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INTERNATIONAL COURTS, UNRECOGNISED ENTITIES AND INDIVIDUALS: COHERENCE THROUGH JUDICIAL DIALOGUE?

Abstract: *The article offers a revisited look at the classic jurisprudence of the ECtHR and CJEU concerning the Turkish Republic of Northern Cyprus from the perspective of the phenomenon of judicial dialogue. In this context, it aims to examine whether judicial dialogue contributes to the development of coherent jurisprudence and in consequence of effective judicial redress in cases involving unrecognised entities and individuals. It draws attention to the threats for both the international rule of law and the protection of rights of individuals resulting from inconsistencies within own jurisprudence of the respective court, as well as from lack of coherence in interpretation and application of the same rules of international law by different courts.*

Keywords: international courts, judicial dialogue, judicial protection, judicial redress, non-recognition, recognition, unrecognised entities, Turkish Republic of Northern Cyprus

INTRODUCTION

Although the legal status of unrecognised entities is disputable under international law,[1] there are some ways in which they may become subjects of interest of international jurisprudence. The existing case law makes it possible to distinguish two types of

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[1] Thus I prefer to use the term "unrecognised entities" to "unrecognised subjects"; for the purposes of the present study it refers to territorial entities claiming statehood (or at least a certain degree of autonomy), including cases of secession or international administration, or to actors (such as e.g. insurgents, self-determination movements) exercising control over a territory of a state (part of it) claiming the status of the legitimate government – *see* E. Milano *Recognition (and Non-recognition) of Non-state Actors*, in: W. Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, p. 11. In the broader sense it also may denote cases of "relative non-recognition", which are mentioned here, but not examined *in extenso*.

situations involving unrecognised entities which fall into the sphere of competence of international courts.

The first one – actually less common – may be characterised as a "direct involvement", i.e. when an unrecognised entity becomes either a direct and primary object of the court's consideration or a direct subject of the court's proceedings, as a party thereto. Some significant examples of the former are found within the advisory jurisdiction of the International Court of Justice (ICJ), like the *Western Sahara* opinion and the *Kosovo* opinion.[2] The latter situation is even more uncommon, as the jurisdiction *ratione personae* of permanent international judicial bodies hardly encompasses entities of such questionable status.[3] In this respect the *Front Polisario* dispute before the Court of Justice of the European Union (CJEU), which includes rulings from both the General Court and the Court of Justice, constitutes a rare example.[4] A splinter within this category includes cases where we are dealing with a relative problem of non-recognition, which occurs where the generally recognised states-parties to the dispute do not recognise each other, or one of them is not recognised by the other (as in the ICJ *Genocide* or *Interim agreement application* cases),[5] or because of a change of configuration of the parties to an existing dispute as result of dissolution of a primary state-party (as in *Legality of the Use of Force* – Yugoslavia dissolved into Serbia and Montenegro).[6]

The other type of situations involving unrecognised entities, described as "indirect involvement" is more common and a lot more multifaceted. The first group of examples comprises cases where a court scrutinises a circumstance concerning a state (usually the administration by an occupying power) or a conduct thereof having impact on the unrecognised entity's affairs. The issues regarding the unrecognised entity may thus constitute the subject matter of the case before the international court, but the case itself is induced by an external factor – a third state. Examples of this type may be found

[2] ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Rep 1975; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep 2010. Although the applications for advisory opinions were brought by the UN General Assembly, it was not the competences of the General Assembly which were at stake as the subject matter of the proceedings, but the status of the unrecognised entity. Thus I qualify these as examples of "direct involvement", while admitting that a clear distinction between "direct" and "indirect" may sometimes be difficult.

[3] CJEU within the procedure of Art. 230 of the Treaty on the functioning of the European Union (TFEU) procedure, European Court of Human Rights (ECtHR) within the individual complaint procedure under Art. 34 of the European Convention on Human Rights (ECHR), when an unrecognised entity fulfils the provided conditions.

[4] Case T-512/12 *Front Polisario v. Council* (GC), ECLI:EU:T:2015:953; Case C-104/16P *Council v. Front Polisario*, ECLI:EU:C:2016:973. Meanwhile there are a few more cases involving Front Polisario pending before CJEU.

[5] ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Rep 2011; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Judgment, 11 July 1996, ICJ Rep 1996; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007.

[6] ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Rep 2004.

within the ICJ jurisprudence in the series of *South West Africa* judgments and opinions, the *Wall* opinion, or the *East Timor* judgment.[7]

Another instance includes cases where a dispute arises between a state whose territory becomes a plane for activity of an unrecognised entity which claims its alleged right to self-determination (from the parent state) and is supported by another state (the sponsoring state), which in fact usually induces or even organises the activity of the entity. The reasons of the sponsoring state may be diverse; sometimes they are based on ethnic bounds with the minority population organised within the unrecognised entity, and sometimes they disguise its own aspirations of territorial expansion or political domination over the neighbouring state or region. Examples of this kind are found in the ICJ jurisprudence (*Bosnia and Hercegovina against Serbia*, *Georgia against Russia*, and the pending case of *Ukraine against Russia*)[8] and the case law of the ECtHR interestingly also involves the same states in some instances.[9]

The next group of cases is typical for international adjudicatory regimes which provide access for individuals.[10] When the activities of an unrecognised entity impact on the subjective rights of an individual, protected under a given international regime, this individual may seek recourse to justice on the international level. A common characteristic of these cases is that the individual claims are not brought against the unrecognised entity concerned (which has no *locus standi* before the court), but against its parent state or administering/occupying/sponsoring state (or both)[11] or a state or international organisation which recognizes and accepts the activities of the entity (which does not automatically entail the recognition of the entity itself).[12] Furthermore, the effects of

[7] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004; *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995.

[8] ICJ, *Genocide convention* case; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ICJ Rep 2011; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* – pending.

[9] Series of claims from Georgia against Russia, Ukraine against Russia, and Cyprus against Turkey.

[10] Notably the ECHR and the EU regimes. Such access is provided by means of direct complaint or indirectly, via the preliminary ruling procedure involving national courts before the CJEU.

[11] Examples typical for the ECtHR practice with cases concerning TRNC/Turkey/Cyprus, Transnistria/Russia/Moldova, Abkhazia and Ossetia/Russia/Georgia, Crimea and Donbas/Russia/Ukraine. For an exhaustive analysis, *see* S. Zaręba *Specyfika odpowiedzialności za naruszenia Europejskiej Konwencji Praw Człowieka związane z działalnością nieuznawanych reżimów – analiza orzecznictwa* [The specific nature of responsibility for violations of the European Convention on Human Rights related to activities of urecognized regimes – an analysis of judicial decisions], 3 Studia Prawnicze 27 (2016); S. Zaręba, *Responsibility for Acts of Unrecognised States and Regimes*, in: W Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, pp. 159-193.

[12] Examples typical for the CJEU practice, with cases concerning e.g. certificates of origin issued for goods originating form occupied territories in Cyprus, Palestine, Crimea, EU sanctions, and measures of cooperation concerning the territories under dispute.

the entity's conduct may influence relations between individuals, which in specific circumstances may lead to a court dispute and by means of special proceedings (such as, e.g., a preliminary ruling before the CJEU) may become subject of consideration for an international judicial body.[13]

This short digest shows how numerous and diverse are the possibilities of bringing a case with an unrecognised-entity-element to the cognition of international courts. In this way the courts obtain opportunities to argue and rule on various aspects of recognition/non-recognition and on the status of unrecognised entities. Due to the proliferation of international dispute settlement institutions and the diversification in the scope of their respective jurisdictions, the same facts or events may actually fall within the competence (and interest) of more than one court. Thus there is certain risk that the courts might take different views on corresponding problems or issue contradictory decisions even in cases based on the same subject matter.

Such potential hazards may be minimised when the courts pay due regard not only to their own case law (which is natural), but also to the jurisprudence of other international judicial bodies. In this way they enter into a form of judicial dialogue in a practical dimension, as it is connected with the exercise of their adjudicative function and the administration of international justice. But they also build up a body of case law which serves as the basis for development of theoretical concepts and legal principles with respect to recognition/non-recognition issues.

