integration into European programmes and networks, increased assistance, and enhanced market access. The implementation of the mutual commitments and

[11] Treaty on European Union, 24 December 2002, OJ 2012 C 326, 13 (Consolidated Version) (TEU).
[12] General Affairs and External Relations Council, Council Conclusions of 16 June 2003, Press Release No. 10369/03 (Presse 166), 33.
[13] *Steven Blockmans/Ramses Wessel,* The European Union and Peaceful Settlement of Disputes in the Neighbourhood: The Emergence of a New Regional Security Actor?, in: Antonis Antoniadis/Robert Schütze/Eleanor Spaventa (eds.), The European Union and Global Emergencies: A Law and Policy Analysis (2011), 73, 90.

objectives contained in the Action Plans is regularly monitored through sub-committees with each country, dealing with those sectors or issues.[14]

In practice, this means that "[p]olitically sensitive actions to resolve conflict will […] only be included in the Action Plans if the countries for which they are drawn up agree to it."[15] This has led to a very uneven picture with regard to how the different Action Plans prioritise conflict settlement in the various countries. For instance, Priority Area 6 of the Action Plan for Georgia refers specifically to a number of actions that this country would have to undertake in order to promote the peaceful resolution of the its 'frozen conflicts' in Abkhazia and South Ossetia.[16] Similar priorities are contained in the Action Plans for Israel[17] and the Palestinian Authorities[18] with regard to the Middle East conflict[19] as well as in the Action Plan for Moldova[20] with regard to the Transnistria conflict.[21] On the other hand, although the EU/Morocco Action Plan[22] refers to conflict prevention in general, it does not mention the dispute over Western Sahara.[23]

So, although the relationship with ENP partners is still based on international agreements, such as the Euro-Mediterranean Association Agreements for the southern neighbours, the nature and structure of the Action Plans underline the fact that the ENP is mainly a framework of 'soft law'. In that sense, the legal toolbox that is available to the EU to effectively intervene to 'frozen conflicts' through the ENP is rather weak.

---

[14] For a detailed analysis of the Action Plans and the methodologies of the ENP see *Marise Cremona,* The European Neighbourhood Policy. More than a Partnership?, in: Marise Cremona (ed.), Developments in EU External Relations Law (2008), 244, 245.
[15] See *Blockmans/Wessel* (note 13).
[16] EU/Georgia Action Plan, available at: https://eeas.europa.eu/sites/eeas/files/georgia_enp_ap_final_en_0.pdf (accessed on 10 September 2016).
[17] EU/Israel Action Plan, available at: https://eeas.europa.eu/sites/eeas/files/israel_enp_ap_final_en.pdf (accessed on 10 September 2016).
[18] European Union - Palestinian Authority Action Plan, available at: https://eeas.europa.eu/sites/eeas/files/pa_enp_ap_final_en.pdf (accessed on 10 September 2016).
[19] See on this conflict *Omar Dajani,* Palestine, German Yearbook of International Law (GYIL) 59 (2016), xx.
[20] EU/Moldova Action Plan, available at: https://eeas.europa.eu/sites/eeas/files/moldova_enp_ap_final_en.pdf (accessed on 10 September 2016).
[21] See on this conflict *Christopher Borgen,* Transnistria, GYIL 59 (2016), xx.
[22] EU-Morocco Action Plan, available at: http://eeas.europa.eu/sites/eeas/files/morocco_enp_ap_final_en.pdf (accessed on 10 September 2016).
[23] See on this conflict *Juan Soroeta,* The Conflict in Western Sahara After Forty Years of Occupation: International Law versus *Realpolitik,* GYIL 59 (2016), xx.

Having said that, one also has to mention that the rather limited legal toolbox of the ENP framework has not stopped the EU from participating in broader political initiatives for the settlement of disputes in the area. To this effect, we note that the Union is a full participant in the Quartet for the Middle East conflict and an observer in the so-called 5+2 talks for Transnistria.[24]

B. Enlargement Process

While the ENP is a framework of 'soft law' that does not allow the EU to be more active in the settlement of 'frozen conflicts' in its wider neighbourhood, the enlargement policy provides the EU with a much stronger legal arsenal to intervene in the conflict resolution processes in its candidate States. Theoretically speaking, at least, the "magnetic appeal"[25] of the EU and the "lure of membership"[26] may lead to the transformation of a given 'frozen conflict'. Such "power of attraction"[27] of the EU is supported by a powerful legal toolbox that may contribute to the resolution of a conflict. This is why it is often said that "[t]he EU's enlargement policy is, in a loose sense, a peacebuilding exercise."[28]

Article 49 TEU provides that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." After receiving such an application, the Council has to unanimously decide on opening the accession negotiations after consulting with the Commission and receiving the consent of the majority of the component members of the European Parliament.[29]

The pre-accession strategy, as a whole, is based upon the evolution of the bilateral relations between the EU and the respective candidate State under the relevant international agreement. For instance, during the fifth enlargement it was the Europe

[24] The five being Russia, Ukraine, OSCE, the EU, and the US, the two being Moldova and Transnistria.
[25] *Ian Black,* Inside Europe, The Guardian, 1 March 2004, available at: https://www.theguardian.com/world/2004/mar/01/eu.politics (accessed on 30 October 2016).
[26] *Robert Kagan,* Embraceable E.U., Washington Post, 5 December 2004, B07.
[27] *Gabriel Munuera,* Preventing Armed Conflict in Europe: Lessons from Recent Experience, 1 June 1994, available *via*: http://www.iss.europa.eu/publications/detail/article/preventing-armed-conflict-in-europebrlessons-from-recent-experience/ (accessed on 10 September 2016).
[28] *Simon Duke/Aurélie Courtier,* EU Peacebuilding: Concepts, Players and Instruments, December 2009, 23, available at: http://www.peacepalacelibrary.nl/ebooks/files/335882072.pdf (accessed on 30 October 2016).
[29] For a brief analysis see *Christophe Hillion,* EU Enlargement, in: Paul Craig/Gráinne de Búrca, (eds.), The Evolution of EU Law (2nd ed. 2011), 187.

or Association Agreements that were reoriented under the reinforced pre-accession strategy in order to provide a vehicle for accession,[30] while with regard to Turkey it is the Ankara Agreement that plays this role. The instruments that reorient those international agreements from the aim of association to the aim of accession are the Accession Partnerships (APs).

