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**TURKEY AND NORTHERN CYPRUS –
THE EUROPEAN UNION AND ITS NEIGHBOURS**

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CHAPTER 9**TURKEY (INCLUDING NORTHERN CYPRUS)****Edgar Lenski*****Relevant legal documents:****Turkey**

- Agreement of 12 September 1963 establishing an Association between the European Economic Community and Turkey, *JO* 3687/64; English version, *OJ* 1977 L 361/29.
- Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing an Association between the European Economic Community and Turkey and on measures taken for their entry into force, *JO* 1972 L 293/68; English version, *OJ* 1977 L 361/60.
- Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, *OJ* 2005 L 254/58.
- Decision No. 2/76 of the EEC-Turkey Association Council (Free Movement of Workers).¹
- Decision No. 1/80 of the EEC-Turkey Association Council of 19 September 1980 on the development of the Association (Free Movement of Workers).²
- Decision No. 3/80 of the EEC-Turkey Association Council on the application of social security schemes of the member states of the European Communities to Turkish workers and members of their families, *OJ* 1983 C 110/60.
- Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, *OJ* 1996 L 35/1.
- Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, *OJ* 2006 L 22/34.

* Lecturer, Humboldt-University Berlin. This chapter is partly based on my article: 'Turkey and the EU: On the Road to Nowhere?', 63 *ZaöRV* (2003) pp. 77-102, available at: <<http://www.whi-berlin.de/turkey.htm>>.

¹ A German version was published in EC Council, *Assoziation zwischen der EWG und der Türkei, Sammlung von Rechtsakten*, Vol. 1 (Luxembourg, Eur-OP 1979) p. 24.

² EC Council, *EEC-Turkey Association Agreement and Protocols and other basic texts* (Luxembourg, Eur-OP 1992) p. 327.

Northern Cyprus

- Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No. 10 on Cyprus, *OJ* 2003 L 236/955.
- Council Regulation (EC) No. 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No. 10 to the Act of Accession, *OJ* 2004 L 161/128.
- Council Decision 2004/511/EC of 10 June 2004 concerning the representation of the people of Cyprus in the European Parliament in case of a settlement of the Cyprus problem, *OJ* 2004 L 211/22.
- Council Regulation (EC) No. 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No. 2667/2000 on the European Agency for Reconstruction, *OJ* 2006 L 65/5.

Turkey's relationship with the European Union started more than forty years ago. Over the years, the two partners have faced a number of setbacks and improvements. Nevertheless, the time of being neighbours is coming to an end. Accession negotiations with Turkey started in October 2005. The European Union's relationship with Northern Cyprus is even more complicated. In 2004, the Republic of Cyprus joined the Union without prior reunification, meaning that the 'Cyprus question' was not solved. The Turkish Republic of Northern Cyprus therefore remains an outsider. After the accession of the Central and Eastern European countries (CEECs), the Republic of Cyprus and Malta on 1 May 2004, the European Union's future relations with Turkey came into the focus of the enlargement debate. However, the likelihood of resolving the 'Cyprus question' has decreased considerably. Further steps by the European Union with regard to Northern Cyprus thus remain on a rather technical level.

1. THE HISTORY OF EU RELATIONS WITH TURKEY AND NORTHERN CYPRUS

In 1963, the then European Economic Community and the Republic of Turkey concluded an association agreement. The primary objective of the so-called Ankara Agreement was 'to promote the continuous and balanced strengthening of trade and economic relations'³ between Turkey and the Community by establishing a

³ Art. 2(1) AA Turkey.

customs union.⁴ Yet, the preamble and Article 28 of the Agreement stated another objective, namely to facilitate the accession of Turkey to the EEC 'at a later date'.⁵ At the 1999 Helsinki European Council, Turkey obtained the status of a candidate country and has since then continuously proceeded towards accession (negotiations).⁶

In contrast, Northern Cyprus appears to be excluded from this path for the time being, after Greek Cypriots rejected reunification in the referendum of 24 April 2004.

1.1 Development of the European Union's association with Turkey

The relationship between the then European Economic Community and Turkey began in 1959, when the Turkish Government asked the EEC to enter into negotiations with it about an association agreement.⁷ Before Turkey's rapprochement to European integration, it had already become a member of the OECD in 1948, joined the Council of Europe in 1949 and acceded to NATO in 1952.⁸ After negotiations lasting almost four years, the Association Agreement between the EEC and Turkey was signed on 12 September 1963 in Ankara and entered into force on 1 December 1964. At the time of its conclusion, political reasons (namely concerning security policy) prevailed over economic reasons, which were considered to be of rather minor importance.⁹

According to Article 2(3) AA Turkey, the association was to be divided into a preparatory stage, a transitional stage and a final stage.

The preparatory stage was established in order to allow Turkey to strengthen its economy with aid from the Community. The purpose of this was to enable it to sustain the transitional and the final stage.¹⁰ The Agreement provides for a period of five years for this first stage. On Turkey's initiative, negotiations to enter into the transitional stage began in 1968. These negotiations ended with the signing of the Additional Protocol on 23 November 1970 and its entry into force on 1 January 1973. This instrument lays down the preparatory work for the establishment

⁴ Art. 2(2) AA Turkey.

⁵ Fourth recital of the preamble and Art. 28 of the Association Agreement. The French version states 'qu[']il] facilitera ultérieurement l'adhésion de la Turquie à la Communauté' instead of 'at a later date'.

⁶ See Bull. *EU* 12-1999, point I.1.

⁷ Initially, Turkey even wanted to start accession negotiations with the EEC immediately.

⁸ On the history of and political developments in Turkey in general, see *The Europa World Yearbook*, 37th edn. (London, Europa Publisher 1996) pp. 3172-3178.

⁹ K. Ertekin, *Der türkische Beitritt zur Europäischen Gemeinschaft* (Frankfurt, Peter Lang 1989) p. 23. This perception seems not to have changed substantially since then. See J. Solana, 'Europe's Path for Turkey', *International Herald Tribune* (7 December 2002).

¹⁰ Art. 3(1) AA Turkey.

of the customs union and the alignment of the economic policies of the two partners based on mutual and balanced obligations.¹¹ In addition, the free movement rights were set out as guidelines for the transitional stage.¹²

The transitional stage was planned to last twelve years. However, this ambitious aim was not achieved due to several complications in the development of Turkish politics. During the 1970s, Turkey faced an almost permanent political and economic crisis.¹³ Another problem was – and to a certain extent still is – the presence of Turkish troops in Northern Cyprus since 1974.¹⁴ Between 1976 and 1980, the association practically stood still.¹⁵ The Association Council – the body established by the Agreement – held no meetings and no further steps were taken to deepen the relationship.

After relations improved briefly in 1980,¹⁶ a military coup under General Evren led to a further setback in the development of the association. Despite the pro-European attitude of the junta,¹⁷ the Community adopted a waiting position and in fact suspended the implementation of the association from the autumn of 1981 onwards,¹⁸ following various resolutions of the European Parliament on massive violations of human rights and the lack of redemocratisation in Turkey.¹⁹ Due to this development, the schedule for the transition to the final stage of the association was not adhered to: the customs union was not established and the free movement of workers was not introduced. The period fixed by Article 36 of the Additional Protocol, which provided for the progressive safeguarding of the free movement of workers until 1 December 1986 (twenty-two years after the entry into force of the Association Agreement), expired without any measures being taken.²⁰

It was only in 1986, after improvements in the Turkish political system, that the association was revived with a meeting of the Association Council on 16 September 1986. Nevertheless, very little was achieved in the time following this

¹¹ Art. 2 et seq. of the Additional Protocol, Art. 4(1) AA Turkey.

¹² Art. 36 et seq. of the Additional Protocol, Art. 12 et seq. AA Turkey.

¹³ For a more detailed description, see M. Bozkurt, *Die Beziehungen der Türkei zur Europäischen Union* (Frankfurt, Peter Lang 1995) pp. 42-59.

¹⁴ See *infra* section 1.2.

¹⁵ E. Esen, *Die Beziehungen zwischen der Türkei und der EG unter besonderer Berücksichtigung der innertürkischen Auseinandersetzungen um die Assoziation 1973-1980* (Bonn, Centaurus 1990) p. 223 et seq.

¹⁶ See Decision No. 1/80 of the Association Council.

¹⁷ European Commission, *XVth General Report* (1981) p. 263 et seq. See also the decision of the Turkish National Security Council (the *de facto* government) of 25 March 1981 on preparing Turkey internally for accession to the Community, in Bozkurt, *op. cit.* n. 13, at p. 60.

¹⁸ *Bull. EC* 12-1981, point 2.2.45. Decision No. 1/83 of the Association Council, *OJ* 1983 L 112/2, dealt only with administrative matters, namely the introduction of the ECU).

¹⁹ See, for example, *OJ* 1980 C 265/55 and *OJ* 1981 C 101/110. On the European Parliament's concerns about Turkey, see, *inter alia*, the Balfe Report on the human rights situation in Turkey, *OJ* 1985 C 343/60.

²⁰ On the resulting problems, see *infra* section 2.2.2.

meeting, mostly because of the Community's opposition to further measures in the field of the Financial Protocol and the free movement of workers. Turkey therefore decided to improve its position in general and applied for membership of the Community on 14 April 1987.²¹ The application was forwarded to the Commission by the Council on 17 April 1987 and was considered by the Commission until 18 December 1989. The Commission recommended not to enter into negotiations with Turkey. It put forward the constitutional situation of the EEC at the time, as well as economic, democratic and human rights reasons, as grounds on which the application should be rejected.²² Instead, the Commission proposed to enter into negotiations about a customs union. The Council accepted this recommendation on 3 February 1990²³ and thereby rejected the Turkish application for the time being.

In spite of this setback, the Community and Turkey continued to negotiate with a view to entering the final stage of the association. In the early 1990s, Turkey showed that it was making further efforts to enter into a customs union with the European Community by implementing measures towards this end. Decision No. 1/95 of the EC-Turkey Association Council²⁴ was a result of this development. By means of this decision, the customs union, as provided for in Article 5 of the Ankara Agreement, was established gradually from the entry into force of the decision on 31 December 1995. The customs union forms the basis of the final stage of the association.

Turkey's will to accede to the European Union remains unchanged. Virtually all Turkish governments have put this on their political agenda. In 1996 and 1997, Turkey even threatened to veto the envisaged accession of the CEECs to NATO if it was not accepted as a candidate for EU membership. This attempt was harshly rejected by the European Union.²⁵ In 1997, the Luxembourg European Council decided not to invite Turkey to the enlargement negotiations with the CEECs.²⁶ This led to a suspension of the political dialogue with the European Union by the Turkish Government²⁷ and to a systematic blockade of all EU attempts towards reconciliation.²⁸ Only after the Commission proposed strategies to involve Turkey

²¹ *Bull. EC* 4-1987, points 1.3.1 and 1.3.2.

²² SEC (1989) 2290 final/2 of 20 December 1989.

²³ *Bull. EC* 1/2-1990, p. 77 et seq.; European Commission, *XXIVth General Report* (1990) p. 285.

²⁴ *OJ* 1996 L 35/1.

²⁵ See T. Buerkle, 'EU Confirms Turkey's Right to Join, but Not Now', *International Herald Tribune* (17 March 1997) p. 5.

²⁶ See *Bull. EU* 12-1997, point I.2.

²⁷ See 'Türkei kündigt aus Enttäuschung Ende des Dialogs mit der EU an', *Der Tagesspiegel* (15 December 1997) p. 1.