The present paper aims to examine whether judicial dialogue serves the development of coherent jurisprudence in cases involving unrecognised entities and individuals. For this purpose the phenomenon of judicial dialogue is defined broadly, as a practice of using any kind of cross-references to the reasoning and interpretation of law conducted by other courts and judges.[14] The selected case-studies focus on the Turkish Republic of Northern Cyprus (TRNC) for two reasons. Firstly, the TRNC is probably the most comprehensively elaborated exemplification of non-recognition in the practice of international courts. This is so because of the involvement of its parent and sponsoring states – Cyprus and Turkey respectively – in the legal regimes of the ECHR (as state-parties to the Convention) and the European Union (Cyprus as a member state[15] and Turkey as an associated country, maintaining a net of economic and political bounds with the EU). Therefore the situations related to the TRNC may fall within the respective competences of the ECtHR or the CJEU. Secondly, due to the special characteristics of their jurisdictions *ratione personae* and *ratione materiae*, both Courts have the opportunity – from time to time – to consider cases concerning the impact of various practical and legal aspects of non-recognition of the TRNC on the situation of individuals.

[13] C-420/07 *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*, ECLI:EU:C:2009:271.

[14] The same approach is adopted by authors of A. Wyrozumska (ed.), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 2017, p. 11.

[15] Before its accession to EU the character of Cyprus' involvement – as both an associated and candidate state – was similar to that of Turkey.

Another factor that determines the approach of the ECtHR and CJEU to issues concerning the TRNC is the fact that there is no controversy within the international community as to the non-recognition of the TRNC as a sovereign state (except for its "sponsor state" Turkey of course). Thus, the Courts, relying on this "common non-recognition", do not engage themselves with an examination whether the TRNC is a state or not. They just take it for granted and focus on the particular legal consequences of such non-recognition, depending on the circumstances and legal problems and issues in a given case.[16]

1. THE "*NAMIBIA* EXCEPTION" IN THE JURISPRUDENCE OF THE ECTHR ON THE TRNC

It is not uncommon in international law that an innocent passage in the *obiter dicta* of international court's ruling becomes a seed for serious legal concepts and theories – the *erga omnes* paragraph in the ICJ's *Barcelona Traction* judgment being probably the most widely known example.[17]

Regarding the topic of recognition/non-recognition such a quality may be attributed to paragraph 125 of the *Namibia* advisory opinion. The ICJ confirmed the rule: the general duty of the UN member states not to recognise as lawful the South African continued presence in Namibian territory, which resulted in the illegality and/or invalidity of the acts of its administration performed with respect to Namibia.[18] However, the Court also provided – under the very paragraph 125 – an exception to this rule, allowing for the recognition of acts which effects could not be ignored for the sake of individuals, such as e.g. registrations of births, deaths and marriages.[19] This concept – soon called by the doctrine "the *Namibia* exception" – drew attention to what was until then rather neglected aspect of the functioning of unrecognised entities on the international plane, the situation of individuals under such unrecognised governance. Previously the

[16] I do not share the view of E. Milano that in this way the ECtHR adopts a "constitutive approach to recognition" – *see* E. Milano, *Unlawful Territorial Situations in International Law*, Martinus Nijhof, Leiden: 2006, pp. 143 ff. It is much more a practical approach of "procedural economy": not to engage into superfluous argumentation to prove something that is merely an established fact. Such a "common non-recognition" of a territorial entity by all states but one (which is not very frequent in the international community) is as a rule based on sound (and not just political) grounds.

[17] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34.

[18] *Namibia (South-West Africa)*, para. 119.

[19] *Ibidem*, para. 125: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory." *See also* Milano, *supra* note 16, pp. 137 ff.

focus was on the consequences of non-recognition on the somewhat abstract level of relations between states and other subjects (entities) of international law. By its "*Namibia* exception" the ICJ raised awareness of the real-life problems that individuals had to deal with in the context of the non-recognition of the regime controlling, administrating, or governing them. Thus it has become a point of reference for any judicial or academic reflection on the status, rights and duties of individuals within an unrecognised entity. The ECtHR jurisprudence concerning the TRNC is no exception in this respect.

The case of *Loizidou v. Turkey* is one of the best known and most commented-on cases within the jurisprudence of the ECtHR on the topic.[20] As its first ruling concerning the TRNC, this judgment turned out to be particularly relevant for the development by the Court of some concepts which strongly influenced the interpretation and application of the European Convention on Human Rights, such as effect of declarations of the state-parties, issues of "continuing violations", the determination of its jurisdiction *ratione temporis*, or extraterritorial aspects of state's jurisdiction within the meaning of Art. 1, including the adoption of the criterion of "effective control" for assessment of the possibility to establish the responsibility of a state-party with regard to situations occurring outside the territory of the state concerned.[21] However, from the perspective of general international law it constitutes a vital contribution to judicial deliberations on the consequences of non-recognition for the status of individuals.

For reasons of clarity it seems appropriate to briefly recall the basic facts.[22] The applicant, Mrs. Titina Loizidou, a Cypriot national, lost access to her property located in the northern part of the island and the possibility to exercise her property rights as a result of Turkey's military intervention in 1973 and subsequent occupation. After the proclamation of the TRNC, on the basis of Art. 159 of the TRNC "constitution" (of 1985) the property of Mrs. Loizidou was considered abandoned and taken over by the TRNC. These circumstances constituted the basis for the application to the ECtHR against Turkey.

Turkey's main argument against the ECtHR's jurisdiction in *Loizidou* concerned the impossibility of attribution to Turkey of conduct of the TRNC authorities – as organs of another sovereign state. In its submissions in the preliminary objections proceedings, the Turkish government argued even that it should not have been regarded as a party to this case, but it could only take a position of *amicus curiae*, representing the interests of the TRNC government, which – for obvious reasons – could not take part in the proceedings.[23] The Court, however, simply and shortly replied that it was not for the defendant state to characterize its standing in the proceedings. Since the application was

[20] ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (App. No. 15318/892), 5 March 1995; *Loizidou v. Turkey (Merits)* (App. No. 15318/892), 18 December 1996.

[21] *See Loizidou (Preliminary Objections)*, paras. 60 ff., 67 ff., *Loizidou (Merits)*, paras. 39 ff, 52 ff.

[22] I present the circumstances and argumentation in *Loizidou* more extensively as a "template" TRNC case; while discussing subsequent cases we shall refer thereto.

[23] *Loizidou (Preliminary Objections)*, para. 47.

only duly submitted against Turkey, as the High Contracting Party to the Convention, Turkey became the party to the proceedings.[24]

The Turkish government further developed its argument by stressing that the problem of deprivation of access to the applicant's property and her expropriation (which constituted the alleged violations of Art. 1 of the Protocol No. 1 to ECHR) could not at all be regarded as falling within Turkish jurisdiction within the meaning of Art. 1 ECHR. It maintained that the Turkish Republic of Northern Cyprus was a sovereign, democratic, constitutional state, where free elections were held and citizens' rights guaranteed.[25] Public authority was exercised by constitutional organs of the TRNC, conduct of which was not imputable to Turkey. The mere presence of Turkish military forces in the territory of Northern Cyprus could not lead to the conclusion that it was under Turkish jurisdiction. The control over these forces was supposed to be exercised jointly by Turkey and TRNC authorities, so Turkish soldiers were to be regarded as acting there on behalf of the TRNC, which itself did not possess sufficient armed forces (sic!).[26] At the same time, according to Turkey the lack of recognition of the statehood of the TRNC by the international community was irrelevant for the assessment of the attribution question.

It seems to follow from such a standpoint that Turkey had only placed a part of its Army at the disposal of an allied state, whose own military was not strong and numerous enough to enable its authorities to effectively exercise their sovereign powers. Paradoxically, such argumentation undermines the thesis of the statehood of the TRNC, because it rises serious doubts exactly as to the effectiveness of this entity as a sovereign state.

The applicant and the Cypriot government (supporting her) expressed an opposite view. According to their position, the non-recognition of the TRNC constituted a key factor. They argued that a state was, as a rule, accountable for violations occurring in territory over which it has physical control.[27] Of course, in the first place this refers to its own territory. But it also applies in case of administration by a state of a territory with no regular status, in particular to an instance where such administration, while remaining under that state's control, is exercised by local organs. It does not matter whether such local administration is functioning in accordance with international law (as in protectorates or dependent territories) or whether its creation is an effect of an illegal situation – e.g. an illegal use of force, as in case of Turkey and the "puppet" local authorities established by it or with its support in the occupied territory of Cyprus. Otherwise, a state would be able to avoid responsibility for a military invasion, occupation and further consequences thereof by creating an apparently independent local administration. In the light of international law this is neither acceptable nor possible. The "common non-recognition" of the TRNC by the international community means that it remains only some territorial entity without a separate international personality, and continues to exist only because of military and economic support from Turkey.