The APs set out in a single framework both the pre-accession actions to be taken by the candidate countries as well as the policy and financial instruments to be taken by the EU to help the candidates in their preparations for accession. They are the key legal instruments in the administrative and political matrix of policy instruments that underpin the pre-accession strategy, which builds on the bilateral structures and achievements to date under the relevant bilateral agreement. Being unilateral decisions of the Council, the APs bind the EU institutions and the Member States only, which are legally bound to scrutinise a candidate State's progress against the relevant priorities.

More importantly for the purposes of the current paper, because they are unilateral decisions of the EU – unlike the ENP Action Plans where the EU and the partner States jointly define the agenda of the reforms – the EU can really shape their form and content and be prescriptive as to the actions that a candidate State should undertake with regard to a 'frozen conflict'. For instance, all the APs for Turkey underline Turkey's obligation to support a comprehensive settlement of the Cyprus issue.[31]

In response to the priorities and objectives laid down in those APs the candidate State adopts a national programme for the adoption of the *acquis* (NPAAs). Thus, APs and NPAAs should be seen as mutually complementing measures that run in parallel to each other. The European Commission monitors the candidates' performance in implementing the relevant priorities in the APs, and consequently in the NPAAs. In case of a failure the Council may step in to resolve the matter.[32] So, although "often presented as a negotiation process, the accession 'negotiations' are more one-sided with the onus being on the candidates satisfying the European Commission and the

[30] For a more detailed analysis see *Kirstyn Inglis,* The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation, Common Market Law Review 37 (2000), 1173.
[31] See generally EC Council Decision 2001/235 of 8 March 2001, OJ 2001 L 85, 13; EC Council Decision 2003/398 of 19 May 2003, OJ 2003 L 145, 40; EC Council Decision 2006/35 of 23 January 2006, OJ 2006 L 22, 34; EC Council Decision 2008/157 of 18 February 2008, OJ 2008 L 51, 4.
[32] See for example Art. 4 EC Council Regulation 390/2001 of 26 February 2001, OJ 2001 L 58, 1.

Member States of their ability" to satisfy the conditions set by the EU and thus to accede to the Union.[33]

Once there is an agreement that the candidate State has complied with all the relevant conditions contained in all the negotiating chapters, an Accession Treaty is drafted. The Treaty provides for all "[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails."[34] The signatories are the Union Member States and the candidate State. The Member States have to ratify the Accession Treaty in accordance with their respective constitutional requirements. Innocuous as it may sound, this might prove a cumbersome process given some recent constitutional developments. For instance, the amended Article 88-5 French Constitution[35] provides that the ratification of an Accession Treaty could be submitted to referendum unless the Parliament decides differently with an enhanced majority of three fifths. In that sense, the Member States can veto the accession of a candidate State even after the signing of the Accession Treaty.

What is particularly interesting to us is that since the European Council of 1993 that set out the so-called 'Copenhagen criteria', EU membership requires that the candidate country has achieved *inter alia* stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.[36] A few years later, in Helsinki, the Member States made also clear that the candidates ought to settle their bilateral disputes before entering the EU.[37] Both those accession conditions that are incorporated and further articulated in the pre-accession instruments of candidate States that face conflicts within their territory point to the fact that the Union possesses a much more powerful toolbox than the ENP one. Such toolbox together with the 'carrot' of membership can support the transformation of a conflict.

[33] See *Duke/Courtier* (note 28).
[34] Art. 49 (2) TEU.
[35] *Constitution de la République Française du 4 Octobre 1958* (Constitution of the French Republic of 4 October 1958)*, Journal Officiel de la République Française* (*JORF*) No. 0238, 5 October 1958, 9151, as amended on 23 July 2013, *JORF* No. 0171, 24 July 2008, 11890.
[36] Copenhagen European Council, Conclusions of the Presidency, Copenhagen, 21-22 June 1993, available at: http://www.europarl.europa.eu/summits/copenhagen/co_en.pdf (accessed on 30 October 2016).
[37] Helsinki European Council, Presidency Conclusions, 10-11 December 1999, available at: http://www.europarl.europa.eu/summits/hel1_en.htm (accessed on 30 October 2016).

An example of successful use of the pre-accession toolbox for conflict resolution has been the case of Macedonia. During the first half of 2001, violent clashes between the Albanian National Liberation Army (NLA) and the Macedonian security forces took place. Given the imminent danger that those clashes could escalate to a fully-fledged civil war, the international community intervened. The then High Representative for the Common Foreign and Security Policy (CFSP) *Javier Solana* used the ratification of the Stabilisation and Association Agreement "as a strong lever to persuade the Macedonian government to engage in negotiations to reform the Constitution and establish equal rights for Slavic and Albanian communities."[38] Indeed, the international pressure on the Macedonian elites together with the incentive of closer relationship with the EU led to the signing of the Framework Agreement of 13 August 2001.[39] The so-called Ohrid Agreement aimed at providing a "framework for securing the future of Macedonia's democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and the Euro-Atlantic Community."[40]

The EU was also successful in lifting the deadlock in the relations between Serbia and Montenegro when they were both parts of the Former Republic of Yugoslavia (FRY) in the period 2001-2002. *Javier Solana* used the lever of opening negotiations "between the FRY and the EU, with its immediate economic advantages and its alluring promise of future EU membership."[41] He "was also reported to have threatened Montenegro with cutting off at least half of the EU's financial aid if Podgorica pursued its plans to stage a referendum on independence."[42] Those tactics led to the Final Agreement of 14 March 2002 (Belgrade Agreement).[43]

According to it, the new State union of Serbia and Montenegro was created. More importantly, both of the composite republics had to agree to wait for a three years

[38] *Steven Blockmans,* The EU and Conflict Resolution: "de facto" States in the Neighbourhood, in: Finn Laursen (ed.), The EU as a Foreign and Security Policy Actor (2009), 115, 126.
[39] Framework Agreement of 13 August 2001 (Ohrid Agreement), available at: http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/framework_agreement_ohrid_130801_en.pdf (accessed on 2 November 2016).
[40] Preamble Ohrid Agreement.
[41] See *Blockmans* (note 38).
[42] *Ibid*.
[43] Starting Points for the Restructuring of Relations Between Serbia and Montenegro (Belgrade Agreement), available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/ME%20RS_020314_The%20Agreement%20on%20Principles%20of%20relations%20between%20Serbia%20and%20Montenegro.pdf (accessed on 10 September 2016).

period before they could hold a referendum on independence. In May 2006, Montenegro decided to become independent in a nation-wide referendum. Although, the Belgrade Agreement proved short-lived, it provided for a pathway for consensual, democratic, and peaceful secession without hindering the progress of either Serbia or Montenegro towards European integration. Taking into account the bloody civil war that followed the dissolution of the former Yugoslavia, one has to appreciate how the "power of attraction" of the EU led to the peaceful lift of such political deadlock.