²⁸ See P. de Graaf, 'EU wil relatie met Turkije verbeteren' [EU wants to improve relationship with Turkey], *De Volkskrant* (5 March 1998) p. 4; T. Gack, 'Die Türkei kommt aus dem Schmolliwinkel nicht heraus', *Der Tagesspiegel* (12 March 1998) p. 6.

in the enlargement process, and after the first steps to that end were taken by the Cardiff European Council of 15 and 16 June 1998,²⁹ did Turkey put an end to its self-imposed isolation and re-engage in a dialogue with the European Union.

The 1999 Helsinki European Council finally accorded Turkey the status of an EU candidate country.³⁰ This led the 2002 Copenhagen European Council to envisage accession negotiations in 2005 if Turkey fulfilled the Copenhagen political criteria.³¹ After the Commission recommended accession negotiations with Turkey in October 2004,³² the European Council of December 2004 decided to start negotiations on 3 October 2005.³³ As scheduled, the membership talks officially started in the night of 3 October 2005.³⁴ Consequently, Turkey's time as a neighbour is coming to an end. However, the accession negotiations might last at least ten to fifteen years.

1.2 The European Union's relationship with Northern Cyprus

The European Union's relationship with the northern part of Cyprus is even more complicated but also very brief. In 1974, Turkish troops occupied the northern part of the island. Turkey explained this intervention by referring to the *coup d'état* in Cyprus, which was carried out by the Cypriot National Guard and backed by the junta in Athens. Although the Turkish military action was condemned by the UN Security Council,³⁵ Turkish troops remained in northern Cyprus. In 1983, the Turkish Cypriots proclaimed the Turkish Republic of Northern Cyprus (hereinafter, 'TRNC'), an entity that is not internationally recognised – except by Turkey. The European Union has no official diplomatic contacts with the TRNC since only the Greek-Cypriot Government of the Republic of Cyprus is accepted as the official representative of the island.³⁶ However, informal relations did evolve, especially during the accession negotiations with the Republic of

²⁹ European Commission, Communication of 4 November 1998, COM (1998) 124 final. See 'Türkei nimmt Beziehungen zur EU wieder auf', *Der Tagesspiegel* (6 November 1998) p. 2; and *Bull. EU* 6-1998, point I.21.68.

³⁰ See *Bull. EU* 12-1999, point I.12.

³¹ See *Bull. EU* 12-2002, point I.6.19.

³² European Commission, Recommendation on Turkey's progress towards accession, COM (2004) 656 final, p. 9 et seq.

³³ See *Bull. EU* 12-2004, point I.7.22. The European Council made the opening of negotiations subject to the political condition that Turkey enact amendments to six statutes relating mainly to the judiciary and judicial rights. Moreover, Turkey had to recognise the Republic of Cyprus by signing the Adaptation Protocol to the Ankara Agreement, see *infra* sections 4 and 4.1.2.1.

³⁴ See *Bull. EU* 10-2005, point I.5.3.

³⁵ Notably UN Security Council resolution 353 (1974) of 20 July 1974.

³⁶ For a critical view on this policy, see P. Pernthaler, 'Some critical aspects regarding the UN Secretary General's proposal for a comprehensive settlement of the Cyprus problem', 1 *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi* [Yeditepe University Law Journal] (2004) p. 119 et seq.

Cyprus, despite the fact that there were no Turkish representatives on the Cypriot delegation.³⁷ The European Union strongly backed the so-called Annan Plan for the reunification of Cyprus and deeply regretted the Greek-Cypriot 'οχι' (no) in the referendum of 24 April 2004.

From a legal point of view, the northern part of Cyprus acceded to the Union as part of the Republic of Cyprus. Application of the *acquis*, however, is suspended for those areas in which the Government of the Republic of Cyprus does not have effective control, that is to say, Northern Cyprus.³⁸

2. THE LEGAL RELATIONSHIP WITH TURKEY: THE ASSOCIATION AGREEMENT

As already mentioned, the Ankara Agreement was supplemented by the 1970 Additional Protocol, various Financial Protocols and several decisions of the Association Council. This collection of instruments forms the 'law of association'.³⁹

2.1 Institutional issues

The Ankara Agreement provides only for an Association Council, although a number of special bodies have been set up over the last forty years.

The Association Council has the task to 'ensure the implementation and the progressive development of the Association.'⁴⁰ It consists of government officials from the Member States and members of the Council and the Commission, on the one hand, and members of the Turkish Government, on the other. Its decision-making powers are exercised by unanimous voting with each of the two sides having one vote.⁴¹ The office of President of the Council is held alternately by a representative of the European Union and a representative of Turkey.⁴² The Agreement provides for the power to adopt decisions⁴³ and make recommendations.

³⁷ F. Hoffmeister, 'The role of the EU in the Cyprus conflict', in Th. Giegerich, ed., *The EU Accession of Cyprus – Key to the Political and Legal Solution of an 'Insoluble' Ethnic Conflict?* (Baden-Baden, Nomos 2006) s. II.3.a. For a critical analysis of the European Union's policy towards the Cyprus conflict, see N. Tocci, 'EU Intervention in Ethno-political Conflicts: The Cases of Cyprus and Serbia-Montenegro', 9 *EFA Rev.* (2004) p. 551 et seq.

³⁸ Art. 1 of Protocol No. 10 to the Act of Accession of 16 April 2003, *OJ* 2003 L 236/955.

³⁹ On the legal framework of the customs union, see S. Peers, 'Living in Sin: Legal Integration under the EC-Turkey Customs Union', 7 *EJIL* (1996) p. 411 et seq.

⁴⁰ Art. 6 AA Turkey.

⁴¹ Art. 23 AA Turkey.

⁴² Art. 24 AA Turkey.

⁴³ Here 'decision' is used in the meaning of the German 'Beschluss'. On the terminology and typology of Community measures, see A. von Bogdandy, et al., 'Handlungsformen im Unionsrecht – Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel', 62 *ZaöRV*

Article 22(3) AA Turkey stipulates a residual competence comparable to Article 308 TEC.⁴⁴

The Association Committee, which was set up by Association Council Decision No. 3/64,⁴⁵ assists the Association Council in order to assure continuity and cooperation within the association.

The Ankara Agreement confers on the Association Council the duty to promote the necessary cooperation and contacts between the European Parliament and the Turkish Parliament. This was implemented by Decision No. 1/65,⁴⁶ which established the Parliamentary Committee. This body now consists of twenty-five members of the European Parliament and the same number of members of the Turkish Grand National Assembly. It can make recommendations to the Association Council, but has no legislative role within the association.

The Customs Cooperation Committee, which was set up by Decision No. 2/69,⁴⁷ and the Customs Union Joint Committee, which was established by Article 52 of Decision No. 1/95, facilitate the exchange of views and mutual information in the context of the customs union. Article 56 of Decision No. 1/95 provides that Turkey is to be informed of the adoption of new Community legislation in all areas of the *acquis* that have any relevance for the customs union. Obviously, Turkey has no veto in this area.

Within the framework of the Accession Partnership, eight sub-committees of the Association Council have been set up in order to prepare Turkey for the adoption of the *acquis communautaire*.⁴⁸

Apart from this institutional cooperation under the association regime, Turkey takes part in the activities of the European Environment Agency⁴⁹ and can also take part in virtually all other Community programmes.⁵⁰

(2002) p. 77 et seq.; J. Bast, 'On the Grammar of EU Law: Legal Instruments', *Jean Monnet Working Paper* 9/03 (2003) p. 23 et seq.; and A. von Bogdandy and J. Bast, 'La loi européenne: Promise and Pretence', in D. Curtin, A.E. Kellermann and S. Blockmans, eds., *The EU Constitution: the best way forward?* (The Hague, T.M.C. Asser Press 2005) p. 171 et seq.

⁴⁴ See Art. I-18 TCE.

⁴⁵ EC Council, op. cit. n. 2, at p. 322 (French version only).

⁴⁶ EC Council, op. cit. n. 2, at p. 323 (French version only).

⁴⁷ Decision No. 2/69 of the Association Council, in EC Council, op. cit. n. 2, at p. 325 (French version only).

⁴⁸ Decision No. 3/2000 of the Association Council, *OJ* 2000 L 138/28. The sub-committees deal with: agriculture and fisheries; internal market and competition; trade, industry and ECSC products; economics and monetary issues, capital movements and statistics; innovation; transport, environment and energy (including TENs); regional development, employment and social policy; and customs, taxation, drug trafficking and money laundering.

⁴⁹ Agreement between the European Community and the Republic of Turkey concerning the participation of the Republic of Turkey in the European Environment Agency and the European environment information and observation network, *OJ* 2001 L 213/111.

⁵⁰ Framework Agreement between the European Community and the Republic of Turkey on the general principles for the participation of the Republic of Turkey in Community programmes, *OJ* 2002 L 61/27.

The Ankara Agreement provides for dispute settlement by the Association Council,⁵¹ which can either settle the dispute itself by adopting a decision or submit it to the Court of Justice of the European Communities (ECJ) or to any other court or tribunal. If dispute settlement is not possible under these rules, the Association Council itself has to determine the rules for arbitration or any other procedure.⁵² Perhaps because no such procedure has ever been initiated, the ECJ considers itself competent to decide on matters of association law. In *Demirel*,⁵³ it held that association agreements are an act of the institutions within the meaning of Article 234(1)(b) TEC and that it therefore has jurisdiction over these matters. In *Sevince*, the ECJ extended this case law to decisions of the Association Council.⁵⁴

2.2 Substantive provisions

The substantive provisions of the Ankara Agreement are more or less shaped according to the model of the original EEC Treaty: the four freedoms, competition, approximation of laws and financial assistance.

2.2.1 *Free movement of goods*

In the field of free movement of goods, the Association Agreement only sets out basic guidelines that are to be followed by implementing the customs union. Article 10 of the Ankara Agreement simply mentions the prohibition of any customs duties, quantitative restrictions as well as measures having equivalent effect between Turkey and the European Community. The Additional Protocol provides for a progressive abolition of customs duties and prohibits the introduction of new ones.⁵⁵ Decision No. 1/95 finalised this development by prohibiting all customs duties on imports and exports, as well as charges having equivalent effect, and all quantitative restrictions on imports and exports, as well as measures having equivalent effect.⁵⁶ Article 7, modelled on Article 30 TEC, allows for exceptions on the grounds of public morality, public policy and so forth (cf., Art. 29 of the Additional Protocol). Furthermore, Turkey is obliged to incorporate Community instruments dealing with the removal of technical barriers to trade into its legal order.⁵⁷ With regard to

⁵¹ Art. 25 AA Turkey.

⁵² Decision No. 1/95 provides for some additional forms of arbitration. See Peers, loc. cit. n. 39, at p. 411 et seq.

⁵³ ECJ, Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

⁵⁴ ECJ, Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461.

⁵⁵ Art. 7 et seq. of the Additional Protocol.

⁵⁶ Art. 4 et seq. of Decision No. 1/95.