[24] *Ibidem*, paras. 51-52.
[25] *Loizidou (Preliminary Objections)*, para. 56; *Loizidou (Merits)* paras. 35 and 51.
[26] *Loizidou (Preliminary Objections)*, para. 56.
[27] *Ibidem*, para. 57; *Loizidou (Merits)*, para. 49.

Therefore, Turkey is the sole subject to whom violations occurring in the northern part of Cyprus may be attributed.

The ECtHR barely referred to these arguments of the parties in its first judgment on preliminary objections. It replied only to allegations concerning the lack of Turkey's jurisdiction over the area of northern Cyprus, by confirming the state-party's obligation to ensure the observance of the rights protected by the ECHR, including when this state, by use of force (no matter whether contrary or not to international law) takes effective control over an area beyond its territory. Moreover, it was irrelevant for the purpose of determining the admissibility of the case whether such control was exercised by the state's own organs, including its military forces, or by locally-established organs.[28] Thus the situation of the applicant potentially fell within the scope of Art. 1 ECHR. The Court, however, found that the detailed arguments of the parties regarding the problems of imputation needed to be examined while ruling on the merits.

In the judgment on the merits, the ECtHR returned to these questions and focused on the assessment of the possibility of attribution of the alleged violations to Turkey in light of the established facts.[29] While it may seem that the Court only slightly expanded its earlier arguments, if however we look at the Court's reasoning through the prism of classical rules of attribution in international responsibility (as expressed in the International Law Commission's *Draft articles on Responsibility of States for Internationally Wrongful Acts*),[30] some interesting conclusions may be drawn. The ECtHR reiterated that state responsibility for violations of the Convention might arise in connection with situations occurring outside the state's territory in an area over which it had overall effective control, irrespective of whether the state exercised such control through its own organs (including military forces) or through a subordinated local administration.[31] Thus the Court, in examining whether the violations of Mrs. Loizidou's rights could be attributed to Turkey, found that Turkey's control over the northern part of Cyprus could be established just on the basis of the mere presence of such a large number of Turkish troops and their engagement in the current administration of the area.[32] It was not necessary to prove that Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC; it sufficed that without such military support the functioning of the TRNC would not be possible.

The ECtHR noted that the international community consistently refused to recognize, in conformity with international law, the Turkish Republic of Northern Cyprus as a state, concluding that the government of the Republic of Cyprus is the only legal authority on the island representing the state as a whole.[33] Although the Court did

[28] *Loizidou (Preliminary Objections)*, para. 62.

[29] *Loizidou (Merits)*, paras. 52-57.

[30] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC Report 53rd Session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (U.N. Doc. A/56/10), pp. 43-365 (text with commentaries).

[31] *Loizidou (Merits)*, para. 52.

[32] *Ibidem*, para. 56.

[33] *Ibidem*, para. 56; *see also* paras. 42-44.

not develop this reasoning further and neither referred expressly to the principles of international responsibility nor the ILC's draft, it reached the conclusion that the "common non-recognition" of the TRNC results in non-application and prevents the application of norms of international law binding on states to the TRNC. Consequently, this regards also the norms on international responsibility, including the principles of attribution of conduct. Therefore the non-recognition of the TRNC results – in the context of *Loizidou* case – in the impossibility of attribution to it of any conduct on the international plane. Accordingly, the violations alleged by the applicant can be attributed solely to Turkey.

This reasoning leads to further conclusions. In the light of international law, acts of an entity such as the TRNC and attributed to a state such as Turkey may be classified as illegal, invalid, ineffective, or even – from legal point of view – non-existent. Regardless of the exact description, the ultimate consequence thereof is the lack of any legal effects of such acts. And here we reach the point where reference to the *Namibia* opinion comes to the foreground.

The ECtHR indeed referred to the ICJ's opinion, but only in a very brief manner, in its judgment on the merits, while considering the arguments with respect to preliminary objections to the Court's jurisdiction.[34] *Inter alia*, Turkey raised an objection of lack of temporal jurisdiction, as the ECtHR gained competence with respect to Turkey only with regard to situations that occurred after 20 January 1990. It was pointed out that the applicant had left her property in 1974 and had lost her property rights as a result of a process of expropriation of abandoned property conducted by the TRNC authorities in 1985 on the basis of the TRNC constitution. In the view of the Turkish authorities, the expropriation was thus fully lawful and Mrs. Loizidou could not have been considered the owner within the meaning of Art. 1 Protocol 1 of the ECHR. However, the ECtHR rejected this argument and confirmed its competence to deal with the case by qualifying the applicant's situation as a "continuing violation" of the Convention. The Court stated that it could not recognize the formal act of expropriation as legally valid as it was committed by the TRNC, an entity unrecognized by the entire international community (except Turkey).[35] Thus the applicant remained the owner entitled to bring a claim regarding the violations of her rights.

Subsequently the ECtHR concluded its reasoning by expressly referring to the *Namibia* exception.[36] It emphasised that international law allowed for recognition – in similar circumstances – of "the legitimacy of certain legal arrangements and transactions."

[34] *Ibidem*, paras. 39-47.

[35] *Ibidem*, paras. 44, 46-47.

[36] *Ibidem*, para 45: "The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the 'TRNC'. It notes, however, that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (see, in this context, *Namibia (South-West Africa)*, p. 56, para. 125)."

But this exceptional recognition could be limited only to acts, a disregard of which would cause harm to the inhabitants of the concerned territory, e.g. acts like registrations of births, deaths and marriages. And having stated that, the Court decided not to elaborate on this issue any further, explaining that it was not indispensable for ruling on the case.

Obviously the expropriation of the applicant's property could by no means be regarded as an act in her favour and thus it did not fall within the scope of application of the *Namibia* exception. It is however a little disappointing that the Court did not conclude the "dialogue" with the ICJ opinion with a clear statement. One might even wonder what was the purpose of recalling the *Namibia* opinion at all. The answer may be found in the beginning of para. 45, where the ECtHR admitted that it did not "consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the 'TRNC'." By this statement the Court implicitly confirmed the existence of established rules of international law governing the legitimacy, lawfulness, and legal effect of the acts of unrecognised entities' (or acts of recognised states in unrecognised situations) – rules which are expressed and applied by the ICJ in the *Namibia* opinion. Therefore the ECtHR found that it did not need to prove the binding force of these norms by "elaborating a general theory"; its short, almost superficial, reference was supposed to "do the trick." It constitutes an example of affirmative judicial dialogue with respect to both dimensions of the ICJ opinion, the principle and the exception. The exception simply turned out to be inapplicable in the circumstances of the *Loizidou* case.

Yet, a few years later the ECtHR got the opportunity to explore the *Namibia* opinion more profoundly in the *Cyprus v. Turkey* judgment.[37] Although formally the case was an interstate one, Cyprus' application was submitted in the general interest of the individuals affected by the effects of Turkish aggression and occupation of northern part of Cyprus, with the main purpose being to protect their personal and property rights as guaranteed by the Convention.[38] Accordingly, the Court's ruling and judgment is relevant for the situation of individuals and their relations with unrecognised entities such as TRNC.

The need for the extensive reference to ICJ opinion was triggered by the decision on admissibility of the case issued by the European Commission of Human Rights (EComHR).[39] While having stated that the case was admissible for the consideration of the Court, the Commission indicated that the condition of exhaustion of local remedies with respect to the TRNC courts should be re-examined, in the light of the Court's findings as to Turkish jurisdiction in *Loizidou*, at the merits stage of the

[37] ECtHR, *Cyprus v. Turkey (Merits)* (App. No. 25781/94), 10 May 2001.

[38] The alleged violations concerned Arts. 1, 2, 3, 4, 5, 6, 8, 9, 11, 13 ECHR. Arts. 1, 2, 3 of the Protocol No. 1, and Arts. 14 and 17 of the ECHR in conjunction with all those mentioned above; *Cyprus v. Turkey (Merits)*, para. 3.