The most recent example of successful use of the toolbox provided by the accession negotiations for conflict settlement is the EU-brokered fifteen-points Brussels Agreement between the governments of Serbia and Kosovo. The agreement was mediated by the then EU High Representative *Baroness Ashton* and agreed by the then Prime Ministers of Serbia *Ivica Dačić* and Kosovo *Hashim Thaçi* on 19 April 2013.[44] According to the Agreement, the normalisation of relations between Serbia and Kosovo entailed *inter alia* the establishment, scope, and functions of a proposed 'Association/Community of Serb majority municipalities in Kosovo';[45] the existence of one police force for all of Kosovo including its northern parts;[46] and the agreement of the parties that municipal elections shall be held in all of Kosovo under Kosovo law.[47] More importantly for the present paper, Paragraph 14 provides that "neither side will block, or encourage others to block, the other side's progress in their respective EU paths." Indeed, the signing of the Agreement brought Serbia close to EU accession talks and Kosovo to initialing a Stabilisation and Association Agreement which was signed in October 2015.

III. The Limits of the 'Catalytic Effect': The Case of the Accession of Cyprus to the EU

While the ENP framework allows the neighbouring States to avoid politically sensitive issues, the nature of the accession negotiations provide the EU with many opportunities to intervene in an intrastate conflict to catalyse its resolution. For the

[44] First Agreement of Principles Governing the Normalization of Relations, Serbia-Kosovo, 19 April 2013 (Brussels Agreement), available at: http://www.kryeministri-ks.net/repository/docs/FIRST_AGREEMENT_OF_PRINCIPLES_GOVERNING_THE_NORMALIZATION_OF_RELATIONS,_APRIL_19,_2013_BRUSSELS_en.pdf (accessed on 2 November 2016).
[45] *Ibid.,* paras. 1-6.
[46] *Ibid.,* paras. 7-9.
[47] *Ibid.,* para. 11.

States that are candidates for EU accession the emphasis is on confirming that they have respected the conditions set by the EU and not on negotiating them. This is why the EU has managed to successfully use the process of the accession negotiations to reach solutions on some disputes such as the one in Macedonia. Having said that, the enlargement process is far from a panacea. A closer look to the Cyprus case points to the limits of the 'catalytic effect' of the EU. The lift of conditionality for the Greek Cypriots has allowed the rejection of the UN-sponsored Comprehensive Settlement of the Cyprus Problem, commonly known as the Annan Plan.[48] At the same time, the EU accession of Cyprus without a comprehensive settlement led to the accommodation of the Cyprus problem within the political and legal order of the EU rather than its resolution.

A. The Limits of the 'Catalytic Effect': Lifting the Conditionality

On 4 July 1990, the then Foreign Minister of the Republic of Cyprus, *George Iacovou,* on behalf of the whole island, presented an application for membership to the European Community. Three years later, the Commission issued its Opinion.[49] There, it considered Cyprus to be eligible for membership[50] but noted that

> the fundamental freedoms laid down by the Treaty, […] and the universally recognised political, economic, social and cultural rights […] would have to be guaranteed as part of a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus.[51]

This is the main reason why it concluded that "Cyprus's integration with the Community implies a peaceful, balanced and lasting settlement of the Cyprus question."[52] It felt, however, that it was necessary to clarify that in case of a failure to reach a settlement through the inter-communal talks under the UN auspices, the situation should be reassessed.[53]

---

[48] Basis for a Comprehensive Settlement of the Cyprus Problem, 26 February 2003, available at: http://www.globalsecurity.org/military/library/report/2004/annan-cyprus-problem_maps_26feb03.pdf (accessed on 8 November 2016).
[49] Bulletin of the European Communities, Supplement 5/93, The Challenge of Enlargement, Commission Opinion on the Application by the Republic of Cyprus for Membership, on the Basis of COM(93)313 final, 30 June 1993.
[50] *Ibid.,* para. 48.
[51] *Ibid.,* para. 10.
[52] *Ibid.,* para. 47.
[53] *Ibid.,* para. 51.

In 1995, the Council decided to start accession negotiations with the RoC and in exchange to establish a customs union with Turkey. In its historic report, 'Agenda 2000: The Challenge of Enlargement', containing its final recommendations on accession negotiations, the European Commission expressed the Union's support for a settlement within the UN framework. More importantly, it stressed that "[t]he Union is determined to play a positive role in bringing about a just and lasting settlement in accordance with the relevant United Nations Resolutions".[54]

At the same time, hoping to use the 'carrots' and 'sticks' offered by the accession negotiations, the then UN Secretary-General *Kofi Annan* invited the two communities to re-launch their talks. In December 1999, the Helsinki European Council,[55] commenting on those important developments, expressed its "strong support for the UN Secretary-General's efforts to bring the process to a successful conclusion." It also underlined that a political settlement would "facilitate the accession of Cyprus to the European Union" but clarified that, in case a settlement was not reached by the completion of the negotiations, the Council's decisions would "be made without the above being a precondition. In this, the Council would 'take all the relevant factors' into account."[56] In exchange, Turkey became a candidate State for accession to the EU.

It is difficult to overemphasise the importance of the conclusions of the European Council in Helsinki. The rationale of lifting the conditionality for the Greek-Cypriot-run RoC rested on a realist logic of conflict settlement. According to it, the Turkish and Turkish Cypriot desire to reap the conditional benefits of membership, and the high costs entailed in the absence of a solution before accession, would create the 'ripe' conditions for a settlement by generating Turkish incentives to change their positions. In other words, a conditional 'stick' both to Turkey and the breakaway State of the Turkish Republic of Northern Cyprus (TRNC) would raise the costs of the *status quo*. In addition, the EU 'carrot' would encourage the parties, including the Greek Cypriots, to support reunification within the EU.

---

[54] European Commission, Agenda 2000 Strengthening the Union and Preparing Enlargement, 15 July 1997, available at: http://ec.europa.eu/enlargement/archives/pdf/press_corner/publications/corpus_en.pdf (accessed 10 September 2016).

[55] Helsinki European Council, Presidency Conclusions, Helsinki, 10-11 December 1999, available at: http://www.europarl.europa.eu/summits/hel1_en.htm (accessed on 30 October 2016).

[56] *Ibid.,* para. 9.