⁵⁷ Art. 8 of Decision No. 1/95.

commercial policy, Turkey has to adopt legislation that is substantially similar to the Community instruments in the areas of import and export rules, anti-dumping measures and, notably, trade in textiles.⁵⁸ Article 13 of Decision No. 1/95 complements Article 17 of the Additional Protocol by requiring Turkey to align its customs tariff to the European Union's common customs tariff. Although these obligations have been in force for ten years, Turkey still shows fundamental shortcomings in complying with these provisions as well as with various other rules of the *acquis* on the free movement of goods.⁵⁹

In the field of agricultural products, one of the main sectors of Turkey's exports,⁶⁰ the Additional Protocol and Decision No. 1/95 recognise the existence of difficulties and hence only provide for an adjustment of Turkish agricultural policy to that of the Community in order to achieve free movement in this field as well.⁶¹ Decision No. 1/98 contains a detailed trade regime for agricultural products.⁶²

2.2.2 *Free movement of workers*

The hotly debated issue of free movement of workers⁶³ can already be found, although in a vague formulation, in Article 12 of the Ankara Agreement. It identifies Articles 48, 49 and 50 TEEC (Arts. 39, 40 and 41 TEC) as a guideline for the association and was further developed in the Additional Protocol and in Decisions Nos. 2/76, 1/80 and 3/80 of the Association Council. According to the Additional Protocol, free movement was to be secured within the period between the end of the twelfth and the end of the twenty-second year after the entry into force of the

⁵⁸ Art. 12 of Decision No. 1/95. See E. Örucü, 'Turkey Facing the European Union – Old and New Harmonies', 25 *ELR* (2000) p. 526 et seq.

⁵⁹ European Commission, Turkey: 2005 Progress Report, COM (2005) 561 final, 9 November 2005, p. 55 et seq.

⁶⁰ See *The Europa World Yearbook*, op. cit. n. 8, at p. 3184.

⁶¹ Art. 32 et seq. of the Additional Protocol; Art. 24 et seq. of Decision No. 1/95. Decision No. 1/97 of the Association Council, *OJ* 1997 L 127/22, elaborates on this. See also European Commission, Working Document on 'Issues arising from Turkey's membership perspective', SEC (2004) 1202, p. 30 et seq.

⁶² Decision No. 1/98 of the EC-Turkey Association Council of 25 February 1998 on the trade regime for agricultural products, *OJ* 1998 L 86/1.

⁶³ See W. Quaisser and A. Repegather, 'EU-Beitrittsreife der Türkei und Konsequenzen einer EU-Mitgliedschaft', Osteuropa Institut München Working Paper No. 252 (January 2004) p. 73 et seq.; R. Yagli, 'Die Rechtsstellung der türkischen Arbeitnehmer in der EU', 3 *ZEuS* (2000) p. 507; C. Vedder, 'Rechtswirkungen von Assoziationsratsbeschlüssen – Die Kus-Entscheidung des EuGH', 29 *EuR* (1994) p. 202; C. Denys, 'Besluit 1/80: ook Turkse onderdanen mogen werk zoeken' [Decision 1/80: Turkish citizens may also seek employment], *NTER* (1997) p. 65 at p. 68; P. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen* [Introduction to the Law of the European Communities], 5th edn. (Deventer, Kluwer 1995) p. 809. See also H. Schmidt, 'Sind die Türken Europäer?', *Die Zeit* 50/2002, p. 1.

Ankara Agreement, that is to say, until 1 December 1986.⁶⁴ However, this was accompanied by a reservation concerning the adoption of the necessary rules by the Association Council.

Due to political problems and opposition to the free movement of Turkish workers within the Community,⁶⁵ the Association Council achieved only minor improvements. Decision No. 2/76 provided for the progressive establishment of the free movement of workers within ten years (from 1 December 1976 until 1 December 1986, pursuant to Art. 36 of the Additional Protocol). Decision No. 1/80⁶⁶ recorded this development and Decision No. 3/80⁶⁷ introduced social security measures for Turkish workers in the European Union. No further measures towards the free movement of workers were adopted by the Council of Association, as the association was in fact suspended after the military coup in 1980.

It was the European Court of Justice that continued to develop the right of free movement of Turkish workers in several decisions. In the *Demirel* judgment,⁶⁸ the Court considered Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol not to be sufficiently precise to confer rights upon individuals after the expiry of the period provided for in the Additional Protocol (1 December 1986).⁶⁹ However, faced with the issue whether Decisions Nos. 2/76 and 1/80, in particular their Articles 2 and 7 and Articles 6 and 13 respectively, were directly effective, the Court held in *Sevince*⁷⁰ that individuals could rely on these measures⁷¹ although the Decisions had not been published⁷² and contained clauses stating that the Member States had to implement these provisions in their national legislation.⁷³ In a number of subsequent decisions, the ECJ developed a solid case law on the right of free movement.⁷⁴

⁶⁴ Art. 36 of the Additional Protocol.

⁶⁵ Notably, the Federal Republic of Germany did not want to improve the position of Turkish workers and opposed further measures vigorously, see Bozkurt, *op. cit.* n. 13, at pp. 45 and 91 et seq.; Kapteyn and VerLoren van Themaat, *op. cit.* n. 63, at p. 809, n. 190.

⁶⁶ EC Council, *op. cit.* n. 2, at p. 327.

⁶⁷ *OJ* 1983 C 110/60.

⁶⁸ ECJ, Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] *ECR* 3719.

⁶⁹ However, this judgment was not unequivocally accepted in legal doctrine, see C. Rumpf, 'Freizügigkeit der Arbeitnehmer und Assoziation EG-Türkei', *RIW* (1993) p. 214 at p. 217 et seq., considering Art. 36 TEEC in conjunction with Art. 48 TEEC (Art. 39 TEC) to be sufficiently clear.

⁷⁰ ECJ, Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie* [1990] *ECR* I-3461.

⁷¹ *Ibid.*, at para. 22.

⁷² *Ibid.*, at para. 24.

⁷³ Art. 12 of Decision No. 2/76 and Art. 29 of Decision No. 1/80.

⁷⁴ On Decision No. 1/80 of the Association Council, see ECJ, Case 237/91 *Kazim Kus* [1992] *ECR* I-6781; ECJ, Case C-434/93 *Bozkurt* [1995] *ECR* I-1465; ECJ, Case C-171/95 *Recep Tetik* [1997] *ECR* I-329; ECJ, Case C-98/96 *Kasim Ertanir* [1997] *ECR* I-5179; ECJ, Case C-1/97 *Mehmet Birden* [1998] *I-7747*; ECJ, Case C-95/98 *Safet Eyüp* [2000] *ECR* I-4747; ECJ, Case C-285/95 *Suat Kol* [1997] *ECR* I-3069; ECJ, Case C-340/97 *Ömer Nazli et al.* [2000] *ECR* I-957; ECJ, Case 329/97 *Sezgin Ergat* [2000] *ECR* I-1487; ECJ, Case C-65/98 *Safet Eyüp* [2000] *ECR* I-4747; ECJ, Case

Today, the free movement of Turkish workers who live and work within the European Union has been realised to a considerable extent. However, access to the EU labour markets for Turkish nationals living outside the European Union is still widely barred.⁷⁵ On the other hand, it must not be overlooked that Turkey has not opened its labour market to Europeans either and that it restricts the conditions of employment in a significant manner.⁷⁶

2.2.3 *Freedom of establishment and freedom to provide services*

In a similar manner to Article 12, Articles 13 and 14 of the Association Agreement identify the provisions of the EC Treaty on freedom of establishment and freedom to provide services as guidelines for the association. The Additional Protocol does not elaborate on this, but provides for a 'stand-still clause' with regard to these freedoms and confers the power to determine a timetable for and the actual shaping of these freedoms on the Association Council.⁷⁷ Although Turkey and the European Union are currently negotiating this issue,⁷⁸ the Association Council has not yet adopted any measures. At the moment, neither Turkish nationals nor Union citizens can rely on association law when they want to provide services or establish themselves, respectively, in the European Union or Turkey.⁷⁹

2.2.4 *Competition law*

The Ankara Agreement already contained a vague clause on competition law.⁸⁰ Further clarification was achieved in Article 43 of the Additional Protocol, according to which the Association Council is charged with the task of adopting

188/00 *Bülent Kurz* [2001] *ECR* I-10961; ECJ, Case C-171/00 *Wählergruppe 'Gemeinsam Zusammen/Birlikte Alternative und Grüne GewerkschafterInnen/UG'* [2003] *ECR* I-2301; ECJ, Joined Cases C-317/01 and C-369/01 *Eran Abatay et al. and Nadi Sahin* [2003] *ECR* I-12301; ECJ, Case C-275/02 *Engin Ayaz* [2004] *ECR* I-8765; ECJ, Case C-467/02 *Inan Cetinkaya* [2004] *ECR* I-10895. On Decision No. 3/80 of the Association Council, see ECJ, Case C-277/94 *Taflan-Met et al.* [1996] *ECR* I-4085; ECJ, Joined Cases C-102/98 and C-211/98 *Ibrahim Kocak and Ramazan Örs* [2000] *ECR* I-1287; ECJ, Case 373/02 *Sakir Öztürk* [2004] *ECR* I-3605.

⁷⁵ For the situation for workers from the CEECs before the enlargement of 1 May 2004, on the other hand, see ECJ, Case C-257/99 *Barkoci and Malik* [2001] *ECR* I-655; D. Thym, 'Zur Ausweitung der Niederlassungsfreiheit auf die EU-Beitrittskandidaten', *NVwZ* (2002) p. 311.

⁷⁶ European Commission, *op. cit.* n. 59, at p. 59.

⁷⁷ Art. 41 of the Additional Protocol. In Case C-37/98 *Abdulnasir Savas* [2000] *ECR* I-2927, the ECJ considered this provision to be directly effective.

⁷⁸ See Decision No. 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey, *OJ* 2000 L 138/27.

⁷⁹ European Commission, *op. cit.* n. 59, at p. 60.

⁸⁰ Art. 16 AA Turkey reads: '[T]he principles laid down in the provisions on competition ... of the Treaty establishing the Community must be made applicable in [the] relations within the Association.'

measures for the application of Articles 81, 82, 86 and 87 TEC. This obligation was implemented by Articles 32, 33 and 34 of Decision No. 1/95 (which are virtually identical to Articles 81, 82, 87 TEC). Article 35 of Decision No. 1/95 provides that the assessment of practices contrary to the aforementioned articles shall be made on the basis of the criteria established in Community law. However, Article 37 of Decision No. 1/95 provides for another implementing measure by the Association Council in order to lay down the exact rules for the application of Article 34 (state aids). Until the adoption of this measure, Articles 32 and 33 are none the less applicable in accordance with Article 37(2)(a). Similarly, Article 37(2)(b) renders Article 34 applicable, albeit under the provisions of the then GATT Subsidies Code.⁸¹

2.2.5 *Approximation of legislation*

Chapter IV of Decision No. 1/95 sets out the fields in which Turkey has to approximate its laws to those of the Community. This concerns, in particular, intellectual property law,⁸² competition law,⁸³ trade defence instruments⁸⁴ and taxation.⁸⁵ However, Turkey's legislation only improved slightly in most of these policy fields⁸⁶ and even worsened in one case.⁸⁷ Further harmonisation is required to facilitate the possible accession of Turkey to the European Union. All chapters of the *acquis* have to be incorporated into Turkish law. The aforementioned subcommittees of the Association Council partly deal with these questions already.⁸⁸

2.2.6 *Financial assistance*

From the beginning of the association, Turkey has received financial assistance in the form of aid, loans and investment schemes from the Community, especially under the Financial Protocols.⁸⁹ At present, Turkey fully participates in the pre-

⁸¹ See Peers, loc. cit. n. 39, at p. 417 et seq.; Örüçü, loc. cit. n. 58, at p. 526. Under the WTO rules, the GATT Subsidies Code is replaced by the Agreement on Subsidies and Countervailing Measures of 15 April 1994, *OJ* 1994 L 336/156.