[39] EComHR, *Cyprus v. Turkey (Admissibility)* (App. No. 25781/94), 28 June 1996.

proceedings.[40] It was understood by the parties as an implicit acknowledgment that it could be possible – under some conditions – to recognise means of legal, especially judicial, redress provided for by the TRNC "constitution" as "local remedies" within the meaning of former Art. 26 ECHR (present Art. 35(1)).[41] This was explicitly confirmed by the Commission in its report and justified as an instance of application of the *Namibia* exception.[42]

The ECtHR drew attention to the Commission's observation that in the light of the *Namibia* advisory opinion the remedies relied on by the respondent State were intended to benefit the entire population of northern Cyprus, and to the extent they could be considered effective, they should be in principle taken into account for the purposes of former Art. 26.[43] As to whether or not a particular remedy could be regarded as effective, and had therefore to be used, had to be determined in relation to the specific complaint at issue.[44] The ECtHR endorsed the Commission's approach in avoiding general statements on the validity of the acts of the TRNC authorities from the standpoint of international law, and confined its considerations to the Convention-specific issue of the application of the exhaustion requirement. In the Court's view, in this way it was not undermining either the opinion adopted by the international community regarding the establishment of the TRNC or the fact that the government of the Republic of Cyprus remained the sole legitimate authority of Cyprus. However, it could not be excluded that under the former Art. 26 ECHR remedies generally made available to individuals in northern Cyprus to enable them to seek redress for violations of their Convention rights had to be examined.[45] Since the TRNC exercised de facto authority over the territory of northern Cyprus, according to what the Court had already stated in its *Loizidou (Merits)* judgment with reference to the *Namibia* opinion, under international law the legitimacy of certain legal arrangements and transactions by TRNC could be recognised, for instance as regards the registration of births, deaths, and

[40] *Cyprus v. Turkey (Admissibility)*, Section IV *in fine*: "Apart from these considerations, the Commission considers it relevant to observe that, in distinction from the previous applications, the respondent Government in the present case rely exclusively on remedies which are claimed to be available before Turkish Cypriot authorities whereas the applicant Government claim that these authorities are *de facto* under the control of Turkey. The Commission also notes the applicant Government's submission according to which these remedies are generally ineffective for Greek Cypriots, and the related complaints submitted under Article 13 (Art. 13) of the Convention. In the light of the Court's *Loizidou* (Preliminary Objections) judgment according to which Turkish responsibility under the Convention may arise also where it exercises control over an area outside its national territory "through a subordinate local administration" (loc. cit. p. 24, para. 62), it appears that the question of the exhaustion of domestic remedies before TRNC courts is closely related to the issue of Turkish "jurisdiction" which can only be determined at the merits stage of the proceedings. To this extent the Commission must accordingly reserve the final determination to the later stage of the proceedings."

[41] *Cyprus v. Turkey (Merits)*, paras. 82 ff.

[42] Report of the EComHR, 4 June 1999, *Cyprus v. Turkey*, paras. 104-128.

[43] *Cyprus v. Turkey (Merits)*, para. 86.

[44] *Ibidem*, para. 87.

[45] *Ibidem*, paras. 89-90.

marriages, "the effects of which can only be ignored to the detriment of the inhabitants of the [t]erritory."[46]

The ECtHR disapproved the applicant Government's criticism over the Commission's interpretation of the *Namibia* opinion. In its view, judged solely from the perspective of the European Convention, the advisory opinion confirmed that "where it can be shown that remedies exist to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies."[47] It was also supposed to be consistent with the Court's earlier statement on the need, in the territory of northern Cyprus, to avoid the existence of a vacuum in the protection of the human rights guaranteed by the ECHR.[48]

The Court was convinced that the absence of such mechanisms of judicial redress as existed under the TRNC regime would worsen the situation of the members of the Greek-Cypriot community in Northern Cyprus. So the individuals concerned actually benefited from the TRNC regulations in that respect, while recognising the effectiveness thereof for the limited purpose of protecting the rights of the inhabitants did not legitimise the TRNC in any way.[49]

Furthermore ECtHR argued that in the light of the ICJ opinion, the obligation to disregard acts of de facto entities was far from absolute, as:

> Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.[50]

Therefore, the Court concluded that it could not disregard the judicial organs of the TRNC, because it was in the very interest of the "inhabitants of the TRNC, including Greek Cypriots" (sic!), to be able to seek the protection of such organs. If the TRNC authorities had not established a means of judicial redress, this would be considered as clearly contrary to the Convention. Accordingly, the individuals living in Northern Cyprus may be required to exhaust these remedies, unless their nonexistence or ineffectiveness can be proven, which should be examined on a case-by-case basis.[51]

In consequence, the ECtHR decided to examine each of the violations alleged by Cyprus, whether the persons concerned could have availed themselves of effective

[46] *Ibidem*.
[47] *Ibidem*, para. 91.
[48] *Ibidem*, para. 78.
[49] *Ibidem*, para. 92.
[50] *Ibidem*, para. 96.
[51] *Ibidem*, paras. 98, 102.

remedies, and to take into account such criteria as: whether the existence of any remedies was sufficiently certain in practice; whether there were any special circumstances which absolve the persons concerned from the obligation to exhaust the remedies, in particular where a repetitive administrative practice incompatible with ECHR has developed, with official tolerance by the State authorities, which made such proceedings futile or ineffective.[52] In practice the Court found – with respect to a number of alleged violations concerning both displaced persons and inhabitants of northern part of Cyprus – that the issue of exhaustion of local remedies did not arise at all.[53] Moreover, the ECtHR found that there had been violations of Art. 13 of the Convention, the right to effective remedy against infringements of personal and property rights of Greek Cypriots, both non-resident (generally) and resident (with respect to interference with TRNC authorities) in the northern part under Turkish occupation.[54]

Although the Court in *Cyprus v. Turkey* finally did not find in practice any reason to apply the *Namibia* exception with respect to any means of judicial redress established by TRNC, it acknowledged such a hypothetical possibility and left the door wide open for future developments in this regard. This in fact did not take too long. Following the judgment, albeit also as a result of the political settlement process under the auspices of United Nations. Some arrangements for securing the rights of the individuals concerned and means of their redress were met. The TRNC authorities adopted, among others, the "Law as to Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus, which are within the Scope of Article 159, paragraph (4) of the Constitution" (Law no. 49/2003), which *inter alia* provided for the establishment of a compensation commission.[55] This regulation soon became subject to ECtHR scrutiny in the case *Xenides-Arestis v. Turkey*.[56]

From our point of view the most interesting findings of the Court are expressed in the decision on admissibility. In reply to Turkey's claim of non-exhaustion of local remedies (Turkey pointed to the above-mentioned law) the Court reiterated that it was necessary that the remedies were effective and available in both theory and in practice at the relevant time, which means that they were accessible, capable of providing redress with respect to the applicant's complaints, and offered reasonable prospects of success.[57] In particular the Court wished to take a realistic account of the general legal and political context in which the remedies operated, as well as the personal circumstances of the applicant.[58] This applied specifically to situations involving unrecognised entities, like the TRNC.

[52] *Ibidem*, para. 99.

[53] *Ibidem*, paras. 168, 193, 295.

[54] *Ibidem*, paras. 194, 324.

[55] The English translation is included in the decision of ECtHR of 14 March 2005 in case *Xenides-Arestis v. Turkey (Admissibility) (*App. No. 46347/99).

[56] *Ibidem* and ECtHR *Xenides-Arestis v. Turkey (Merits)* (App. No. 46347/99), 22 December 2005; *Xenides-Arestis v. Turkey (Just satisfaction)* (App. No. 46347/99), 7 December 2006.

[57] *Xenides-Arestis v. Turkey (Admissibility)*, Section 3.(c)i.

[58] *Ibidem*.

