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Requirement to Exhaust Domestic Remedies in De Facto Regimes Under Art. 35.1 of ECHR: Expansion of Namibia Exception

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Abstract

Current developments in European Court of Human Rights (ECtHR) regarding the requirement to exhaust remedies provided by non-recognized effective territorial regime of the Turkish Republic of Northern Cyprus led to extensive scholarly debate as to whether it was not a too extensive interpretation of the so called "Namibia exception" that would imply recognition of the regime and facilitate entrenchment of its actual hold of the territory. Considering the manner in which illegal territorial regimes are treated under international law, considerable hardships are created for their inhabitants who are affected more severely than the regimes themselves. This paper aims to demonstrate that the position of the ECtHR in requiring exhaustion of effective domestic remedies provided by the authorities of de facto regimes, does not contravene the obligation of non-recognition and is within the scope of the essence of Namibia exception. After comprehensive examination of the doctrine of non-recognition and interpretations of Namibia exception, the author goes on to argue two points: first, the requirement to exhaust domestic remedies provided by DFRs is compatible with the function of exhaustion rule and purpose of the Convention and second, the Court's interpretation is compatible with the obligation to abstain from implied recognition of legality of a territorial regime and entrenchment of its de facto authority. She concludes that the obligation of non-recognition shall be interpreted in light of the rationale of the rule, i.e. preservation of international peace and order, which allows wider flexibility in extending the scope of Namibia exception to meet this rationale.

Introduction

The requirement to exhaust domestic remedies is a well know principle of customary international law and forms one of ECtHR (European Court of Human Rights) admissibility criteria entrenched in article 35.1 of the Convention, which stipulates that 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law'[2]. The rationale for the rule is to give national authorities opportunity to identify and cure the violation based on the assumption, reflected in article 13 of the Convention, that domestic system comprises an effective remedy available with regard to the alleged violation[3]. Difficult questions arise, however, when it comes to the determination of the need and the manner in which duty of exhaustion should be applied to the remedies of de facto regimes, i.e., entities, where 'governing apparatus exercises control over a population in the territory and makes a claim of sovereignty over that territory'[4]. The heart of this problem is in the tension between theobligation of non-recognition and the requirement to exhaust effective domestic remedies provided by non-recognized territorial regimes.

Being well-established in international law, principle of non-recognition dictates that a state may not recognize territorial acquisition or the establishment of a purported state which results from a violation of a peremptory norm of international law, such as prohibition of the use or threat of force, or respect towards the right of people to self-determination[5]. This principle is reflected in maxim *ex injuria jus non oritur,* stating that illegal acts cannot become sources of legally valid results.[6] The obligation of non-recognition was thoroughly examined in ICJ advisory opinion on Namibia, which currently continues to be the most authoritative interpretation of the content of this principle in customary international law. The Court particularly noted that 'the principle *ex injuria jus non oritur* dictates that acts which are contrary to international law cannot become a source of legal acts for the wrongdoer… To grant recognition to illegal acts or situation will tend to perpetuate it and be benefitial to the state which has acted illegally'[7]. Since the purpose of non-

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, 5 November 1950, Council of Europe

[3] Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd edn Oxford Publishing, 2011), 126

[4] Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 1

[5]Ranjan Amerasinghe and others, 'International Jurists Opinion on Exhaustion of Local Remedies' www.google.ru/url?sa=t&rct=j&q=expert+opinion+on+local+remedies+draft+01&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.law.gov.cy%2FLaw%2Flawoffice.nsf%2F0%2F0AB851D1B5CE0AD0C225768C003FEC92%2F%24file%2FINTERNATIONAL%2520JURISTS%2520OPINION%2520ON%2520EXHAUSTION%2520OF%2520LOCAL%2520REMEDIES%2520-%2520Experts'%2520Opinion%2520on%2520Local%2520Remedies.doc&ei=4rlgUO-WJtDYsgb8goH4DA&usg=AFQjCNF3UBrOq7xSIT_HdYSR3WCQqiseSg&cad=rjt accessed 24 September 2012

[6] Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 1

[7] Ranjan Amerasinghe and others, 'International Jurists Opinion on Exhaustion of Local Remedies' <www.google.ru/url?sa=t&rct=j&q=expert+opinion+on+local+remedies+draft+01&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.law.gov.cy%2FLaw%2Flawoffice.nsf%2F0%2F0AB851D1B5CE0AD0C225768C

recognition is to preserve legal nullity of an illegal regime created in violation of a peremptory norm of international law, it is a temporary measure per se, a means to an end, and not an end in itself. Nevertheless, some de facto regimes exist for a long period of time during which discrepancy continues to exist between law and practice.[8] Based on practical necessity to acknowledge the actual existence of such regimes, international law provides an exception to the general rule of non-recognition with the help of "Namibia exception" or " Namibia principle", which recognizes that effective practice in certain circumstances may generate legal consequences, particularly, through international human rights law. This approach is also reflected in the maxim *ex factis jus oritur*that operates opposite to the general principle of non-recognition. In this regard ICJ particularly noted that invalidity of official acts of South Africa's Government on behalf of or concerning Namibia after the termination of the Mandate 'cannot be extended to those acts, such as, for instance, registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory'[9].