⁸² Art. 31 of Decision No. 1/95.

⁸³ Arts. 39-43 of Decision No. 1/95.

⁸⁴ Art. 44 et seq. of Decision No. 1/95.

⁸⁵ Arts. 49-51 of Decision No. 1/95.

⁸⁶ European Commission, op. cit. n. 59, at p. 66 et seq. (intellectual property) and p. 68 et seq. (competition policy).

⁸⁷ *Ibid.*, at p. 63 et seq. (public procurement).

⁸⁸ On the subcommittees, see *supra* n. 48. On Turkey's alignment with the various chapters of the *acquis*, see *infra* section 4.1.2.4.

⁸⁹ First Financial Protocol, *JO* 3705/64; Second Financial Protocol, [1977] *JO* L 361/118; Third Financial Protocol, *OJ* 1979 L 67/1.

accession strategy⁹⁰ and receives aid from various Community funds. Since 2000, an average annual sum of almost €180 million has been provided to Turkey. The Commission expected to double this sum in 2006. Financial assistance for the priorities identified in the recently adopted Accession Partnership will be made available through annual financing decisions taken by the Commission, following the procedure set out in Article 8 of Council Regulation (EC) No. 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey (for the 2006 programme) and in the Regulation for the Instrument for Pre-accession Assistance (IPA), once this has been adopted (for the 2007 to 2013 programmes). The financing decisions will be followed by a financing agreement signed with Turkey.⁹¹

2.2.7 *Common Foreign and Security Policy and Justice and Home Affairs*

Although not covered by association law in a strict sense, this section takes a very brief look at Turkey's involvement in second and third pillar issues.

To a large extent, Turkey aligns itself with CFSP statements.⁹² A certain reluctance is perceivable, especially regarding human rights and national security concerns. However, Turkey endeavours to play a stabilising role in the Middle East region⁹³ and is taking part in the EUFOR-ALTHEA mission in Bosnia-Herzegovina – as it did in SFOR – as a troop-contributing nation. In addition, Turkey was involved in the EU police mission in Macedonia (EUPOL Proxima).⁹⁴

Turkey's path towards harmonisation in the area of Justice and Home Affairs seems to be thornier. The Commission has identified various fields where progress is needed, for example reform of the judiciary, the fight against corruption and cooperation with the European Union on illegal migration and the fight against human trafficking, as well as some aspects of the 1951 Geneva Convention on Refugees.⁹⁵

⁹⁰ Regulation (EC) No. 390/2001, *OJ* 2001 L 58/1; Regulation (EC) No. 2500/2001, *OJ* 2001 L 342/1, as last amended by Regulation (EC) No. 2112/2005, *OJ* 2005 L 344/23; EU-Turkey Framework Agreement of 26 February 2002, *OJ* 2002 L 61/29.

⁹¹ European Commission, Proposal for a Council Regulation establishing an Instrument for Pre-Accession Assistance (IPA), COM (2004) 627 final, 29 September 2004.

⁹² For a detailed overview, see H. Kramer, 'Die Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union und die Türkei', *27 Integration* (2004) p. 44 et seq.

⁹³ European Commission, op. cit. n. 59, at p. 128 et seq.

⁹⁴ Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union Police Mission (EUPOL Proxima) in the former Yugoslav Republic of Macedonia, *OJ* 2004 L 354/89.

⁹⁵ European Commission, op. cit. n. 59, at p. 110 et seq.

2.3 Conclusion

The law of the association, in particular the customs union, has led to a situation in which almost no customs duties 'protect' Turkey's economy from its EU competitors. Turkey therefore has to cope with increasing competition that is already preparing it for accession to the European Union.⁹⁶ It already had to adopt a considerable amount of economic Community legislation under the association regime, but a lot of legislative work remains to be done. Decision No. 1/95 established procedures for informing and consulting Turkey on new EU decision making, but Turkey has no formal right of involvement in the legislative process. The firm (and only possible) attitude of the European Union regarding the *acquis* is that of 'take it or leave it'. Finally, it should not be overlooked that the substantive provisions of the Association Agreement and the subsequent measures are only truly effective for Turkish citizens in the European Union and not vice versa. European Union citizens still face substantial obstacles when doing business in Turkey.⁹⁷ Despite these difficulties, Turkey has already achieved a substantial level of legal harmonisation with the EU system.

3. THE RELATIONSHIP WITH THE NORTHERN PART OF CYPRUS

Formal legal relations with the northern part of Cyprus do not exist, since the TRNC is recognised neither by the European Union nor by its Member States.⁹⁸ After the failure of the reunification referendum in April 2004, some adjustments to the Accession Treaty and new secondary legislation were necessary, as the application of the *acquis* is suspended for the northern part of Cyprus. However, these provisions are of a rather technical nature. The Republic of Cyprus, one of the ten new Member States, is the sole representative of Cyprus. While the European Union supports efforts towards the reunification of Cyprus, no substantive rules on direct trade between the Member States and the northern part of the island have so far been adopted. The current deadlock in the Council on a proposed regulation in this regard⁹⁹ is caused to a certain extent by the Republic of Cyprus, which considers the chosen legal basis (Art. 133 TEC) to be inappropriate.¹⁰⁰ A regulation on

⁹⁶ See Ç. Akkaya, et al., *Länderbericht Türkei* (Darmstadt, Wissenschaftliche Buchgesellschaft 1998) p. 96 et seq.

⁹⁷ European Commission, op. cit. n. 59, at p. 134 et seq.

⁹⁸ On the problems arising as a result – already and especially under the association regime with Cyprus – see S. Talmon, 'The Cyprus Question before the European Court of Justice', 12 *EJIL* (2001) p. 727 et seq.

⁹⁹ Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, COM (2004) 466 final.

¹⁰⁰ Hoffmeister, loc. cit. n. 37, at section IV.

financial assistance to the Turkish Cypriot community has recently been adopted.¹⁰¹ Under this regulation (based on Art. 308 TEC, Art. I-18 TCE) €139 million is to be spent on various activities aimed at the reunification of Cyprus.¹⁰²

4. ACCESSION OF TURKEY TO THE EUROPEAN UNION

The following section deals with the issue of Turkey's accession to the European Union and focuses on some core questions.¹⁰³ Since the 1999 Helsinki European Council, and in particular since 2002, Turkey has adopted an impressive amount of internal legal reforms.¹⁰⁴ However, much remains to be done.

4.1 The criteria for accession

Article 49 TEU sets out the legal basis for accession.¹⁰⁵ In addition, the 1999 Helsinki European Council decided also to apply the criteria established by the 1993 Copenhagen European Council¹⁰⁶ to Turkey.¹⁰⁷ In the case of Turkey, almost

¹⁰¹ Council Regulation (EC) No. 389/2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No. 2667/2000 on the European Agency for Reconstruction, *OJ* 2006 L 65/5.

¹⁰² See Council Conclusions of 27 February 2006, in Press Release No. 6343/06 (Presse 45).

¹⁰³ An in-depth analysis from a political point of view is carried out by the European Commission in its regular reports. See, for example, European Commission, *op. cit.* n. 59.

¹⁰⁴ See the (revised) Turkish National Programme for the Adoption of the Acquis, available at: <http://ec.europa.eu/comm/enlargement/turkey/npaa_2003.htm> (last visited 30 July 2006). On recent amendments to the Turkish legal system, see European Commission, *op. cit.* n. 59, *passim*; Council of Europe Parliamentary Assembly Report by M. Delvaux-Stehres and L. Van den Brande, 'Honouring of obligations and commitments by Turkey', Doc. No. 10111 (17 March 2004), available at: <<http://assembly.coe.int/documents/WorkingDocs/doc04/Edoc10111.htm>> (last visited 30 July 2006); H. Kramer, 'Ein wichtiger Schritt in Richtung EU', *SWP Aktuell* 29/02 (2002) p. 1 et seq.; P. Tanlak, 'Turkey EU Relations in the Post Helsinki Phase and the EU Harmonisation Laws Adopted by the Turkish Grand National Assembly in August 2002', *SEI Working Paper* No. 55 (Brighton 2002) pp. 8-12.

¹⁰⁵ In the current Constitutional Treaty, Art. I-58, in conjunction with Arts. I-1(2) and I-2, contains the relevant law. Former Art. O TEU, which had the same wording as Art. 237 TEEC, only required that the state was European.

¹⁰⁶ *Bull. EU* 6-1993, point I.13.

¹⁰⁷ *Bull. EU* 12-1999, point I.12. On the European Union as a subject of international law acts through the European Council as its organ, see J.C. Wichard, in C. Callies and M. Ruffert, eds., *EUV/EGV-Kommentar*, 2nd edn. (Neuwied, Luchterhand 2002) Art. 1 EG para. 13. See also the opposite views on the legal personality of the European Union described by Wichard, *ibid.*, at para. 5 et seq. Even if one follows these opposite views, the acts of the European Council must be seen as joint acts of the Member States. The extent to which states and an organisation like the EU are bound by their unilateral acts is currently still under discussion. See the debate in the ILC, 'Report on the work of its 53rd Session 2000', *General Assembly Official Records, 54th Session Supplement No. 10*, Doc. A/54/10, p. 176 et seq.; ILC, 'Report on the work of its 53rd Session 2001', *General Assembly Official Records, 55th Session Supplement No. 10*, Doc. A/55/10, p. 522 et seq.; ILC, 'Report on the

all of these requirements (democracy, respect for human rights and the rights of minorities, the rule of law, stable political institutions, a functioning market economy, the ability and will of the candidate to take on the obligations arising from membership, adherence to the aims of political, economic and monetary union and the ability of the European Union to absorb new members) prove difficult. One specific issue was and remains that of Cyprus.

It is generally accepted that the Council enjoys a discretionary power in the field of accession and consequently is not legally obliged to accept the application of a candidate even if it fulfils all the criteria.¹⁰⁸ Moreover, the Ankara Agreement only obliges the European Union to *facilitate* the accession of Turkey to the Union at a later date.¹⁰⁹ It does not create a legal obligation for the European Union to allow accession without conditions. Ahead of the Council's decision to start negotiations, the Commission, in its capacity as the major player in the accession process,¹¹⁰ proposed a Negotiation Framework. This Framework was adopted by the Council in October 2005 and is based on three pillars.¹¹¹ The first pillar is designed to support the reform process in Turkey. The Commission will continue to deliver regular reports on the basis of a revised Accession Partnership for Turkey.¹¹² The second pillar will design the actual framework for the negotiations. Finally, the third pillar will comprise measures aimed at strengthening the

work of its 54th Session 2002', *General Assembly Official Records, 56th Session Supplement No. 10*, Doc. A/56/10, p. 193 et seq. As a basic rule, subjects of international law have to abide by their commitments, at least as long as they do not expressly revoke their statements. See ICJ, *Nuclear Tests Case*, ICJ Rep. 1974, p. 253 at p. 269 et seq. See also C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century – General Course on Public International Law', *RdC* 281 (1999) (The Hague, The Hague Academy 2001) p. 344 et seq. with further references.