Such a strategy was effective enough to ensure the support of Turkey, and most importantly the Turkish Cypriots, to the Annan Plan. Their community overwhelmingly voted in favour of the reunification of the island in the simultaneous referendums in April 2004. However, it failed to foresee the stance of the Greek Cypriots after they signed the Treaty of Accession in 2003 when they had, thereby, ensured that the RoC would become an EU Member State. In fact, the then President of the RoC, *Papadopoulos,* in his dramatic speech on 7 April 2004, asked the Greek Cypriots to say "a resounding NO on 24 April,"[57] pointing out that if the Greek Cypriots rejected the Plan it would be the internationally recognised Republic of Cyprus and not the United Cyprus Republic that would "become a full and equal member of the European Union."[58] Indeed, the Greek Cypriot community rejected the Annan Plan in an almost 3:1 ratio.

B. Accomodating an Intrastate Conflict

A week later, on 1 May 2004, Cyprus became an EU Member State on terms provided *inter alia* in Protocol No. 10 on Cyprus of the Act of Accession 2003.[59] This legal instrument is the main tool that the EU has used in order to accommodate within its legal order this unresolved dispute. In that sense, a closer analysis of it reveals how the Union offers an insight to how EU manages intrastate conflicts that take place within its borders.

In its Preamble, the EU Member States and the acceding States including the RoC reaffirmed their commitment to a comprehensive settlement of the Cyprus problem. However, since such a comprehensive settlement had not yet been reached, they considered that it was necessary to provide for the suspension of the application of the *acquis* in northern Cyprus, a suspension which shall be lifted in the event of a solution. In addition, they provided for the terms under which the relevant provisions of EU law would apply to the territorial 'border' between northern Cyprus and the government-controlled areas (Green Line).

[57] Press and Information Office of the Republic of Cyprus, Declaration by the President of the Republic Mr Tassos Papadopoulos regarding the referendum of 24th April 2004, Press Release, 7 April 2004.
[58] *Ibid*.
[59] Protocol No. 10 on Cyprus, Act of Accession 2003, OJ 2003 L 236, 955.

So, Article 1 (1) Protocol No. 10 provides that the application of the *acquis* is suspended in northern Cyprus. The main scope of Article 1 is to limit the responsibilities and liability of Cyprus as a Member State under EU law. Although Cyprus joined the Union with its entire territory, its government cannot guarantee effective implementation of EU law in the north.[60] In fact, according to international courts,[61] Turkey exercises effective control in those areas.

However, it should be noted that the scope of the suspension is territorial. This means that the Turkish Cypriot citizens of the Cyprus Republic residing in the northern part of the island should be able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.[62]

Concerning the withdrawal of the suspension, we have to underline that according to Article 1 (2) Protocol No. 10 it is the Council, acting unanimously on the basis of a proposal from the Commission, that will eventually decide. Nothing in this provision prevents the partial withdrawal of the suspension of the *acquis.* It should also be noted that, according to the preamble, a "comprehensive settlement", to which the first two recitals refer, is not a prerequisite for the withdrawal of the suspension. A "solution" to the Cyprus problem is deemed enough.[63]

Until the withdrawal of the suspension takes place, Article 2 allows the Council, acting unanimously on the basis of a proposal from the Commission, to define the terms under which the provisions of EU law shall apply to the territorial 'border' between the government-controlled areas and northern Cyprus. This Article provided the legal basis for the adoption of Regulation 866/2004 (Green Line Regulation),[64] which constitutes the main legislative device for the partial application of the *acquis* in the northern part of the island. This is an interesting piece of legislation because it regulates the free crossing of people and goods between an area of a Member State where the free movement *acquis* applies and which is within the customs union, on

[60] European Court of Justice (ECJ), *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams,* Case C-420/07, Opinion of AG *Kokott,* 2009 ECR I-3571, paras. 40-41.
[61] European Court of Human Rights (ECtHR), *Cyprus v. Turkey,* Judgment of 10 May 2001, RJD 2001-IV, para. 77.
[62] *Max Uebe,* Cyprus in the European Union, GYIL 46 (2004), 375, 384.
[63] Recital (4) Preamble Protocol No 10. The distinction between a "comprehensive settlement" and a "solution" is a rather fine one. According to *Uebe* it implies that a "solution" to the Cyprus issue requires something less than a fully-fledged "comprehensive settlement" plan such as the Annan Plan, see *Uebe* (note 62).
[64] EC Regulation 866/2004 of 29 April 2004, OJ 2004 L 161, 128 (Green Line Regulation).

the one hand, and one where the free movement *acquis* does not apply and which is outside the customs union, on the other hand.

Concerning the free movement of persons, we note that Article 21 of the Treaty on the Functioning of the European Union (TFEU),[65] according to which every EU citizen has the "right to move and reside freely within the territory of the Member States", applies only south of the Green Line but not in northern Cyprus. In order to deal with this situation, the Green Line Regulation defines *inter alia* the terms under which the free movement of persons applies to this 'territorial border' between an area of Cyprus where the *acquis* applies and where it does not. The central provision is Article 2 (1). According to it, the RoC has the responsibility to carry out checks on all persons crossing the Green Line with the aim of combating illegal immigration of third-country nationals and to detect and prevent any threat to public security and public policy.[66]

With regard to the free movement of goods, the main hurdle that the EU had to surpass in order to establish trade relations with a part of its territory where there is an unrecognised government was exactly to avoid any form of recognition of it. In order to do so, the EU, in agreement with the RoC, authorised a Turkish Cypriot NGO, the Turkish Cypriot Chamber of Commerce,[67] to issue accompanying documents so that goods originating in northern Cyprus may cross the line and be circulated in southern Cyprus and the Union market.

The Commission has also pointed out that it was not the intention of the drafters of Protocol No. 10 "to exclude the application of all provisions of Community law with a bearing on areas under the control of the Turkish Cypriot community."[68] To that effect, Article 3 Protocol No. 10 allows measures with a view to promoting the economic development of northern Cyprus. The existence of such a provision clarifies that the division of the island should not rule out economic assistance of the Union to the less privileged part of the island. Indeed, on 27 February 2006, the Council unanimously adopted Regulation 389/2006 which establishes an instrument for encouraging the economic development of the Turkish Cypriot community (Financial

[65] Treaty on the Functioning of the European Union, 13 December 2007, OJ 2012 C 326, 47 (Consolidated Version) (TFEU)
[66] Art. 2 (2) Green Line Regulation.
[67] Art. 4 (5) Green Line Regulation; EC Commission Decision 2004/604 of 7 July 2004, OJ 2004 L 272, 12.
[68] See ECJ, *Meletis Apostolides* (note 60), para. 40.