In the light of these criteria and in accordance with its approach established in *Cyprus v. Turkey*, the ECtHR thoroughly examined the mechanism established by Law no. 49/2003. In the first place, it noted that the compensation with respect to the deprivation of property was limited to damages concerning pecuniary loss for immovable property. No provision mentioned movable property or non-pecuniary damages. More significantly, the terms of compensation did not allow for the restitution of the property withheld. Thus, despite the provided compensation, such regulation could not be considered by the Court as a complete system of redress.[59] Additionally the ECtHR pointed out that the Law did not address the applicant's complaints under Arts. 8 and 14 of the Convention. Moreover, the Law was ambiguous as to its temporal application; it was unclear whether it had retrospective effect with respect to applications filed before its enactment and entry into force. Instead it merely referred to the retrospective assessment of the compensation. Finally, the Court raised concerns as to the composition of the compensation commission, since in the light of the evidence submitted by the Cypriot Government the majority of its members were living in houses owned or built on property once-owned by Greek Cypriots. Accordingly, the ECtHR observed that the respondent Government had neither denied the Cypriot Government's arguments, nor had it provided any additional information on that matter. In this regard the Court suggested that a composition involving international members would enhance the commission's standing and credibility. For these reasons the Court found that the remedies under Law no. 49/2003 did not satisfy the requirements under the Convention so as to be regarded as "effective" or "adequate" means for redressing the applicant's complaints.

In *Xenides-Arestis* ECtHR again did not find the occasion to apply the *Namibia* exception, however its extensive and detailed analysis was treated as an instruction by Turkey and the TRNC authorities and paved the way for the significant reversal of the Court's approach in the case *Demopoulos (and others) v. Turkey*.[60]

In its judgment on the merits in *Xenides-Arestis*, the ECtHR decided to establish a pilot-judgment procedure with respect to Turkey regarding the establishment of effective remedies in light of the criteria set out in the admissibility decision. Pending the implementation thereof the Court adjourned consideration of all applications deriving from the same general cause.[61] The eight applications examined jointly under the *Demopoulos* title were the "oldest" affected by it, where the decision as to their admissibility had been withheld until the implementation of the said measures by Turkey.

In response to the pilot procedure a new TRNC law was introduced, namely the "Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution" (Law no. 67/2005). This Law entered into force on 22 December 2005.[62] The

[59] *Ibidem*, Section 3.(c)ii.

[60] ECtHR (GC), *Takis Demopoulos and Others v. Turkey (Admissibility)* (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04), 1 March 2010.

[61] *Xenides-Arestis v. Turkey (Merits)*, paras. 40 and 50.

[62] English translation of the relevant provisions, as amended by Laws nos. 59/2006 and 85/2007, are reproduced in the ECtHR decision *Demopoulos and Others v. Turkey (Admissibility)*, para 37.

central figure in the redress system established thereunder is the Immovable Property Commission (the IPC), which examines claims by natural and legal persons concerning rights to immovable or movable property placed in the territory under TRNC control, of which such persons were unwillingly deprived as a result of the Turkish invasion.[63] The decisions of the IPC have a binding effect and are of an executory nature, similar to judgments of the judiciary, and they shall be implemented without delay. Refusal to cooperate with the IPC is an offence. Furthermore, the TRNC "ministry" responsible for financial affairs is obliged to provide, under a separate item of the budget law for each year, for the payment of compensation awarded by the IPC and other relevant expenses.

Despite the fact that the applications which were submitted before (in some cases years before) the adoption of Law no. 67/2005, they were examined by the ECtHR with respect to the exhaustion of local remedies in connection with this regulation. It was clear already from the tone of the decision in *Xenides-Arestis* and the subsequent launching of the pilot-judgment procedure that the Court was tending to block or at least slow down the overflow of claims by the Greek Cypriots harmed by the effects of Turkish invasion from the 1970s. For several years the ECtHR acted as both the first and last instance in their cases, as the only judicial body that could protect their rights. This was a difficult task, as the Court itself observed: "Thus, the Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level."[64] This reality, as well as the passage of time and the continuing evolution of the broader political dispute must affect the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.

The only way to remain in line with the principle of non-recognition of situations unlawful under international law, respect the worldwide policy not to recognise the TRNC as a state, and stay coherent with its own jurisprudence, starting with the *Loizidou* judgment, was for the ECtHR to rely on the *Namibia* exception. Thus in the reasoning of the admissibility decision dealing with the argument that requiring exhaustion of local remedies lent legitimacy to an illegal occupation, the Court once more, this time probably the most extensively so far, referred to the ICJ opinion.

In this respect the Court observed that the alleged legitimisation of the TRNC underlaid most of the objections raised by the applicants and the intervening Cypriot Government. It noted that in the proceedings the parties had differed as to the relevance or applicability of the "so-called 'Namibia principle'."[65] Yes, the ECtHR called what actually was an exception a principle, and defined its content as follows:

[63] There are also certain temporal conditions as to the ownership and time limits for bringing a claim, and a fee of 100 TRY. The burden of proof rests upon the applicant. *See Demopoulos and Others v. Turkey (Admissibility)* paras. 35 ff.

[64] *Demopoulos and Others v. Turkey (Admissibility)*, para. 85.

[65] *Ibidem*, para. 93.

> [t]his, in brief, provides that even if the legitimacy of the administration of a territory is not recognised by the international community, 'international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (Advisory Opinion of the International Court of Justice in the Namibia case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, vol. 16, p. 56, § 125).[66]

The Court was aware of the differences between the ICJ case and its own jurisdiction, as well as between the situation in Namibia and that in northern Cyprus, in particular since the applicants in the TRNC cases were not living under occupation in a situation whereby basic daily realities would require recognition of certain legal relationships, but were rather seeking to vindicate from another entity their rights, mostly to property then under the control of the occupying power. Nevertheless, in its opinion the *Namibia* exception (seemingly raised by the ECtHR to a rank of "principle"?) justified a finding "that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention."[67] Furthermore, the ECtHR pointed out that since Turkey exercised control over the territory of northern Cyprus it took responsibility for the policies and actions of the TRNC. In consequence, individuals affected by such policies or actions came within the "jurisdiction" of Turkey for the purposes of Art. 1 ECHR, and Turkey was to be held accountable for violations of their rights guaranteed under the Convention and was obliged to take positive measures to protect those rights. It would thus be inconsistent with such obligations under the Convention if such measures adopted by TRNC organs or their application in the territory under occupation were to be denied any validity.[68]

The crucial consideration of ECtHR was to avoid a legal vacuum in the protection of individual rights on a daily basis. The right of individuals to make claims under the ECHR could not be seen as substitute for a functioning judicial system or mechanism for the enforcement of criminal or civil law. Thus, in the Court's view if there was an effective remedy available under the jurisdiction of the Turkish Government responsible under the Convention (albeit exercised by the organs of the TRNC as a subordinated entity), the rule of exhaustion applied, even if the applicants were not inhabitants of the occupied territory. However, on all occasions the ECtHR consistently repeated in this connection that this could by no means be understood as undermining the

[66] *Ibidem*.

[67] *Ibidem*, para. 94.

[68] *Ibidem*, para. 95. The Court referred to some of its case law in that respect: *Foka v. Turkey* (App. No. 28940/95), 24 June 2008, para. 83, where an arrest for obstruction of the applicant Greek Cypriot by a TRNC police officer was found to be lawful; and *Protopapa v. Turkey* (App. No. 16084/90), 24 February 2009, para. 87, where a criminal trial before a "TRNC" court was found to be in accordance with Art. 6, there being no grounds for finding that these courts were not independent or impartial or that they were politically motivated.

position of the international community regarding the establishment of the TRNC or the fact that the government of the Republic of Cyprus remained the sole legitimate authority thereof. Allowing the respondent State to correct wrongs imputable to it did not amount to an indirect legitimisation of an unlawful regime under international law.[69]

Apart from the argument of illegality the applicants (supported by the Cypriot government) pointed out that it could not be regarded as to their benefit to require them to make use of remedies, given the background of the time, effort and humiliation that this would involve after years of continuing and flagrant violations. The Court however, taking a fully institutionalised approach, could not understand this argument as from its perspective a competent domestic body, with access to the properties, registries and records, was a more appropriate forum than the Court for deciding on matters of property, ownership and financial compensation. This institutional lack of empathy was probably the weakest point of the Court's reasoning.