¹⁰⁸ W. Müller, in H. Smit and P. Herzog, eds., *The Law of the European Community*, Vol. 6 (New York, Matthew Bender 1996) Art. 237, p. 372. See also ECJ, Case 93/78 *Lothar Matheus v. Doego Fruchimport und Tiefkühlkost eG* [1978] *ECR* 2203 para. 7. *Contra* J. Zeh, *Recht auf Beitritt* (Baden-Baden, Nomos 2002) *passim*. The wording of the accession articles in the European Constitution might support this view – at least to the extent that a political claim can be derived from the fact that the criteria are fulfilled. See Independent Commission on Turkey, *Turkey in Europe: More than a promise?* (Brussels, British Council 2004) p. 9.

¹⁰⁹ Naturally, Turkey and the then EEC agreed on a possible accession. This, however, is not possible any more since the Maastricht Treaty repealed Art. 237 TEEC and replaced it with Art. O TEU (now Art. 49 TEU). At the time of a possible accession, a provision similar to Art. I-58 TCE will probably be in force already. These amendments do not change the nature of the obligation. Today, accession to the European Community can be achieved only by acceding to the European Union. See U. Everling, 'Reflections on the Structure of the European Union', 29 *CMLRev.* (1992) p. 1063.

¹¹⁰ See F. Hoffmeister, 'Changing Requirements for Membership', in A. Ott and K. Inglis, eds., *Handbook on European Enlargement* (The Hague, T.M.C. Asser Press 2002) p. 99 et seq.

¹¹¹ The Framework is available at: <http://ec.europa.eu/comm/enlargement/turkey/pdf/st20002_en05_TR_framedoc.pdf>.

¹¹² Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, *OJ* 2006 L 22/34.

political and cultural dialogue through civil society in Turkey and the European Union.

4.1.1 *European state*

The criterion according to which the candidate must be European is not very clear-cut, and this was probably intentional. The Commission gave a vague definition of this concept in 1992, saying that ‘it combines geographical, historical and cultural elements.’¹¹³ On the occasion of the conclusion of the Ankara Agreement, the then President of the Commission, Walter Hallstein, stated that ‘Turkey is a part of Europe.’¹¹⁴ The 1987 application of Turkey was not (initially) rejected on the grounds that Turkey was not European (as in the case of Morocco¹¹⁵) but for several other reasons.

From a geographical point of view, Turkey belongs – at least partly – to Europe. Thrace, consisting of the western-most provinces of Turkey, is undoubtedly on the European continent. If one defines ‘Europe’ as the western ‘peninsula’ of the Eurasian continent, the Bosphorus does not necessarily constitute Europe’s eastern border.¹¹⁶ The other elements – history and culture – are subject to debate.¹¹⁷ Whatever culture is exactly, Turkey’s culture is based on the Islamic faith and is influenced by Christian, Jewish and classical thought.¹¹⁸ However, it must not be forgotten that an Islamic culture can simultaneously be a European one (e.g., Bosnia-Herzegovina and Albania). Turkey’s culture cannot be described as Asian or Islamist.¹¹⁹ There has been a continuous exchange between different cultures in South-Eastern Europe. The Balkans have embraced much of the Ottoman culture over the course of centuries.¹²⁰ The south-eastern

¹¹³ European Commission, Europe and the Challenge of Enlargement, Supplement 3/92 – *Bull. EC* 3-1992, point 7. See F.C. Mayer and J. Palmowski, ‘European Identities and the EU’, 42 *JCMS* (2004) p. 573 at p. 579 et seq.

¹¹⁴ W. Hallstein, Speech in Ankara on 12 September 1963 (‘La Turquie fait partie de l’Europe’), German translation in T. Oppermann, ed., *Walter Hallstein – Europäische Reden* (Stuttgart, DVA 1979) p. 439 et seq.

¹¹⁵ The application of Morocco of 8 July 1987 was rejected on the grounds that it was apparently not a European state, see *Bull. EC* 9-1987, point 2.2.19.

¹¹⁶ See C. Dorau, ‘Die Öffnung der Europäischen Union für europäische Staaten’, 34 *EuR* (1999) p. 736 at pp. 738-739.

¹¹⁷ See Hoffmeister, loc. cit. n. 110, at p. 92.

¹¹⁸ Akkaya, et al., op. cit. n. 96, at p. 164 et seq.; Y.S. Tezel, ‘Gefangen zwischen Demokratie und Autoritarismus’, 11 *Internationale Politik* (2001) p. 1 et seq.; Öricü, loc. cit. n. 58, at p. 523, quoting former Turkish Prime Minister B. Ecevit; E.J. Zürcher, ‘Turk is niet minder Europees dan Siciliaan’ [Turks are no less European than Sicilians], *De Volkskrant*, 21 April 1997, p. 7.

¹¹⁹ For a contrary view reducing Europe to Christian culture, see L. Siedentop, *Democracy in Europe* (London, Penguin 2000) p. 189 et seq.

¹²⁰ On the general interrelations of Christianity and Islam regarding Turkey, see G. Luciani, ‘Die Türkei und der Islam’, 3 *Internationale Politik* (2002) p. 27 et seq.

part of Anatolia is undoubtedly underdeveloped and very different from urban sites in Western Europe. However, the Turkish political elite and a majority of Turkey's population are constantly orientated towards the West and modernisation as well as secularism.¹²¹

The political debate on the issue whether Turkey 'fits' into the European Union often focuses on the criterion of whether or not it is a 'European state'. Public opinion in Europe is split on this topic. For example, while the President of the European Convention, Valéry Giscard d'Estaing, and with him a number of national conservative parties heavily oppose Turkish membership of the European Union,¹²² a large number of political and economic players are strong proponents of Turkey's accession.¹²³ However, one should bear in mind that in principle this issue was already decided in 1963. The Ankara Agreement qualifies Turkey as a European state.

4.1.2 *Respect for the principles of the Union*

Respect for the basic principles of the European Union, as identified by Article 6(1) TEU and the Copenhagen criteria, is an indispensable prerequisite for any accession candidate. Although these principles are subject to political assessment, they are of a legal nature and therefore subject to legal scrutiny.

4.1.2.1 Human rights, minority rights and the principle of liberty

The requirement of respect for human rights and fundamental freedoms still seems to constitute a major problem in relation to the possible accession of Turkey.¹²⁴

¹²¹ See G. Goltz and H. Kramer, 'Politischer Erdrutsch bei den Wahlen in der Türkei', *SWP Aktuell* 48/02 (2002) p. 1 et seq.; D. Akagül, 'Le cinquième élargissement de l'Union européenne et la question de la candidature turc', *RMCU* (1988) p. 359 at p. 360. See further W. Schönbohm, 'Auf dem Weg nach Europa', 11 *Internationale Politik* (2001) p. 18. Naturally, a simple orientation towards Europe cannot lead to a qualification as European. Still, it shows a certain tendency. This has not been undermined by the idea of military leaders to focus on a separate Eurasian perspective for Turkey that has been raised from time to time, see I.D. Dagi, 'Competing Strategies for Turkey: Eurasianism or Europeanism?', *Central Asia-Caucasus Analyst*, 8 March 2002, available at: <http://www.cacianalyst.org/view_article.php?articleid=1189> (last visited 3 July 2006).

¹²² V. Giscard d'Estaing, 'Pour ou contre l'adhésion de la Turquie à l'Union européenne', *Le Monde*, 9 November 2002; *ibid.*, 'Zurück zur Vernunft', *Frankfurter Allgemeine Zeitung*, 26 November 2004, p. 10. See also 'Turkey and the EU – The impossibility of saying no', *The Economist*, 18 September 2004.

¹²³ See J. Solana, *loc. cit.* n. 9. See also 'Why Europe must say yes to Turkey', *The Economist*, 18 September 2004. Moreover, 53 per cent of Europeans are in favour of future enlargements (including Turkey) according to the European Commission's poll in *Eurobarometer No. 62* (Autumn 2004) p. 19.

¹²⁴ For a more detailed description of the human rights situation see, for example, European Commission, *op. cit.* n. 59, at pp. 18, 103 et seq.; Amnesty International, 'Amnesty International

According to the wording of Article 2 of the Turkish Constitution, the Turkish state is based on human rights. In fact, the human rights situation has improved only in recent years.¹²⁵ The relevant constitutional provisions on human rights were amended in October 2001.¹²⁶ A number of implementing laws have been enacted since. Since May 2004, moreover, international human rights instruments prevail over internal legislation.¹²⁷ However, the most apparent problem is still that of torture in Turkish prisons. The European Committee for the Prevention of Torture (CPT)¹²⁸ reports annually on torture in Turkish police custody and has twice even published a public statement¹²⁹ – a truly extraordinary step. Since 2002, the CPT reports are more optimistic. In general, the situation has improved. It appears that grave forms of torture are no longer applied systematically, but the implementation of anti-torture legislation is still a weak point. The situation conforms neither with the standards of the Council of Europe¹³⁰ nor with those of the European Union.¹³¹ Even compared to other accession candidates like Bulgaria¹³² or Romania,¹³³ which carry a legacy of forty years of dictatorial rule, the situation in Turkey is deplorable. The CPT reports reveal horrifying practices in Turkish prisons. Moreover, investigations into various ‘disappearances’ of opposition

Report 2006 – Turkey’, available at: <http://web.amnesty.org/report2006/tur_summary_eng> (last visited 30 July 2006); N. Güney, ‘Das Antiterrorgesetz-Urteil des türkischen Verfassungsgerichts vom 6. Januar 1999 – Zugleich ein Beitrag zu den Grenzen der Beschränkbarkeit von Grundrechten nach der türkischen Verfassung’, 62 *ZaöRV* (2002) p. 473, coming to a more optimistic conclusion based on the case law of the Turkish Constitutional Court.

¹²⁵ For an analysis of the (very poor) state of play in the early 1990s, see W. van Genugten, ‘Turkije en de mensenrechten’ [Turkey and human rights], 68 *NJ* (1993) p. 720 et seq.

¹²⁶ Act No. 4709 of 3 October 2001, *Turkish Official Journal* of 17 October 2001, No. 24556.

¹²⁷ For a brief analysis, see K. Başlar and E. İshakoğlu, ‘Turkey’, in A.E. Kellermann, et al., *Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries – Hopes and Fears* (The Hague, T.M.C. Asser Press 2006) p. 195.

¹²⁸ Established according to Art. 1 of the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment of 26 November 1987, ETS No. 126, entry into force on 1 February 1989.

¹²⁹ CPT, Public Statement on Turkey, 15 December 1992, 14 *HRLJ* (1993) p. 49 et seq.; CPT, Public Statement on Turkey, 6 December 1996, 18 *HRLJ* (1997) p. 294 et seq.; CPT, Reports on Turkey, available at: <<http://www.cpt.coe.int/en/states/tur.htm>> (last visited 4 July 2006). On the problem of torture in Turkey, see R. Alleweldt, ‘Auf dem Weg zu wirksamer Folterprävention in der Türkei?’, 27 *EuGRZ* (2000) p. 193 et seq.

¹³⁰ CPT, The CPT Standards 2004 (revised version), available at: <<http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>> (last visited 4 July 2006).

¹³¹ See *Gerechtshof te 's-Gravenhage* [Hague Court of Appeal], Case 04/1595/KG *The Netherlands v. N. Kesbir*, 20 January 2005, available at: <<http://www.rechtspraak.nl>> (last visited 4 July 2006). See also European Commission, op. cit. n. 59, at pp. 18, 103 et seq., which – although more optimistic – lists an impressive number of human rights problems.

¹³² See CPT, Reports on Bulgaria, available at: <<http://www.cpt.coe.int/en/states/bgr.htm>> (last visited 4 July 2006).