Aid Regulation).[69] Although the legal basis for this Regulation was Article 308 TEC[70] (now Articles 352 and 353 TFEU), in the preamble there is also a reference to Article 3 Protocol No. 10.

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

Those four Articles that make up Protocol No 10 reveal the seemingly depoliticised and technical approach that the Union has adopted with regard to the Cyprus issue after the RoC's accession to the EU. The Protocol together with the Regulations on the Green Line and on Financial Aid show that the EU mainly aimed at accommodating the conflict rather than resolving it. The Union has focused on finding ways to alleviate the tensions created by the fact that the RoC's government does not exercise effective control over northern Cyprus. It did so by suspending the *acquis* in the north, regulating the free movement of people and goods between the two sides of the island, and providing for some financial assistance to the less privileged part. But there is nothing in those Articles that regulate the situation in Cyprus after its accession that could suggest that the EU could be deemed an entity that could engage in 'catalysing' a solution. This is in stark contrast to the content of the pre-accession instruments. Such a policy of minimum involvement is far from unexpected given the role of the EU in similar situations such as the conflict in Northern Ireland where the Union reduced its involvement to the funding of cross-border projects mainly through the INTERREG III programme.[71]

---

[69] EC Council Regulation 389/2006 of 27 February 2006, OJ 2006 L 65, 5.
[70] Treaty Establishing the European Community, 29 December 2006, OJ 2006 C 321 E, 37 (Consolidated Version).
[71] *Trevor Salmon,* The EU's Role in Conflict Resolution: Lessons from Northern Ireland, European Foreign Affairs Review 7 (2002), 337; *Brigid Laffan/Diane Payne,* INTERREG III and Cross-Border Cooperation in the Island of Ireland, in: Angela K. Bourne (ed.), The EU and Territorial Politics within Member States. Conflict or Co-operation? (2004), 157.

IV. Understanding the Limits of the 'Catalytic Effect': A Law Perspective

In Section II. of the article we showed that the closer the association a State has with the EU, the stronger the potential for resolving its 'frozen conflict'. We based our argument on the fact that the EU possesses a much stronger toolbox to intervene in a given conflict in the context of the accession negotiations than in that of the ENP. Section III., however, pointed to the limits of this 'catalytic effect' thesis. The empirical evidence from the Cyprus case contradicts emphatically any linear conceptualisation of a 'catalytic effect' of integration on intrastate conflicts. In fact, it shows that there is a clear difference between the Union approach when dealing with conflicts that take place outside its borders and those 'internal' to its territory.

It is true that lifting the conditionality with regard to the Greek-Cypriot community meant that the rejection of the comprehensive settlement plan came without any cost to the RoC's EU integration. To this effect, *Tocci* noted that "[d]espite the potential in [the] 'structure' [of the Enlargement process], the Union failed in the realm of 'agency'."[72] It is equally true that the absence of post-accession conditionality is partly responsible for the EU not being able to 'catalyse' a settlement after the accession of Cyprus. At the end of the day, it is well documented that the absence of enhanced surveillance mechanisms post-accession creates a discrepancy between the conditions that have to be satisfied when a State is a candidate and after it has acceded in areas such as minority protection.[73]

However, I would argue that the observation that the 'break point' in the linearity of enhanced conflict resolution potential on the part of the EU lies at the moment of the accession of any given State is not just because the conditionality 'carrot' disappears. It is also due to the structural working of the EU itself.

There are intrinsic characteristics of the Union constitutional structure that constrain the EU from becoming active in intrastate conflicts within its borders. The Member States as 'Masters of the Treaties' refrain from allowing the EU to become active in an area that touches on the very core of their sovereignty. This becomes particularly

[72] See *Tocci,* EU Accession Dynamics (note 4).
[73] See for instance, *Peter Van Elsuwege,* Minority Protection in the EU: Challenges Ahead, in: Kirstyn Inglis/Andrea Ott (eds.), The Constitution for Europe and an Enlarging Union: Unity in Diversity (2005), 257.

evident if one examines closely whether the EU has a legal basis to act as an honest broker in such conflicts.

A. Member States as 'Masters of the Treaties'

Dashwood once famously proclaimed that the EU is a "constitutional order of States."[74] This means *inter alia* that the Member States as *Herren der Verträge* have to unanimously agree on the text of the EU Treaties in order to design the constitutional framework of the Union. They are the authors of the constitutional charter of the Union.[75] Taking that into account, it is hardly surprising that the Member States do not want to impute any particular role to the EU with regard to issues that touch upon their national sovereignty, such as intrastate conflicts. Those conflicts often question the sovereignty of a metropolitan State over a given territory and thus the very essence of statehood.

Protocol No. 10 of the Act of Accession 2003 provides for an example. It was signed by the then fifteen Member States and the ten acceding ones including Cyprus. In that sense, Cyprus was one of the co-authors of this piece of primary legislation. Although it was drafted at a moment in which there was dynamism and hope in the negotiation process for the reunification of the island, the Member States did not recognise any role to the EU other than to accommodate a solution or its lack thereof. Similarly, the two legislative instruments to which we have referred – the Green Line and the Financial Aid Regulations – aim at managing the crisis that comes from the fact that Cyprus has joined the Union without solving its intrastate conflict. The Member States and in particular Cyprus have never allowed the Union to assume a more dynamic role that could 'catalyse' a solution to the conflict.

Of course, Protocol No. 10 is a specific piece of primary legislation that tries to deal with an unprecedented situation and at the same time to respect the sensitivities of a Member State. It is rather difficult to reach broader conclusions just based on it. However, if we look more broadly to the text of the EU Treaties, it is rather impossible to reach a different conclusion. Apart from generic references to "[t]he

[74] Anthony Arnull *et al.* (eds.), A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood (2011).
[75] ECJ, *The Greens (Les Verts) v. The Parliament,* Case C-294/83, 1986 ECR 1339.

Union's aim […] to promote peace"[76] that are often referring to its relations with the wider world,[77] there is no explicit reference to the role of the EU in intrastate conflicts that take place within its territory. Again, this is hardly unexpected given the painful compromises that Treaty amendments have always entailed and how difficult it has been to reach those compromises in each and every intergovernmental conference. So, reaching a consensus on how the EU could deal with intrastate conflicts that exist within their own borders, would have been a *Sisyphean* task for the 28 Member States that have not even adopted a common position with regard to the recognition of Kosovo.