2. INTERPRETATION OF THE "*NAMIBIA* EXCEPTION" WITH RESPECT TO THE TRNC BY THE CJEU

The Court of Justice of the (then) European Communities,[70] by reason of its function as the guardian of the European Union legal order and of the scope of its jurisdiction, also had to deal with the issue of recognition of the legal effects of the activities of the TRNC – in the light of the *Namibia* exception – and in its case more comprehensively than its Strasbourg fellow court. An opportunity for this arose with the case C-432/92 *Anastasiou*.[71] A British court (High Court of Justice, Queen's Bench Division) referred to the CJEU a question whether, in the light of community law – in particular the association agreement between the EEC and the Republic of Cyprus of 1972[72] and a protocol of 1977 thereto,[73] as well as Directive 77/93/EEC[74] – it was admissible for those member states with importing plant products originating from the area of northern Cyprus to accept movement certificates and phytosanitary certificates issued by the TRNC administration.[75]

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[69] *Demopoulos and Others v. Turkey (Admissibility)*, para. 96.

[70] For coherence I keep using the acronym CJEU in the whole text.

[71] C-432/92 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte P. P. Anastasiou (Pissouri) Ltd and others*, ECLI:EU:C:1994:277.

[72] Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, OJ 1973 L 133, p. 1.

[73] Concerning the definition of the concept of "originating products" and methods of administrative cooperation, OJ 1977 L 339, p. 1.

[74] Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, OJ 1977 L 26, p. 20, as subsequently amended.

[75] *Anastasiou*, paras. 14-15.

According to the provisions of the protocol and the above-mentioned Directive, such certificates have to be issued by competent organs of the exporting state.[76] And this state is the Republic of Cyprus, which was recognized by the EU (then still EC) and its member states as the sole sovereign over the entire Cypriot territory. However the authorities of the United Kingdom adopted quite a liberal approach to these requirements. rejecting only documents which contained an express designation of the "Turkish Republic of Northern Cyprus" to refer to the place of origin of the goods or of the bodies issuing the certificates. They accepted, certificates bearing a stamp "Republic of Cyprus – Ministry of Agriculture", which were in fact not issued by the ministry of the real Republic of Cyprus, but by the TRNC organs. From 1991 almost all products from the northern part of the island had been labelled in such a way.[77] Such practice on the part of the UK authorities raised doubts among Cypriot exporters and producers, who brought a claim to the High Court.

In the subsequent case before the CJEU, the applicants in the main proceedings, supported by the Greek government, reiterated that recognition by the EC member states of movement certificates and phytosanitary certificates issued by a body other than authorized organs of the Republic of Cyprus constituted a violation of the obligations set out in the provisions of the association agreement, the 1977 protocol, and the 77/93 Directive. Only the Republic of Cyprus, bound by the same norms, was able to assure the competence of officials issuing the certificates and proper administrative cooperation indispensable for the realisation of the goals of association. Only in this way could it be guaranteed that the properly-examined and certified goods fulfilled the requirements of preferential treatment and phytosanitary standards.

In contrast, according to the UK government and the Commission (which shared its views), the practice in question was justified on the grounds of the extraordinary situation in Cyprus. Acceptance of certificates issued by the TRNC authorities was supposed to prevent possible discrimination between individuals and enterprises from the northern and southern parts of the island. Art. 5 of the association agreement stated that "the rules governing trade between the Contracting Parties may not give rise to any discrimination between nationals or companies of Cyprus." The UK and the Commission pointed out that it was impossible – or at least very difficult – to obtain certificates other than those issued by the local TRNC administration. As a result only the exporters from the south, having documents issued by competent Cypriot authorities would enjoy preferential treatment and other benefits of the association agreement. At the same time, the UK and the Commission stipulated that the practice of acceptance of certificates issued by TRNC authorities was by no means tantamount to a recognition of the TRNC as a state. It only constituted an appropriate and justified response to the need to take into account the interests of the whole Cypriot population.[78] To support

[76] *Ibidem*, paras. 7-9.

[77] Earlier the UK organs accepted even certificates with the notion Republic of Cyprus – Turkish Federated State of Cyprus (*see Anastasiou*, para. 13).

[78] *Ibidem*, para. 34.

this position, the Commission referred to the ICJ *Namibia* opinion and to the EC practice of application of other provisions of the association agreement and its protocols concerning the financial aid dedicated for the whole territory of Cyprus, including the northern part as well.[79]

The CJEU, however, totally rejected this argumentation. The Court stressed that in the case of both types of certificates the certification systems were – as set out by the 1977 protocol and the 77/93 Directive – based on mutual trust and cooperation between the competent authorities of the exporting and importing states.[80] Acceptance of the certificates issued within the framework of these systems constitutes an expression of such trust and guarantees that any verifications, consultations and dispute resolution are conducted by cooperation between the engaged states. Such systems function properly only when the cooperation procedures are strictly observed. And any cooperation with the authorities of an entity such as TRNC is impossible, in particular because it is recognized neither by the EU (EC), nor by its member states. Recognition of certificates by the TRNC authorities would result in defeating the object and purpose of the systems established by the protocol and the Directive.[81]

The Court emphasised that it was impossible, in the case before it, to rely on the *Namibia* exception, and pointed out that the situations in the cases of Namibia and the TRNC respectively were not comparable and that in effect no analogy could be drawn.[82] The CJEU concurred in that respect with the argumentation of Advocate General Gulmann, who after a very comprehensive analysis concluded that the difference concerning the circumstances lies in the extent of the entitlement of the EU Member States – in breach of the express rules of an existing international agreement on the matter – to accept "official acts", the purpose of which was to enable trade with businesses from the area under administration unrecognised under the Security Council's resolutions.[83] Accordingly, the AG stated that the "official documents" in question were not of a type covered by the ICJ's *Namibia* exception, as it concerned official acts issued in the population's interest and the situation regarding the position of the population groups in question was not comparable.[84]

In the light of this approach, the principle of non-discrimination as expressed in Art. 5 of the association agreement also could not justify the non-compliance with the obligation not to recognize such acts. The CJEU noted that according to the rules of interpretation of treaties, the object and purpose of a treaty and the practice of its application are particularly relevant for its proper interpretation.[85] The principle of non-

[79] *Ibidem*, para. 35.
[80] *Ibidem*, paras. 38-39 and 61-63.
[81] *Ibidem*, paras. 40-41 and 63.
[82] *Ibidem*, para. 49.
[83] Opinion of Advocate General Gulmann of 20 April 1994 in case C-432/92 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte P. P. Anastasiou (Pissouri) Ltd and others*, ECLI:EU:C:1994:159, paras. 57-59.
[84] *Anastasiou* Opinion, paras. 58 in fine-59.
[85] Expressed in Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT).

discrimination is just an element of a more complicated construction of the object and purpose of the association agreement and must not prevail over other elements. Therefore, it cannot be used as a justification for non-compliance with the fundamental provisions of the agreement, which determine its application in conformity with the will of all contracting parties and with due consideration of their interests. On no account may Art. 5 be regarded as an excuse for the EU (EC) or its member states to claim a right to interfere in the internal affairs of Cyprus.[86] In that respect the Court referred to the example of application of the protocols on financial aid to the whole territory of the island with respect to the implementation of projects relating to the unified town planning scheme for Nicosia and the Nicosia sewerage scheme, part of which extends into the territory of the northern part of Cyprus.[87] While this example was presented by the Commission to support its argumentation, the CJEU contended however that this was precisely an instance where, unlike in the case of recognition of movement and phytosanitary certificates, it was possible to let the whole population benefit from the association agreement without violation of the interests of the Republic of Cyprus and in complete accordance with its will.

The *Anastasiou* judgment confirms the principle that non-recognition of a territorial entity as a state results in non-recognition of the legal effects of acts and activities of the organs of such entity. From the perspective of international legal order they constitute "illegal situations" and are non-opposable to other subjects of international law. With respect to the ICJ's *Namibia* opinion the judgment constitutes a fine example of constructive judicial dialogue. The CJEU developed a sound justification for limiting the applicability of the *Namibia* exception by reference to the specific circumstances and specific provisions of EU law applicable in this case, interpreted in the light of general international law, and in particular the rules of interpretation of treaties. In this way it contributes to the determination the scope of application of principles governing the legal effects of recognition/non-recognition in international law and to the implementation of the general principle *ex iniuria ius non oritur*.