¹³³ See CPT, Reports on Romania, available at: <<http://www.cpt.coe.int/en/states/rom.htm>> (last visited 4 July 2006).

leaders and intellectuals, extra-judicial executions, the oppression of trade unions and the media and so forth are not yet pursued thoroughly.¹³⁴ A whole range of fundamental human rights, especially women's rights, were and continue to be violated,¹³⁵ particularly in Kurdistan. Even now, a considerable number of journalists and writers are held in custody for their writings.¹³⁶ Even members of the Turkish Grand National Assembly are sentenced for their political actions.¹³⁷ Despite various improvements,¹³⁸ much therefore remains to be done. A positive development is the abolition of the death penalty.¹³⁹

Although Turkey already acceded to the Council of Europe in 1954, it recognised the individual complaint procedure (former Art. 25 ECHR) only in 1987 and the compulsory jurisdiction of the European Court of Human Rights (former Art. 46 ECHR) in 1990. However, the individual complaint procedure, which forms the main possibility for citizens to seek protection, is becoming more and more effective. In 1991, only ninety complaints were lodged against Turkey (cf., the Netherlands with a quarter of the population and 165 applications¹⁴⁰). In 2005, the European Court of Human Rights registered 1,812 new applications regarding Turkey.¹⁴¹ The number of applications is alarming and encouraging at the same time. Although an enormous number of Turkish citizens feel that their human rights are infringed by government authorities, they do make use of the complaint procedure and therefore induce Turkey to ameliorate its human rights record.

¹³⁴ See Reporters sans frontières, 'Turkey still far from European standards of press freedom', 16 December 2004, available at: <http://www.rsf.org/article.php3?id_article=12096> (last visited 4 July 2006); T. Sommer, 'Gesucht: ein moderner Atatürk', *Die Zeit*, 6 June 1997, p. 7; H. Müller, 'De waarheid van de Turkse media' [The truth of the Turkish media], *De Volkskrant*, 7 June 1997, p. 51.

¹³⁵ See Amnesty International, op. cit. n. 124, and the following judgments of the European Court of Human Rights: *Akdivar and others v. Turkey*, judgment of 16 September 1996, Rep. 1996-IV, p. 1192 et seq.; *Zana v. Turkey*, judgment of 25 November 1997, Rep. 1997-II, p. 2534 et seq.; *Mentes and others v. Turkey*, judgment of 28 November 1997, Rep. 1997-VIII, p. 2690 et seq.; *Kurt v. Turkey*, judgment of 25 May 1998, Rep. 1998-III, p. 1153 et seq.

¹³⁶ Sommer, loc. cit. n. 134, at p. 7, mentioning Turkey as the state with the highest number of journalists and writers held in prison of all. Charges brought against the author O. Pamuk for mentioning the massacres of Armenians were dropped only after EU pressure, cf., S. Hacıoğlu, 'Turkish Court drops charges against novelist', *The Independent*, 23 January 2006, p. 4.

¹³⁷ European Court of Human Rights, *Sakik and others v. Turkey*, judgment of 26 November 1997, Rep. 1997-VII, p. 2609 et seq.

¹³⁸ Human Rights Watch, 'Turkey – A Crossroads for Human Rights' (15 December 2004), available at: <<http://hrw.org/doc?t=europe&c=turkey>> (last visited 4 July 2006); Reporters sans frontières, '2004 Annual Report – Turkey', available at: <http://www.rsf.org/article.php3?id_article=10265> (last visited 4 July 2006).

¹³⁹ European Commission, op. cit. n. 59. See Güney, loc. cit. n. 124, at p. 468 et seq. It should be noted, however, that this penalty has already not been enforced any for several years.

¹⁴⁰ European Commission of Human Rights, *Survey of Activities and Statistics 1991* (Strasbourg 1992) p. 23.

¹⁴¹ European Commission, op. cit. n. 59, p. 19.

However, Turkey's willingness to execute judgments of the ECHR has improved only slightly.¹⁴²

The situation of minorities and freedom of religion is also in a fairly poor state. The 1923 Lausanne Agreement¹⁴³ granted certain rights to (some) non-Islamic minorities (Greeks, Armenians and Jews), but the major problem is still that of the Kurdish minority. After recent changes in Turkish law,¹⁴⁴ legal discrimination against the Kurds has been partly abolished. Too often, however, judicial and administrative practice remains highly discriminatory.¹⁴⁵ Discrimination against other minorities¹⁴⁶ and non-Muslim communities in Turkey exists in fact and in law, for example in relation to cultural life.¹⁴⁷ In general, problems regarding respect for minority rights will remain, as these rights are still largely regarded as violating the constitutional principle of the indivisible unity of the Turkish nation¹⁴⁸ (Art. 3 of the Turkish Constitution).¹⁴⁹

Moreover, Turkey's position in the ongoing dispute about Northern Cyprus, though moderate compared to the past, is another complicated aspect within the accession process. Since the Ankara Agreement contained a clause on its territorial scope in which the application of the agreement was confined to the then Member States and Turkey, each enlargement had to be accompanied by a subsequent amendment of the Ankara Agreement. In December 2004, Turkey promised to recognise the Republic of Cyprus and ratify the Adaptation Protocol to the Ankara Agreement before the start of the accession negotiations. The Conclusions of the Presidency of the European Council of December 2004 did not expressly make the recognition of Cyprus by Turkey a precondition for the opening of

¹⁴² See Council of Ministers of the Council of Europe, Interim Resolution IntResDH (2004) 38, but see also Interim Resolutions IntResDH (2004) 31 and IntResDH (2002) 98, available at: <<http://wcd.coe.int/ViewDoc.jsp?id=138187>> and <<http://wcd.coe.int/ViewDoc.jsp?id=294871>> (last visited 30 July 2006) and Parliamentary Assembly of the Council of Europe, Resolution 1268 (2002), 23 *HRLJ* (2002) p. 110. However, recent amendments provide for the revision of judgments if the ECHR finds them to be in violation of European human rights law. See Arts. 445 and 448 of the Code of Civil Procedure and Arts. 327 and 335 of the Code of Criminal Procedure, as amended by Act of 3 August 2002. See Kramer, loc. cit. n. 104, at p. 5 et seq.; Tanlak, loc. cit. n. 104, at p. 10 et seq.

¹⁴³ Peace Treaty between the Allies and Turkey of 24 July 1923, 18 *LNTS* 12.

¹⁴⁴ See Kramer, loc. cit. n. 104, at p. 3.

¹⁴⁵ European Commission, op. cit. n. 59, at p. 36.

¹⁴⁶ There is, for example, a Roma community, and Alevi Muslims are sometimes also regarded as a minority. See Akkaya, et al., op. cit. n. 96, at p. 185 et seq.; European Commission, op. cit. n. 59, at p. 35 et seq.

¹⁴⁷ H. Kramer, 'Die Türkei und die Kopenhagener Kriterien', *SWP-Studie* 39/02 (Berlin 2002) p. 35.

¹⁴⁸ Turkish Constitutional Court, judgment of 30 June 1994, quoted in C. Rumpf, *Das türkische Verfassungssystem* (Wiesbaden, Harrassowitz 1996) p. 254.

¹⁴⁹ It should be noted, however, that France also has a constitutional provision that establishes indivisibility of the nation as a fundamental principle, see Art. 1 of the French Constitution of 4 October 1958, available at: <<http://www.assemblee-nationale.fr/english/8ab.asp>> (last visited 10 July 2006).

accession talks.¹⁵⁰ In October 2005, the European Union – pressed for time – decided to open accession negotiations after Ankara had accepted the Adaptation Protocol.¹⁵¹ But Turkey still claims that this does not constitute a recognition of Cyprus, and it still opposes the application of EU-Turkey association law to Cyprus. EU enlargement commissioner Olli Rehn has recently urged Turkey to implement the protocol and open its ports and airspace to Greek-Cypriot ships and planes if it wants to proceed smoothly with membership talks.¹⁵²

4.1.2.2 Stable democracy and the rule of law

Even within the European Union, democratic systems vary considerably. Democracy is not easy to define.¹⁵³ Described in a general way, it requires that all government authority emanates from the citizens and that they (can) participate in government.¹⁵⁴ In order to satisfy the condition of being a ‘stable democracy’, a candidate country must also respect the European Union’s standards of factual and institutional safeguards for democracy.

The wording of the Turkish Constitution satisfies the requirements of this test.¹⁵⁵ It vests legislative power in the unicameral Turkish Grand National Assembly,¹⁵⁶ which is elected by universal suffrage. General elections are held every

¹⁵⁰ From a legal point of view, recognition is not crucial since it is merely of a declaratory nature, see I. Brownlie, *Public International Law*, 6th edn. (Oxford, OUP 2003) p. 86 et seq. Politically and economically, however, it is an imperative.

¹⁵¹ Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, *OJ* 2005 L 254/58.

¹⁵² L. Kubosova, ‘EU urges Turkey to keep its word on Cyprus’, *EUObserver.com*, 10 March 2006. Apart from these current problems arising from the Cyprus conflict, Turkey’s position regarding the 1915-1916 massacres of Armenians likewise causes astonishment. It must be admitted that some Armenian interest groups tackle the problem very aggressively. Nevertheless, Turkey’s refusal to discuss the issue is telling. See the publications of the Turkish Parliament on the genocide inflicted upon Turks by Armenians, available at: <<http://www.tbmm.gov.tr/yayinlar/yayin3/atrocitiy.htm>> (last visited 30 July 2006).

¹⁵³ See, for example, the overview and analysis by D. Held, *Models of Democracy* (Cambridge, Polity Press 1996).

¹⁵⁴ See Abraham Lincoln’s Gettysburg Address of 19 November 1863, available at: <<http://www.loc.gov/exhibits/gadd/gatr1.html>> (last visited 30 July 2006): ‘Government of the people by the people for the people.’

¹⁵⁵ Art. 2 of the Constitution already shows Turkey’s general commitment to democracy: ‘The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.’ Turkish Constitution of 18 October 1982 (translation by the Turkish Foreign Ministry), as amended on 7 May 2004 by Act No. 5170, available at: <<http://www.tbmm.gov.tr/english/constitution.htm>> (last visited 30 July 2006). The most recent – not yet officially translated – amendments do not relate to Art. 2.

¹⁵⁶ Art. 7 of the Turkish Constitution.

five years¹⁵⁷ on the basis of proportional representation, on the basis of lists drawn up by political parties. Turkey has a multiparty political system. Parliament elects the President, who holds executive power, for a period of seven years. The President is empowered to appoint a Prime Minister and senior members of the judiciary,¹⁵⁸ which comprises judicial, administrative and military courts, as well as a Constitutional Court. In addition, there is the National Security Council, which (officially) serves as an advisory body.

However, certain doubts remain. In order to receive a seat in the Turkish Grand National Assembly, a party has to receive 10 per cent of the votes cast. This is the highest threshold for entry into parliament in Europe.¹⁵⁹ The outcome of the last general elections in November 2002 led to a situation in which 34.2 per cent of the votes resulted in 66 per cent of the seats in the Grand National Assembly.¹⁶⁰ In total, 45.4 per cent of the votes cast did not count towards seats in Parliament at all, although 36.5 per cent were cast for parties which each received more than 5 per cent of the votes.¹⁶¹

Moreover, the role of the National Security Council (NSC) gives rise to doubts regarding the institutional framework of democracy in Turkey. The NSC is composed of the five highest-ranking military commanders, on the one hand, and (at least) seven civilians, namely the President, the Prime Minister, the Vice Prime Ministers (currently three) and the Ministers for Home Affairs, Foreign Affairs, Justice and Defence, on the other.¹⁶² The NSC was established as an advisory body but in fact still has a very influential role in the field of security policy and beyond in practically all areas of Turkish politics.¹⁶³ The 2001 Turkish national programme preparing for accession therefore already envisaged a review of the relevant provisions on the role of the NSC.¹⁶⁴ Some improvements were enacted in recent years. Since the 2001 constitutional amendments, the NSC

¹⁵⁷ Art. 77 of the Turkish Constitution.