Instead, there is quite some constructive ambiguity with regard to how the EU law framework may accommodate even the peaceful resolution of an intrastate conflict that takes place within its borders. The most recent example of this phenomenon has been the debate on the continuing EU presence of Scotland if it becomes independent from the UK. The debate was whether a new independent State that has been created after a consensual and democratic process of secession from a Union Member State could continuously remain within the EU. Even in this case, the EU law framework does not seem capable of providing for a definite answer. Instead, the interested parties interpreted the Treaties in opposing ways.

Following the landslide win of the Scottish National Party in 2011, there was a debate whether the Scottish Parliament had the legislative competence to unilaterally organise an independence referendum.[78] In other words, the question was whether an Act of the Scottish Parliament allowing the organisation of an independence referendum could be deemed *ultra vires*. The 'two governments of Scotland' decided to resolve this important constitutional question with a political agreement,[79] the Edinburgh Agreement. According to this agreement, *David Cameron* and *Alex Salmond* – as the then heads of 'Scotland's two governments' – agreed to amend the

[76] Art. 3 (1) TEU.
[77] Arts. 3 (5), 8 (1), 21 (2)(c) TEU.
[78] For an analysis of the debate see *Cormac Mac Amhlaigh,* … Yes, But is it legal? The Scottish Independence Referendum and the Scotland Act 1998, 12 January 2012, available at: ukconstitutionallaw.org/2012/01/12/cormac-mac-amhlaigh-yes-but-is-it-legal-the-scottish-independence-referendum-and-the-scotland-act-1998/ (accessed on 10 September 2016).
[79] For an analysis of the legal nature of the Edinburgh Agreement see *Christine Bell,* The Legal Status of the Edinburgh Agreement, 5 November 2012, available at: http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/431/Christine-Bell-The-Legal-Status-of-the-Edinburgh-Agreement.aspx (accessed on 10 September 2016).

text of the Scotland Act of 1998 to the effect that a new Section 29A was introduced. This new Section explicitly conferred the power on Holyrood to organise an independence referendum by no later than 31 December 2014.

Despite the fact that the Scottish independence would have been achieved in accordance with a consensual and democratic process, there was a debate on whether Scotland enjoyed a right for a continuing EU membership. On the one hand, the official position of the Commission at the moment was that

> If part of the territory of a Member State would cease to be part of that State because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.[80]

Thus, Scotland would have to follow the procedure under Article 49 TEU in order to become an EU Member State.

However, the Scottish government held a different view. They based their argument[81] on the fact that the Scottish situation is *sui generis.* It would have been the first time that a region would secede from an EU Member State by a consensual and lawful constitutional process. It did so in order to distinguish itself from other secessionist claims in Europe and to ease the concerns of the respective metropolitan States. According to the Scottish position, Article 49 only regulates "conventional enlargement where the candidate country is seeking membership from outside the

---

[80] President of the European Commission *José Manuel Barroso,* Letter of 10 December 2012 to the House of Lords Economic Affairs Committee regarding the status of EU membership for Scotland in the event of independence, available at: http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf (accessed on 1 November 2016). In fact, this letter follows almost *verbatim* a similar position expressed by a previous President of the Commission, *Romano Prodi,* in 2004. According to it, "[w]hen a part of the territory of a Member State ceases to be a part of that state, e.g. because the territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the Treaties would from the day of its independence, not apply anymore […]" If the new country wished them again to apply there would need to be "a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State.", President of the European Commission *Romano Prodi,* Answer to Written Question P-0524/04, OJ 2004 C 84E, 421.

[81] See Scottish Government, Scotland's Future: Your Guide to an Independent Scotland, 216-224, available at: www.gov.scot/resource/0043/00439021.pdf (accessed on 10 September 2016).

EU."[82] But Scotland has been part of the EU since 1973. Therefore, the appropriate legal basis that would facilitate Scotland's transition to Union membership is Article 48 TEU, the generic provision on the amendment of the EU Treaties. In other words, the Scottish position has been that the amendment of Article 52 TEU, which provides for the States to which the Treaties apply and the relevant articles concerning the composition of the EU institutions would be, by and large, sufficient in order for Scotland to become an EU Member State after its independence.

Such considerable ambiguity as to how EU law applies in a situation like that[83] is partly due to the fact that there is no consensus between the Member States as to how such political developments should be addressed. In fact, in the long hours of the morning of 19 September 2014, the then Spanish Foreign Minister made clear that if Scotland had become independent, it would have had to join the queue of the other candidate States, underlining how time-consuming this might be. More importantly, his statement shed doubt on whether Spain would ever accept Scotland as a Member State, fearing that this would create a dangerous precedent especially for the secessionist movements that exist in Spain.[84] Again, this shows that the Member States as 'Masters of the Treaties' have never intended to allow the Union to have a more active role in 'catalysing' settlements of their intrastate conflicts.

B. The Legal Basis Problem

According to the 'catalytic effect' argument the Union is not expected *per se* to become the initiator of a peace process in any direct sense. Instead, this theory considers the EU "as an added factor that encourages conflict resolution to take place more quickly than might have been expected."[85] Having said that, from an international law point of view, Chapter VI and especially Article 33 Charter of the United Nations[86] do not prevent the Union from becoming the mediator in any initiative for a solution of any intrastate conflict. Indeed, as we shall see in the next

[82] *Ibid.,* 21.
[83] For the different academic views on this debate see http://verfassungsblog.de/category/focus/scotlands-eu-membership/ (accessed on 10 September 2016).
[84] A summary of the views of the Spanish government on the Scottish independence referendum 2014 are available at: https://www.theguardian.com/politics/2014/sep/17/spain-independent-scotland-years-eu-membership (accessed on 13 November 2016).
[85] See *Ker-Lindsay* (note 6).
[86] Charter of the Unites Nations, 26 June 1945, UNCIO 15, 335.

sub-section, the Union has adopted a number of decisions to facilitate and contribute to conflict resolution in a number of areas of the world.[87]

However, Article 5 TEU clarifies that the Union is an organisation of conferred powers. The Union can only act on competences that the Member States have conferred on it. A closer look to its present institutional and legal framework clearly shows that although the Union can become a mediator in any conflict that takes place beyond its borders, it cannot assume such a role for intrastate conflicts that are within its territory. This lack of competence shows how much more difficult it is for the EU to 'catalyse' the settlement of an intrastate conflict inside its borders than outside. It also points to the fact that there is a clear 'break point' in the linearity of enhanced conflict resolution potential on the part of the EU at the moment of the accession of any given State.