3. JUDICIAL DIALOGUE AND THE IMPLICATIONS OF NON-RECOGNITION IN RELATIONS BETWEEN INDIVIDUALS

So far the focus has been on cases concerning the effects of non-recognition which materialize at the level of international legal order and in relations mostly between subjects of international law, only occasionally involving individuals (in their relations with states or even international organizations). In this part we examine – on the basis of CJEU judgment in *Apostolides* and the ECtHR decision in *Orams v. Cyprus* – how non-recognition of an entity on the international plane may influence relations

[86] *Anastasiou*, paras. 44, 47.
[87] *Ibidem*, para. 45.

between individuals and how these relations may become the subject of cognition of two different international courts.[88]

When in 2004 the Republic of Cyprus acceded to the European Union, by virtue of protocol 10 to the Accession Treaty the operation of EU law within the area of Northern Cyprus, which remained under the physical control of Turkey and the unrecognized TRNC, had been suspended. In the part of the island under Cypriot control the *acquis communautaire* is applied entirely.

In 2002 a British couple, Mr. and Mrs. Orams, had bought a piece of land (from a private person) in the northern part of Cyprus. They built a house and spent a lot of time there. They acquired it in good faith and in conformity with the laws of the TRNC. However, they were not aware that before the Turkish intervention in 1974 the land had been owned by Mr. Meletis Apostolides, a Greek Cypriot, who after the intervention was, along with his family, expelled and for many years (like Mrs. Loizidou) had lost access to his property and had no possibility to exercise his property rights. The property had been taken over by TRNC, then a third person bought it from the authorities, and subsequently sold it to the Orams couple.

According to Cypriot law, and – in the light of the ECtHR *Loizidou* judgment and subsequent jurisprudence in similar cases – as well as according to international law, Mr. Apostolides remained the owner of the land in question. Having learned about the fate of his property, he brought a claim against the Oramses before a Cypriot civil court in Nicosia (in the southern part of the city). He demanded the return of the property, restitution of it to its original condition, and compensation for unlawful usage thereof.

The respondents had problems with understanding what actually was happening and formulating a proper reaction to the suit. Thus the first instance proceedings ended up with a default judgment in favour of M. Apostolides, issued on 9 November 2004 by the District Court in Nicosia. The Oramses applied to the District Court to have this default judgment set aside, but their application was unsuccessful (judgment of 19 April 2005). Although the Oramses managed to appeal against that latter judgment, the Supreme Court in Nicosia dismissed their appeal on 21 December 2006.

In the meantime, on 18 November 2005 on the basis of regulation 44/2001 (Brussels I),[89] Mr. Apostolides applied for recognition and execution of Cypriot court judgment of 9 November 2004 to a competent British court, which declared the judgments enforceable. This order, however, was successfully challenged by the Oramses, and in effect dismissed. In consequence, Mr. Apostolidis appealed on 28 June 2007 to the Court of Appeal, which decided to refer some questions on the interpretation of the Brussels I regulation for a preliminary ruling; a referral received by the CJEU on 13 Sep-

[88] C-420/07 *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*, ECLI:EU:C:2009:271; ECtHR, *David Charles ORAMS and Linda Elizabeth ORAMS v. Cyprus* (App. No. 27841/07), 10 June 2010.

[89] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p. 1.

tember 2007. The Court of Appeal asked, *inter alia*, whether the suspension of operation of EU law in the area of northern Cyprus and the fact that the property in question is situated there might have had an influence on the enforceability of the judgments, as the government of the Republic of Cyprus did not exercise effective control over it.[90]

The CJEU started with the question of the suspension of application of EU law. It contended that because the suspension concerned the northern area of Cyprus and the judgments in the main proceedings had been issued by a court with a seat in the territory under the control of the Republic of Cyprus – the suspension did not apply to the case. The fact that the judgments in the main proceedings concerned property located in the north did not preclude such an interpretation.[91] Therefore it was possible to apply the Brussels I regulation to the judgments of the Cypriot courts concerning property located in the area controlled by Turkey and the TRNC.

The Court further noted that the case before the national court (i.e. Court of Appeal) fell within the scope of regulation 44/2001, i.e. the Brussels I regulation. Namely, the property is located in the territory of the Republic of Cyprus, even though the legitimate, internationally-recognized government does not control the whole territory. Thus, the Cypriot court did have the competence to adjudicate the case. Art. 22 of the regulation regards the international aspects of jurisdiction of the courts of member states, and not the internal division of competence between the national courts within the member state.[92] At the same time, the fact that the property was located in an area

[90] *Apostolides*, para. 31.

[91] *Ibidem*, paras. 32 ff.

[92] *Ibidem*, paras. 48-50. The provision reads: "Article 22. The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced."

not under the effective control of the Cypriot government might actually mean that such judgments could not be enforced in practice in that area. This, however, does not preclude that such judgments may be recognized and enforced in another member state (in the *Apostolides* case – in the UK).[93] The national court may not refuse to recognize a judgment of a court from another member state solely on the basis that it considers that in such judgment the national or community law was misapplied. The public-policy clause as grounds for refusal would apply in such case solely if that error of law meant that the recognition or enforcement of the judgment in the member state where the enforcement was sought would be qualified as a manifest breach of an essential rule of law in the legal order of that state.[94] Furthermore, with respect to the enforceability of the judgments in question, the CJEU reiterated that the fact that Mr. Apostolides had difficulties with the execution of these judgments in the area of northern Cyprus did not deprive them totally of their enforceability. According to the Court, it does not prevent the courts of the member state in which enforcement is sought – namely the UK – from declaring such judgments enforceable.[95]

Meanwhile Mr. and Mrs. Orams tried to challenge the Supreme Court judgment before the ECtHR on the basis of the alleged incompatibility of the Cypriot proceedings in their case with the standards required under Art. 6 of the ECHR concerning the right to fair trial, and under Art. 13 concerning the right to an effective remedy. In an application of 13 June 2007, supplemented by a memorandum of 8 August 2007, they raised a number of complaints under Art. 6(1) and Art. 13, including, *inter alia*, that the Supreme Court had not properly examined their case; that the Supreme Court was not composed in accordance with the applicable constitutional provisions; and that the applicants had been denied a fair hearing. The ECtHR examined each of the complaints very thoroughly, finding that in respect of every charge the proceedings and activities of the Supreme Court in Nicosia had met the Convention standards. Thus on 10 June 2010 the ECtHR declared the application inadmissible on the grounds of being manifestly ill-founded, and that the allegations in the memorandum were raised outside the six-month time-limit.

The mere fact that such a case arose is a result of the long-term functioning of the TRNC as an unrecognized territorial entity. On one hand, the more or less peaceful persistence and actual administration of the area of Northern Cyprus may lead individuals (such as Mr. and Mrs. Orams) to a certain conviction with respect to the stability, or even legitimacy, of the authorities of the TRNC and the legal order established by it. Such a conviction may encourage individuals to engage in various kinds of relations within this legal order. However, on the other hand the consistent non-recognition of the TRNC on the international plane makes this stability illusory. Acts and arrangements of the TRNC administration and its legal order become, in their trans-border dimension, legally non-effective and non-opposable to other legal subjects, public and

[93] *Ibidem*, paras. 53 ff.
[94] *Ibidem*, paras. 59-60.
[95] *Ibidem*, paras. 65 ff.

private. In effect individuals are deprived of any legal protection where their situation transgresses the borders of territory administered by the TRNC.

What is interesting about this "double case" – as the same facts constituted the subject matter of both cases – from the perspective of judicial dialogue is that in the *Apostolides* judgment there are no explicit, substantial references either to the TRNC as such, or to the issue of its non-recognition by the international community and the consequences thereof, including the international and CJEU jurisprudence on these matters. The *Orams v. Cyprus* judgment refers only briefly to the ECtHR case law and the principles of the application of the European Convention resulting therefrom, instead engaging in an extensive examination of the activities of the Cypriot Supreme Court. So one may ask: Where did judicial dialogue come in, especially in light of the potential and substantial risk of conflicting judgments? It is worth noticing that both applications reached the respective courts at a similar time (between June and September 2007), and both rulings were issued within a period of about 13 months from each other – first the CJEU preliminary ruling on 28 April 2009, and second the ECtHR decision on 10 June 2010. The CJEU *Apostolides* judgment is not referred to in the reasoning and operative part of the *Orams v. Cyprus* decision, although it is extensively presented therein as part of section A, "The circumstances of the case." This clearly demonstrates that both Courts were informed about the parallel proceedings and took notice of each other's actions. This indicates not only a dialogue through jurisprudence, but a kind of informal, comity-based institutional dialogue, which may turn out to be a decisive tool for minimising the risk of contradictory rulings in same-subject-matter-based cases.