¹⁵⁸ Art. 104 of the Turkish Constitution.

¹⁵⁹ In Poland, party alliances must receive 8 per cent of the vote to enter the *Sejm*, the Polish Lower House, while individual parties require 5 per cent. Georgia introduced a threshold of 7 per cent for entry into its Parliament. To enter the Parliament of Azerbaijan 6 per cent is needed. A requirement of 4 or 5 per cent is widely applied in Europe. See also W. Ismayr, 'Die politischen System der EU-Beitrittsländer im Vergleich', 5-6 *APuZ* (2004) p. 10 et seq.; Parliamentary Assembly of the Council of Europe, Resolution 1380 (2004) of 22 June 2004, para. 6.

¹⁶⁰ See Goltz and Kramer, loc. cit. n. 121, at p. 1 et seq.

¹⁶¹ *Ibid.*

¹⁶² Art. 118 of the Turkish Constitution.

¹⁶³ European Commission, op. cit. n. 59, at p. 14; Kramer, loc. cit. n. 147, at p. 20 et seq. On the situation before the 2003 legislative changes, see the chapter on national security policy in the Ministry of Defence's White Paper 2000, available at: <<http://www.msb.gov.tr/Birimler/GnPPD/pdf/p3.pdf>> (last visited 30 July 2006).

¹⁶⁴ Turkish National Programme for the Adoption of the Acquis (adopted in March 2001), available at: <http://europa.eu.int/comm/enlargement/turkey/pdf/npaa_full.pdf> (last visited 4 July 2006) p. 27.

comprises a majority of civilian members and, since August 2004, even its Secretary General – a powerful position – is a civilian. The NSC's direct influence on education and media policy was curtailed by the 2004 reforms. However, the NSC is politically still dominated by its military members¹⁶⁵ and therefore a potential source of unaccountable political decisions. Although the reforms go very far – at least in terms of Turkish politics – the shape and role of the NSC still conflicts with European standards. At the moment, no major conflicts regarding European integration exist between the Erdoğan Government and the military. However, given the paramount position that the NSC and – in particular – its military members used to have in Turkish politics, it is unclear whether this 'peace' will last. The recognition of the Republic of Cyprus might become a critical test of this relationship.

Regarding the stability of Turkish democracy, fears of a military coup under the guise of safeguarding secularism remain, but this is no longer an imminent danger.¹⁶⁶ Another critical issue is the case law of the Turkish Constitutional Court prohibiting certain political parties (Art. 69 of the Turkish Constitution). Among others, the Welfare Party of former Prime Minister Erbakan was dissolved.¹⁶⁷ Corruption and political instability at governmental level determined the political scene in Turkey for decades.¹⁶⁸ Despite major improvements, the democratic standards in Turkey therefore still have to improve.

The rule of law should also be secured more thoroughly. Article 2 of the Turkish Constitution prominently states the country's commitment to the rule of law. In general terms, the rule of law comprises the components of freedom, legal certainty and material justice, as well as the principle that all public authorities are bound by law.¹⁶⁹ The rule of law is therefore intrinsically linked, first of all, to respect for fundamental rights and a democratic political system. As mentioned

¹⁶⁵ European Commission, *op. cit.* n. 59, at p. 14.

¹⁶⁶ See Kramer, *loc. cit.* 147, at p. 21.

¹⁶⁷ See ECHR, *Refah Partisi and others v. Turkey*, judgments of 31 July 2001 (Chamber) and 3 February 2003 (Grand Chamber), available at: <<http://hudoc.echr.coe.int>> (last visited 4 July 2006), in particular the joint dissenting opinion of Judges Fuhrmann, Loucaides and Bratza and the separate opinions of Judges Ress and Kovler; ECHR, *Socialist Party of Turkey (STP) and Others v. Turkey*, judgment of 12 November 2003; ECHR, *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v. Turkey*, judgment of 9 April 2002. See also 'Hof Turkije verbiedt Welzijnspartij' [Turkish Court of Appeal bans Welfare Party], *De Volkskrant*, 17 January 1998, p. 1.

¹⁶⁸ T. Seibert, 'Folz zwischen Staat und Mafia in der Türkei', *Der Tagesspiegel*, 21 January 1998, p. 6; see also Kramer, *loc. cit.* n. 147, at p. 20 et seq.

¹⁶⁹ The concept of the rule of law differs considerably between legal systems. On German constitutional law, see Bundesverfassungsgericht, *BVerfGE* 7, pp. 92-93. A. Dicey, *Introduction to the Study of the Law of the Constitution* (London, MacMillan 1881, reprint 1961) p. 200 et seq. (and with him most of the English legal tradition) defines the rule of law as 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [...] equality before the law [and formal or procedural justice].'

above, the fulfilment of these criteria is partly questionable. Until now, the situation has only improved slightly, despite constitutional changes in 1995 and especially since 2001.¹⁷⁰ A number of changes have been made to acts of parliament, but administrative and judicial implementation and interpretation still have to follow.¹⁷¹ In addition, the rule of law encompasses the principle of separation of powers, the need for a legal basis for all state action that interferes with the fundamental rights and freedoms of citizens as well as effective remedies before impartial judges. The separation of powers is guaranteed by Article 7 et seq. of the Turkish Constitution. However, the position of the National Security Council remains a potential danger despite recent constitutional amendments.¹⁷² In fact, the 'recommendations' issued by the National Security Council still have a considerable political impact.¹⁷³

The right to an impartial judge is not entirely secured either. Following judgments of the European Court of Human Rights¹⁷⁴ and pressure from the European Union, the State Security Courts were finally abolished by means of an amendment of the Constitution in 2004.¹⁷⁵ As regards Article 6(1) ECHR, however, a considerable share of Turkish criminal proceedings, especially those before Military Courts (Art. 145 of the Turkish Constitution), still does not fully live up to European human rights standards.¹⁷⁶ Moreover, the impartiality of judges is undermined by the constant danger of being disciplined (i.e., sent to another court, especially in the south-east of the country). This is done by means of a

¹⁷⁰ M. Charriot, 'La Turquie: un difficile partenaire pour l'Union Européenne', *RMCU* (1995) p. 432 et seq.; see Kramer, loc. cit. n. 147, at p. 23 et seq.; *contra* Tanlak, loc. cit. n. 104, at p. 14, who believes that Turkey is already in accordance with the Copenhagen criteria.

¹⁷¹ E. Öricü, 'The Turkish Constitution Revamped?', 8 *EPL* (2002) p. 217. See H.-H. Kühne, 'Der Rechtsstaat und seine Implementierung in der modernen Türkei am Beispiel des Bankgesetzes', 16 *EuZW* (2005) p. 75 et seq., who questions the conformity of the newly introduced Bank Act with rule of law standards.

¹⁷² Art. 118(3) of the Turkish Constitutions reads: 'The National Security Council shall submit to the Council of Ministers its views on the advisory decisions that are taken and ensuring necessary coordination with regard to the formulation, establishment, and implementation of the national security policy of the State. The Council of Ministers shall evaluate decisions of the National Security Council concerning the measures that it deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country and the peace and security of society.'

¹⁷³ See Kramer, loc. cit. n. 147, at p. 21; S. Kardas, 'Human Rights and Democracy Promotion: the Case of Turkey-EU Relations', 1 *Alternatives: Turkish Journal of International Relations* (2002) p. 144. On the general perception of the Army as a guarantor of political stability, see Schönbohm, loc. cit. n. 121, at p. 17 et seq.

¹⁷⁴ ECHR, *Incal v. Turkey*, judgment of 9 June 1998, available at: <<http://hudoc.echr.coe.int>> (last visited 4 July 2006).

¹⁷⁵ Act No. 5170 of 7 May 2004, *Turkish Official Journal* of 22 May 2004, No. 25469.

¹⁷⁶ Amnesty International, op. cit. n. 124. See R. Kolb, 'The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters, Addenda 1999-2000', 22 *HRLJ* (2001) pp. 351, 356 and 361; Kramer, loc. cit. n. 147, at p. 25.

decision of the Supreme Council of Judges and Public Prosecutors, which is presided over by the Minister of Justice and against which no appeal is available (Art. 159 of the Turkish Constitution). This mechanism has a considerable influence on the administration of justice.

4.1.2.3 A functioning market economy

The issue of a functioning market economy could be another obstacle to accession. Although Turkey has made considerable efforts to establish a more stable economy,¹⁷⁷ there is still a gap between the European Union and Turkey. The Turkish economy is on a level equivalent to that of Bulgaria or Romania.¹⁷⁸ In order to be able to cope with competition in the common market, Turkey will have to undergo further substantial reforms. However, an in-depth examination of this issue should be left to economic analysis.

4.1.2.4 Ability and will to accept the duties arising from membership

The criterion concerning the 'ability and will to accept the duties arising from membership' comprises adherence to the aims of political, economic and monetary union as well as the acceptance of the *acquis communautaire*. The assessment of these criteria is of a political nature. In substance, however, the implementation of the *acquis* deals with the entire legal corpus of EU law. Turkey has made substantial progress in many fields of Community law. In general, however, this progress can only serve as a basis for future efforts. In virtually all areas of the *acquis*, numerous laws and regulations still have to be enacted or amended.¹⁷⁹ Turkey's progress is hampered by the fact that newly enacted laws sometimes even move away from the *acquis*. Moreover, much remains to be done on the administrative level and with regard to implementation in general. Finally, not only should the discrimination against Cyprus be ended but equal treatment of Turkish and EU citizens, goods and services should also be achieved in general.

¹⁷⁷ European Commission, op. cit. n. 59, at p. 43 et seq. See Quaisser and Reppegather, op. cit. 63, at p. 10 et seq. On developments since the mid-1990s, see Akagül, loc. cit. n. 121, at p. 363 et seq.; B. Yılmaz, 'Wirtschaftskrise in der Türkei', 1 *Internationale Politik* (1998) p. 35; F. Şen, 'Die Türkei zu Beginn der EU-Beitrittspartnerschaft', 13-14 *APuZ* (2001) p. 31 et seq. On the situation in 1989, see J. van Ginderachter, 'L'élargissement de la Communauté: le cas de la Turquie', *RMC* (1989) p. 587 et seq.; J. Bourrinet, 'La CEE confrontée à la demande d'adhésion de la Turquie', *RMC* (1989) p. 78 et seq.

¹⁷⁸ See K. Hughes, 'Turkey and the European Union: Just Another Enlargement?' Friends of Europe Working Paper (June 2004) p. 8 et seq.; Eurostat, Structural indicators of candidate countries in 2000, available at: <<http://europa.eu.int/comm/enlargement/turkey/pdf/indicators.pdf>> (last visited 4 July 2006).

¹⁷⁹ European Commission, op. cit. n. 59, at p. 134 et seq.