1. The Common Foreign and Security Policy

In its relations with the wider world, the Union has to contribute *inter alia* to peace and security.[88] That is why the adoption of a legislative act that could allow the EU to engage in principal mediation in negotiations for the settlement of any intrastate conflict could be *prima facie* legally based on the provisions for the Common Foreign and Security Policy. The Union could assume such a role in order to "safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security."[89]

In order to achieve this CFSP scope, the Union could adopt a decision defining the relevant actions to be undertaken.[90] The device of the CFSP decisions has been introduced by the Lisbon Treaty and, in essence, it replaces what was known in the pre-Lisbon era as joint actions.[91] The joint actions were addressing specific situations where operational action by the EU was deemed necessary.[92] They have concerned *inter alia* activities such as support for peace and stabilisation processes through the

[87] See *infra,* notes 93-96.
[88] Art. 3 (5) TEU.
[89] Art. 21 (2) TEU.
[90] Art. 25 TEU.
[91] Ex Art. 12 TEU.
[92] Ex Art. 14 (1) TEU.

convening of an inaugural conference,[93] general support of a specific peace process,[94] a contribution to a conflict settlement process,[95] and the appointment of a Special Representative.[96] Thus, both the current provisions of the Treaties and the Union practice in the past suggest that the role of the negotiator between the parties in a dispute could be attributed to the EU by a decision defining an action.

The adoption of such a decision for an intrastate conflict within the borders of a Member State, however, may be problematic from a legal point of view. If the Treaty on European Union is interpreted in accordance with the ordinary meaning to be given to its terms, following the well established rule of Article 31 (1) Vienna Convention on the Law of the Treaties,[97] it would be difficult to justify the use of a CFSP device for an area that is part of the Union and for mediation between parties, whose members are Union citizens. In that sense, the adoption of a CFSP decision by the Council, in order to authorise the Union to play the role of the honest broker in an intrastate conflict that takes place within its borders, can be considered an *ultra vires* act since a CFSP device cannot be used for an area that is part of the Union.

2. Other Union Competences

Unsurprisingly, conflict resolution does not appear in Title I of the Treaty on the Functioning of the EU, which deals with categories and areas of Union competence. Thus, one could rightly argue that *prima facie* the TFEU cannot provide for any legal basis in order for the Union to authorise itself as the principal actor in negotiations for the resolution of an intrastate conflict.

However, the EU does possess a residual power in accordance with Article 352 (1) TFEU:

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after

[93] EU Council Decision 93/728 of 20 December 1993, OJ 1993 L 339, 1.
[94] EU Council Decision 94/276 of 19 April 1994, OJ 1994 L 119, 1.
[95] EU Council Joint Action 2001/759 of 29 October 2001, OJ 2001 L 286, 4.
[96] EU Council Joint Action 2002/211 of 11 March 2002, OJ 2002 L 70, 7.
[97] Vienna Convention on the Law of Treaties, 13 May 1969, UNTS 1155, 331.

obtaining the consent of the European Parliament, shall adopt the appropriate measures.

To the extent that assuming the role of the mediator in an intrastate conflict can be deemed as necessary for the achievement of one of the Treaty objectives, one could argue that Article 352 TFEU could provide for the legal basis.

However, the Lisbon Treaty has clarified that the aforementioned Article cannot serve as "a basis for attaining objectives pertaining to the common foreign and security policy."[98] This follows the well-established case law of the Court of Justice which has held that "recourse to that provision demands that the action envisaged should," on the one hand, relate to the "operation of the common market" and, on the other, be intended to attain "one of the objectives of the Community."[99] "That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP."[100] As already mentioned, the role of the 'broker' in peace negotiations is considered as rather serving CFSP objectives.

For the sake of argument, however, let us imagine that the Council unanimously approves a Commission proposal under Article 352 TFEU. Such legislative act would authorise the Union to become the principal actor in the negotiations for a settlement of an intrastate conflict such as the Cyprus one. Even in this case, the *2/94 Opinion*[101] of the Court of Justice questions the legality of such a decision. On that occasion, the Council had requested the Opinion of the ECJ, both as regards the competence, under the then EC Treaty, for the Community to accede to the European Convention of Human Rights and the compatibility of such an accession with substantive provisions and principles of EC law. In particular, the Court focused on the exclusive jurisdiction of the Court of Justice and the autonomy of the Community legal order. For the purposes of the present paper, it is important to note that, according to the Court, ex Article 308 TEC (now Article 352 TFEU) could not serve as a basis for widening the scope of EC powers beyond the general framework created by the Treaty provisions,

[98] Art. 352 (4) TFEU.
[99] ECJ, *Kadi and Al Barakaat v. Council of the European Union,* Joined Cases C-402/05 P and C-415/05 P, 2008 ECR I-6351, para. 200.
[100] *Ibid*., para 201.
[101] *Id., Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms,* Opinion 2/94, 1996 ECR I-1759. For a comprehensive analysis of that judgment and the use of ex Art. 308 TEC see generally *Robert Schütze,* From Dual to Cooperative Federalism: The Changing Structure of European Law (2009), 133-143.

as a whole, and by those that defined the tasks and the activities of the then EC.[102] Article 352 TFEU (ex Article 308 TEC) cannot be used as a basis for the adoption of provisions whose effect, in substance, would be to amend the Treaty without following the procedure provided for that purpose.[103] If that proposition applied to this case, it would mean that by attributing the role of the principal mediator to the Union following the adoption of a legislative act under Article 352 TFEU, the scope of the Union competences contained in the TFEU would most probably be widened beyond the general framework created by the provisions of this Treaty. Therefore Article 352 TFEU should not be used as a legal basis to that effect.

On the other hand, one has to note that accession to the European Convention on Human Rights would have been, in substance, a Treaty amendment without following the procedure provided for by the Treaty. Thus, it is rather difficult to draw conclusions from this Opinion for the purposes of this paper given that the constitutional significance of extending the scope of Union competences under the TFEU to include dispute resolution would have been much more trivial than the accession to the European Convention on Human Rights.