CONCLUSIONS

It seems incontrovertible to state that international courts have a vital role to play in safeguarding the rights of individuals involved in various relations with unrecognised entities. For the most part they are acting as guides for the members of the international community – in particular for states and international organisations – in that, through interpretation and application of relevant international law, they set the standards and shape the principles to be followed in dealing with unrecognised entities. Through their interpretation and application of the relevant international law, they set the standards and shape the principles to be followed in dealing with unrecognised entities. By its *Namibia* opinion, the ICJ performed precisely this function. But there are also cases, like those discussed above, where the international courts (due to their jurisdictional characteristics) become direct makers of law by ruling on the rights of concrete individuals. At the same time however, through their individual judgments they may develop more general concepts and policies that also serve the former function.

Indications of both functions can be observed in the presented case law of the ECtHR and the CJEU with respect to the interpretation and application of the *Namibia* exception. At the beginning both Courts adopted the same approach: following the

non-recognition of the TRNC as a state under international law, they declared the invalidity and non-opposability of its acts, in particular of the TRNC "constitution." They acknowledged the *Namibia* exception, but found no space to apply it in *Loizidou* and *Anastasiou*, respectively. However, subsequently their models of interpretation have evolved in opposite directions.

The ECtHR, which after *Loizidou* had become the court of first and only instance for cases concerning violations of individual rights by the TRNC and Turkey, was facing an overload of such complaints. The only possible solution was for the Court to take a more flexible approach to the application of the *Namibia* exception and accept the redress mechanism established by TRNC as a "local remedy" within the meaning of the present Art. 35(1) ECHR. This was a gradual process, within which the ECtHR entered into a kind of dialogue with Turkey and the TRNC, setting out the requirements to be met by the TRNC measures in order to fulfil the Convention criteria of effectiveness. The culmination of this process was the *Demopoulos* decision, by which the ECtHR actually closed the path for all claimants seeking enforcement of their property rights against the TRNC who did not avail themselves of the redress measures provided by TRNC legislation, and in addition giving such an interpretation retrospective effect so as to include applications submitted before the redress mechanism was established.

While accepting the TRNC redress measures as legitimate local remedies for the benefit of individuals, the Court continued to insist that this did not in any way imply recognition or legitimisation of the TRNC as such. This reservation seems at least a little schizophrenic though, if we bear in mind that the redress mechanism was based on the TRNC "constitution", which the ECtHR in *Loizidou* found invalid under international law. The reasoning presented in *Demopoulos* shows more weaknesses. Firstly, it is premised on a linguistic falsification: what so far had been known as the *Namibia* exception is described as the "so-called *Namibia* principle." This blurs the difference between the rules of interpretation of principles and of exceptions and "allows" the Court to depart from the rigours of the strict and narrow interpretation applicable to exceptions. In this regard the ECtHR developed an extensive argumentation on how to understand when the acts of the unrecognised entity served to the benefit of individuals, taking into account just its own and Turkey's (in the light of the ECHR obligations) perspective, while ignoring the perspective of the individuals concerned. Furthermore, by extending the obligation to exhaust the local TRNC remedies to non-residents of the occupied territory, the Court put itself in contradiction with the rationale of the ICJ reasoning in the *Namibia* opinion. The ICJ's idea was to grant protection to individuals in a no-win situation, as those living under an unrecognised authority do not have any other way to manage their personal affairs than to deal with this authority. The ECtHR actually forces the individuals who are not subjects to such authority to enter into relations with it and to use measures provided by it which are unlawful under international law. How this can be regarded as "to their benefit" remains a mystery.

The ECtHR seems to follow – in its interpretation of the *Namibia* exception – the philosophy of "illegal but legitimate", an interpretation which in itself is incoherent

and internally contradictory. The beneficiaries thereof are just the Court itself and the parties responsible for the violation of international law, i.e. Turkey and the TRNC. How unpredictable and serious are the effects such approach may have been illustrated by a quite recent case, *Güzelyurtlu and Others v. Cyprus and Turkey*,[96] where Cyprus was found responsible for a violation of procedural rights under Art. 2 ECHR in that it did not (allegedly) sufficiently cooperate with the TRNC organs. The philosophy behind *Demopoulos* was extrapolated by the ECtHR Chamber onto the international obligations of Cyprus, suggesting that the state injured by Turkish aggression was obliged under the ECHR to cooperate with the unrecognised puppet regime of its aggressor. Fortunately the Grand Chamber reversed the judgment with respect to any responsibility on the part of Cyprus, but the seeds of uncertainty have been planted.

In contrast to the developments of the ECtHR, the model of interpretation of the *Namibia* opinion adopted by the CJEU in *Anastasiou* has not been revised. There the Court – and along with it the national courts and the Union institutions – upheld its consequent and coherent approach, according to which the scope of an exception to a principle of non-recognition should be determined narrowly, both with regard to the situation of individuals under the unrecognised entity's governance and to the entirety of international obligations binding upon the Union and its member states, in particular those stemming from EU law. The key rule followed by the CJEU in this respect was to avoid any circumstances that could be regarded as an indication of recognition or legitimisation of an unrecognised regime. This model is successfully applied by the Court also with regard to other unrecognised situations.[97]

Interestingly, in cases which shared some similarities both European Courts entered into a dialogue with ICJ with respect to the *Namibia* exception, but avoided a dialogue with each other, although they have done so before many times with regard to other issues. Only when forced by the circumstances of a specific pair of cases based on the same facts did they decide to regard to their actions as limited to this particular double-case, rather than to put it in the more general context of their TRNC jurisprudence. Nevertheless, the *Apostolides/Orams* saga indicates the possible threats raised by the lack of a coherent approach by both Courts, including the danger of contradictory rulings. And I cannot get one question out of my mind: If the claim before the ECtHR were from Mr. Apostolides against Turkey concerning execution of his Cypriot court judgment, would he also be required to exhaust the TRNC "local remedies"?

The ICJ, in formulating the *Namibia* exception, provided neither any exhaustive list of recognisable acts or activities, nor any duty of automatic recognition, leaving the deciding actors (international or national courts, state authorities) a fair margin of appreciation as to its interpretation and application. However this cannot be understood

[96] ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey* (App. No. 36925/07), 4 April 2017 (Chamber judgment), 29 January 2019 (Grand Chamber judgment).

[97] *See e.g.* Case C-386/08 *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91; Case C-363/18 *Organisation juive européenne, Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances*, ECLI:EU:C:2019:954.

as full discretion. Especially the international courts, in their role as guides and standard setters, are bound by the general principles of law, by the rules of interpretation of international law, and by the postulate of cohesion and coherence in the application thereof. In the light of the presented case law of the ECtHR and CJEU, it is very disturbing to observe that it is not the protection of the rights of individuals and of the international rule of law that is in put in first place, but that sometimes the interests of the court itself, or even (though usually as a "collateral benefit") of the state responsible for violation prevail. It seems that judicial dialogue, which was considered to be a perfect tool for achieving consistency in the interpretation and application of international law, thus strengthening the protection of rights of individuals, does not always serve these goals, but rather is trumped by more prosaic ones.

The conclusions of the analysis of the presented jurisprudence reveal the need for a deeper reflection on questions of a more general nature: How should the rights of individuals involved in relations with unrecognised entities be protected? Are we really satisfied with a system of international protection of human rights where a pivotal judicial organ welcomes a redress mechanism provided by an unrecognised entity in a situation which is unlawful under international law? Is such protection really "legal protection"?

Putting aside political goals and considerations, from just a legal perspective it seems clear that in internationally unrecognised situations it is judicial protection on the international level that gives the best prospects for effectively defending the rights of individuals. This is the model that should be promoted by the international community, where the legal protection is safeguarded by international judicial bodies (courts, tribunals, internationalised/hybrid bodies, claims commissions etc.) and supported by national courts, cooperating and engaging in a conclusive dialogue, the legality and legitimation of which should be unquestionable.