However, one major aspect of the ability to accept the *acquis* cannot be fulfilled as long as the transfer of sovereign rights to any international or supranational institution is constitutionally impossible.¹⁸⁰ The preamble of the Turkish Constitution clearly states that ‘sovereignty is vested fully and unconditionally in the Turkish nation.’¹⁸¹ Consequently, Article 6 of the Turkish Constitution only allows for the exercise of sovereign rights by the organs of the state. The delegation of sovereign rights is explicitly forbidden.¹⁸² Articles 7-9 of the Turkish Constitution elaborate on this in relation to legislative, executive and judicial power. An amendment of these provisions is indispensable for accession to the Union.¹⁸³

Apart from this constitutional obstacle, the will to integrate Turkey into a supranational union, which entails a considerable loss of power at national level, still seems to require an enormous change in Turkish political thinking.¹⁸⁴ Although the Turkish political and economic elite strongly supports accession to the European Union, the general attitude towards European integration within these circles is not very integrationist. It seems that the implications of EU membership on the entire national constitutional system¹⁸⁵ have not yet been internalised.¹⁸⁶ The European Union has become a sophisticated political entity with a legal system that is not just limited to economic issues. Although the European Union is not a state, it exercises many of the traditional functions of a state. Since this complex system requires a strong political will to integrate, the (future) largest

¹⁸⁰ Başlar and İshakoğlu, loc. cit. n. 127, at pp. 200-201. See also M. Soysal, ‘Introduction to the Constitutional Problems of the Accession of Turkey’, in A.E. Kellermann, et al., eds., *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague, T.M.C. Asser Press 2001) p. 259 et seq. See also the remarks by Özücü, loc. cit. n. 58, at p. 218.

¹⁸¹ Third recital of the Preamble of the Turkish Constitution: ‘[The Constitution embodies...] the understanding of the absolute supremacy of the will of the nation and of the fact that sovereignty is vested fully and unconditionally in the Turkish nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from liberal democracy and the legal system instituted according to its requirements.’

¹⁸² Art. 6 of the Turkish Constitution: ‘(1) Sovereignty is vested fully and unconditionally in the Nation. (2) The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution. (3) The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution.’

¹⁸³ Başlar and İshakoğlu, loc. cit. n. 127, at 201; Soysal, loc. cit. n. 180, at p. 261.

¹⁸⁴ See A. Savaş Akat, ‘Türkei spielt europäische Karte aus’, *Süddeutsche Zeitung* (14 January 2003) p. 2; Şen, loc. cit. n. 177, at p. 29; Özücü, loc. cit. n. 58, at p. 535.

¹⁸⁵ On these implications, see I. Pernice, ‘Multilevel Constitutionalism in the European Union’, *27 ELR* (2002) p. 511 et seq.

¹⁸⁶ See M. Yılmaz (former Turkish Prime Minister), ‘Die Türkei und die Europäische Union’, speech within the *Forum Constitutionis Europae*, available at: <<http://www.whi-berlin.de/yilmaz.htm>> (last visited 4 July 2006), who seems to perceive the European Union mainly as a coordination of foreign policies.

Member State, in particular, has a duty to keep the European Union on the path of political integration. National interests are to be incorporated into the pursuit of the common welfare. The European Union should not attach little value to its achievements and it should beware of becoming a mere ‘customs union *plus*’.

4.1.2.5 Ability of the Union to absorb new members

The assessment whether the Union is able to absorb Turkey as a new Member State is basically of a political and economic nature. This especially holds true for the proposed costs of accession. A detailed analysis of the implications on the Common Agricultural Policy, the regional and structural policy and the EU budget cannot be made here.¹⁸⁷ Calculations on the financial impact of transfer payments vary from €10 billion to more than €30 billion per year.¹⁸⁸ However, some legal caveats regarding European constitutional law can be addressed.

The Union declared itself ready for the accession of new Member States by concluding the Nice Treaty.¹⁸⁹ In fact, this goal was only partially reached.¹⁹⁰ The Convention on the Future of Europe¹⁹¹ again tried to establish a solid basis for the future European Union. At that time the 2004 enlargement took place. A widely accepted aim of the entire constitutional process was and remains to preserve the supranational, integrationist character of the Union. This aim will be the basis for a future European Union based on a European Constitution. Naturally, a European Union composed of twenty-five states is already very different from the initial Community of six. However, the accession of Turkey will confront the EU framework with even greater institutional challenges.

Just the size of Turkey will be a problem for the European constitutional system. At present, Turkey has a population of almost 70 million citizens, which will rise to almost 80 million shortly after 2010 and consolidate at close to 100 million by 2035.¹⁹² Following the 2004 enlargement, the European Union has approximately 450 million inhabitants, and it will have some 480 million citizens after the accession of the twenty-seventh Member State. Turkey will become the largest

¹⁸⁷ On these issues, see, for example, European Commission, op. cit. n. 59; Quaisser and Reppe-gather, op. cit. n. 63, at p. 55 et seq.; W. Quaisser and S. Wood, ‘EU Member Turkey?’, 25 *Forost Arbeitspapier* (October 2004) p. 44 et seq.

¹⁸⁸ See Quaisser and Wood, op. cit. n. 187, at p. 46 et seq.

¹⁸⁹ Nice Intergovernmental Conference, Declaration No. 23, para. 2, *OJ* 2001 C 80/85.

¹⁹⁰ See the critique by P. Pescatore, ‘Nice – Aftermath’, 38 *CMLRev.* (2001) p. 265 et seq.

¹⁹¹ The official homepage of the Convention can be found at: <<http://european-convention.eu.int>>. Turkey took part in the Convention like the other candidate countries. The Turkish Government was subsequently represented by M. Yilmaz, Y. Yakiş and A. Gül. Z. Akcam and K. Derviş represented the Turkish Grand National Assembly. Until December 2002, this task was performed by A. Tekin and A. Yilmaz.

¹⁹² See *Turkey’s Window of Opportunity* (Istanbul, TÜSIAD 1999) p. 34.

Member State at the time of its accession or shortly afterwards, as well as one of the poorest. On the other hand, Turkey will become the most influential Member State in the European Union simply because of its size, that is to say, the number of Turkish MEPs and Turkey's weight in the Council will be the greatest of all Member States. As regards the European Parliament, this is not likely to create extensive problems, since Turkish MEPs will probably integrate into the existing European political structures with relative ease, much like a Turkish Commissioner would also do within the Commission. To be precise, the problem lies in the Council. Since the Council is much more likely to be influenced by national interests than the European Parliament, Turkey could block decision making in the European Union more easily than any other Member State, even if it could not veto legislation on its own.¹⁹³ Moreover, disparities between the members of the Council might rise if Turkey does not take huge steps forward on the political and economic plane.

4.2 Conclusion

To sum up, Turkey still has to undergo enormous changes before accession, but the European Union also faces challenges. The European Neighbourhood Policy and the Common Foreign and Security Policy will have to deal with new neighbours like Georgia, Armenia, Syria, Iran and Iraq. Above all, however, the entire political balance in the European Union, which was more or less achieved in Nice and has now been reshaped by the European Constitution, might be altered considerably again. The accession of Turkey is mostly discussed in terms of religion or culture, whereas the debate on the institutional implications is not conducted as intensely.¹⁹⁴ If the ambitious goal of political integration is not supported by Turkey, the degeneration of the European Union into an expanded customs union is almost certain. Although closer cooperation between those Member States that are willing to proceed on the path of political integration is a possible way out,¹⁹⁵ it is not desirable to aim for this from the beginning. The EU institutions should therefore take a close look at the conditions for accession.

¹⁹³ This is underlined, in particular, by the weighting of votes according to the size of the population, as provided for in Art. I-25 TCE. Art. 205(4) TEC already requires the concurring votes of Member States representing at least 62 per cent of the EU population. This is overlooked by G. Avci, 'Putting the Turkish EU Candidacy into Context', 7 *EFA Rev.* (2002) p. 104.

¹⁹⁴ But see Giscard d'Estaing (2004), loc. cit. n. 122.

¹⁹⁵ See only the 'centre of gravitation' proposed by J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', speech within the *Forum Constitutionis Europae*, available at: <<http://www.whi-berlin.de/fischerengl.htm>> (last visited 4 July 2006).

5. OUTLOOK

To a certain extent, the 2004 enlargement paved the way for Turkish membership despite the unresolved Cyprus problem. However, the new negotiation strategy adopted by the Council will result in a very different approach to accession talks. This time around, the European Union will look much deeper into the actual implementation of the *acquis*. It should therefore be welcomed that the Commission has proposed strong support for the reform process in Turkey and fostered a political and cultural dialogue between the current Member States and Turkey.¹⁹⁶

However, some problems are not likely to be solved during the accession talks. This has led the Commission to propose long transition periods or even – in the case of the free movement of workers – permanent safeguard clauses. Although this approach seems to be reasonable from the point of view of some Member States, it is questionable as a permanent solution for a constitutional system like that of the European Union.¹⁹⁷ Another argument put forward in favour of Turkey's membership is that the integration of Turkey into the EU system could secure stability and peace in the region.¹⁹⁸ It is doubtful that Turkey will be capable of bringing stability to its neighbouring countries or building a bridge to the Arab world, especially since the rule of the Ottoman Empire over large parts of the region has not been forgotten by these countries. The predominant attitude of Turkey's neighbours towards Turkish ambitions in the region is rather reluctant.¹⁹⁹

Turkey's path towards accession will be a long and winding road.²⁰⁰ Negotiations with the CEECs took four and a half years; talks with Turkey will undoubtedly last much longer.

¹⁹⁶ European Commission, *op. cit.* n. 32, at p. 2 et seq.

¹⁹⁷ See U. Becker, 'EU-Enlargements and Limits to Amendments of the EC Treaty', 15 *Jean Monnet Working Paper* (2001), available at: <<http://www.jeanmonnetprogram.org>> (last visited 4 July 2006) p. 11 et seq.; A. Bodnar, 'Transitional Periods for Employment – "Second Class" EU Citizenship?', in O. Zetterquist, ed., *Law and Modernity* (Cracow, Polpress 2004) p. 138 et seq.; C. Hillion, 'The European Union is dead. Long live the European Union...', 29 *ELR* (2004) p. 583 at p. 593 et seq. For a more optimistic view, see D. Thym, *Ungleichzeitigkeit im Europäischen Verfassungsrecht* (Baden-Baden, Nomos 2002) p. 341 et seq.

¹⁹⁸ G. Verheugen, 'For a more Inclusive Union', *Private View – Quarterly Int'l Review of the Turkish Industrialists' and Businessmen's Association* (Spring 2000) p. 45, also available at: <<http://www.tusiad.org/yayin/private/spring00/union.pdf>> (last visited 4 July 2006); Independent Commission on Turkey, *op. cit.* 108, at p. 17 et seq. For a more balanced view, see H. Kramer, 'EU-kompatibel oder nicht?', *SWP-Studie* 34/2003 (Berlin 2003) p. 20 et seq./28 et seq.

¹⁹⁹ See G. Höhler, 'Ankaras Verhältnis zu den Nachbarn – eine Geschichte von Konflikten', *Handelsblatt*, 13 December 2004, p. 6.

²⁰⁰ Not only do the Member States' Parliaments have a veto on each Act of Accession, but referenda will also be held in some Member States on the possible accession of Turkey and before any of the changes of the European Constitution can enter into force. Moreover, the European Parliament will have a close look at the situation in Turkey, as it did throughout recent decades. See, for example, the Eurlings Report on the 2004 Regular Report on Turkey, adopted by the European Parliament on 15 December 2004, Doc. No. A6-0063/2004.

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