In any case, I would argue that Article 352 TFEU does not provide for a legal basis for authorising the Union to play the role of the honest broker in dispute settlement either. Such an argument is based on the competences attributed to the Union, the delimitation of Article 352 TFEU by the Lisbon Treaty, the *Kadi* Judgment and the reasoning of the Court in its *2/94 Opinion.*

3. An Informal Way Out of the Legal Conundrum: The EU Role in the Croatia-Slovenia Border Dispute

Overall, it has been shown that there are important legal constraints in the present Union institutional framework that would make the attribution of the role of principal mediator to the Union for intrastate conflicts that take place within the borders of its Member States rather unlikely. The Union does not seem to have a competence to act as mediator between parties in such intrastate conflicts.

[102] ECJ (note 101), paras. 27-30.
[103] *Ibid*.

However, the leading role that the European Commission played in bridging the differences of Croatia and Slovenia over a border dispute might suggest that the political reality is more nuanced than presented before. In that particular case the then Commissioner for Enlargement *Olli Rehn* "took the unusual role of mediating between a Member State and a candidate country." Indeed the agreement that was signed in November 2009 unblocked the accession negotiations between Croatia and the 27 Member States.[104]

By analogy, this could mean that if the parties to an intrastate conflict ask the Union to act as mediator in a conflict situation – as Slovenia and Croatia have done – it would be rather difficult for the EU to reject such a request. In that sense, the EU could use a rather informal setting as it has done in the aforementioned case in order to act as a mediator and to 'catalyse' a settlement in an intrastate conflict. In any case, a limited reading of the role that the Union could play in the quest for the settlement of a conflict may disregard the fact that the scope of the CFSP over the years has been defined widely and the role of the European Council has been construed broadly.

V. Socialisation

The Union failed to 'catalyse' a comprehensive settlement in the age-old dispute in Cyprus mainly because conditionality was lifted for the Greek Cypriots in order for the EU to deal with the intransigence of the then Turkish Cypriot leader *Denktash* and Turkey. At the same time, the differences between the pre-accession legal framework and the Union's constitutional order account for the fact that the Union is better equipped to 'catalyse' a solution in an intrastate conflict before a State accedes to the EU rather than afterwards. This does not mean that Union membership should be understood as a trivial change of context that cannot alter the dynamics of a given conflict and contribute to its resolution.

For instance, *Guelke* suggested as early as in 1989 that the place of Northern Ireland in the EU, European standards on democracy, human rights, and the treatment of minorities would be just as important as the interlocking internal, North-South, and

[104] *Frank Hoffmeister,* The European Union and the Peaceful Settlement of International Disputes, Chinese Journal of International Law 11 (2012), 77, 102.

East-West dimensions of a solution inspired by local and British-Irish ideas.[105] Some years later, *Meehan* argued that the broader European background and new perceptions of sovereignty that EU membership has facilitated, influenced the designing of Good Friday Agreement.[106]

> To be sure, the EU has had no impact on sectarian factionalism within Northern Ireland. However it has provided a framework for improved practical relations between the UK and Irish governments. In this way, the sharing of sovereignty within the EU has spilled over into some sharing of sovereignty over Northern Ireland.[107]

In the case of Cyprus, the Union could potentially offer some inspiration with regard to issues of shared sovereignty and consociational policy mechanisms. At the end of the day, the Union's comparative advantage is in its long-term efforts to change the environments out of which conflicts spring, so as to inoculate against them.[108] Twelve years after the accession of Cyprus to the EU, the view according to which the EU mode of governance could move historical antagonists to new routes of cooperation has not been verified yet.

VI. Conclusion

The main argument of the paper is that there is an inherent paradox in the Europeanisation of intrastate conflicts. Although the comparison between the policy and legal instruments available to the Union in the context of enlargement and the ENP verifies that the closer the association, the stronger the potential for the Union to 'catalyse' a settlement in a given conflict, the accession of a State to the Union does not increase such potential. Instead, the Member States have been very reluctant in allowing the Union to effectively intervene in ethno-political conflicts within their borders. This is rather unexpected if one takes into account that the Member States as 'Masters of the Treaties' have the power to reduce the say of the EU in issues that

[105] *Adrian Guelke,* Northern Ireland: The International Perspective (1988), 135-153.
[106] *Elizabeth Meehan,* Britain's Irish Question: Britain's European Question? British-Irish Relations in the Context of European Union and The Belfast Agreement, Review of International Studies 26 (2000) 83.
[107] *Sionaidh Douglas-Scott,* A UK Exit from the EU: The End of the *United* Kingdom or a New Constitutional Dawn?, 5 March 2015, 9, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574405## (accessed on 10 September 2016).
[108] *Christopher Hill,* EPC's Performance in Crisis, in: Reinhardt Rummel (ed.), Toward a Political Union: Planning a CFSP in the EC (1992), 135, 146.

touch on the core of their sovereignty. At the same time, the Union, being an organisation of conferred powers, does not seem to have the competence to mediate and thus 'catalyse' resolution of intrastate conflicts that take place within its borders.

This is not to suggest that Union membership is not important in creating a positive environment for the peaceful cooperation of enemies of the past. In fact, the events that followed the Brexit referendum might suggest that withdrawing from the EU might lead to the exacerbation of nationalist sentiments and the reopening of debates concerning the constitutional status of areas that have a tense relationship with their metropolitan State.

The morning after the referendum, the First Minister of Scotland, *Nicola Sturgeon,* made abundantly clear that she intends to "take all possible steps and explore all options to give effect to how people in Scotland voted – in other words, to secure [their] continuing place in the EU and in the single market in particular."[109] The reason being that "Scotland faces the prospect of being taken out of the EU against [their] will."[110] At the same time, Sinn Féin has called for a referendum for the unification of Ireland and thus for Northern Ireland to remain in the EU.[111] It has even been reported that Gibraltar is in talks with Scotland in order to remain in the EU.[112]

So, the question that we might have to pose ourselves in the future is whether the 'de-europeanisation' of intrastate conflicts leads to the 'resurrection' of the spectre of nationalism…

[109] *Nicola Sturgeon,* Response to the EU Referendum Result, 24 June 2016, available at: https://firstminister.gov.scot/news-conference-eu-referendum-result/ (accessed on 10 September 2016).
[110] *Ibid*.
[111] *Anon.,* Sinn Fein seeks Irish reunification vote as Britain votes for Brexit, The Business Post, 24 June 2016, available at: www.businesspost.ie/sinn-fein-seeks-irish-reunification-vote-as-britain-votes-for-brexit/ (accessed on 10 September 2016).
[112] *Gabriel Gatehouse,* Brexit: Gibraltar in talks with Scotland to stay in EU, BBC, 27 June 2016, available at: http://www.bbc.co.uk/news/uk-politics-eu-referendum-36639770 (accessed on 10 September 2016).