In 2001, ECtHR Grand Chamber delivered a decision on a similar issue in *Cyprus v. Turkey* case, particularly relying on paragraph 125 of Namibia Advisory Opinion. There the court found Turkey responsible for human rights violations committed in the territory of self-proclaimed Turkish Republic of Northern Cyprus (TRNC) and stated that TRNC courts may be regarded as domestic remedies for the purposes of art. 35.1 of the Convention creating duty of exhaustion[10]. With regard to Turkey's legal accountability, the court noted that the source of state responsibility is its physical control over a territory, whether exercised through the state's armed forces or subordinate local administration and irrespective of being a result of lawful or unlawful military action. Hence, the court did not link the idea of "state responsibility" with "legality" of the local administration.[11]

As to validity of TRNC's legislative and administrative acts, the Court found that there is no absolute obligation to disregard acts of de facto regimes. Particularly, it stated that for the purposes of the Convention and in order to avoid vacuum in human rights protection, the inhabitants may be required to exhaust the remedies provided by TRNC courts, unless their inexistence or ineffectiveness can be proved, a matter which should be examined on a case by case basis. The Court found that TRNC courts can fill this potential gap in legal protection and their absence could

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[8] Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011),

[9] Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para 125

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

[11] KudretOzersay and AylaGurel, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle' (2008) Middle Eastern Studies 44:2, 291-321

work to the detriment of the population, hence, they must be taken into count for the purposes of article 35.1 of the Convention. [12]

This decision raised a number of interesting questions and controversies regarding, inter alia, responsibility of de facto regimes for human rights violations and compatibility of extensive interpretation of Namibia exception with the obligation of non-recognition. Though the Court's interpretation has been subject to extensive scholarly debate, the influence of political considerations is significant here. Few sources view the question from the perspective of the interests of the very inhabitants of the territory. Due to the fact that international law does not define the status of de facto regimes, a situation is created where the obligation of non-recognition deters international community from encouraging undertakings of De facto regimes in the field of human rights protection. The examples of long and effective existence of some territorial regimes illustrate that normally non-recognition as a "community countermeasure" more severely impacts inhabitants, rather than the regime itself. Considering the grave consequences that these legal difficulties create for the people living under the authority of effective territorial regimes, the study of this problem represents great academic and practical significance and would allow to outline the contours of the current state of international law as well as trends of its development.

The purpose of this paper is to demonstrate that the position of the European Court of Human Rights in requiring exhaustion of effective domestic remedies provided by the authorities of de facto regimes, does not contravene the obligation of non-recognition and is within the scope of the essence of Namibia exception. In order to do this, following steps will be completed.

The first chapter will provide the definition of the obligation of non-recognition and will outline the essence and content of the doctrine differentiating it from other recognition issues and separately examining its object, function, legal basis and content. The second chapter will lay down three interpretations of Namibia exception and the position of ECtHR in this regard. Finally, chapter three will address expansive interpretation of Namibia exception provided by ECtHR, testing its validity against the function of exhaustion rule, the purpose of the Convention, compatibility with the obligation to abstain from implied recognition of legality of a territorial regime and entrenchment of its authority.

Considering that the paper will examine the abovementioned question exclusively in the context of ECtHR, issues concerning the status of de facto regimes and human rights obligations flowing from that status will not be the subject of the present paper, since according to the rules of territorial jurisdiction, the Court may only examine those cases where ratione loci jurisdiction of one of the contracting parties is established. Another important limitation of this paper is that it does not aim to address and examine the tension between principles of state sovereignty and self-determination. The criteria for statehood as well as doctrines of recognition will not be addressed

[12] *Cyprus v. Turkey*, App. no. 25781/94 (ECtHR, 10 May 2001), paras 91 and 92

as well. The scope will be restricted only to the obligation of non-recognition without being concerned with other recognition issues, such as premature recognition, policy of non-recognition, implied recognition, etc. Though, certain aspects of these legal issues will be discussed to preserve integrity of the research, each of them is an independent and complex topic which is impossible to thoroughly address due to certain constrains of this study. Finally, this paper will concentrate on purely legal side of the research question without examining its political implications.

1. The Meaning of The Doctrine of Non-Recognition

Before entering into discussion about thedoctrine of non-recognition, we should first clarify the meaning of the term "de facto regime" (DFR) or "effective territorial regime"in the context of this paper. DFR is generally understood as a political regime exercising at least some effective political authority over a territory and making a claim of sovereignty over that territory. According to Lord Atkin, the term "effective de facto administrative control" implies 'exercising all the functions of a sovereign government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government'.[13] Territorial regimes may take different forms, including entities purporting to be states, instances of occupation, annexation, international administration, etc. In any case, the distinctive feature of DFRs remains the exercise of effective authority over a territory and, what is more important, people living on it. Since the regime is not recognized by international community, it exercises its authority de facto, which signifies its illegal or at least extralegal foundation.[14] In order to validate their existence, DFRs seek recognition by major powers to give considerable weight to their status and claims.

Turning to substance of the doctrine and in order to understand the meaning of non-recognition, the term "recognition" should first be defined and examined under international law. As Turmanidze provides, recognition is 'an act of the executive authority taking note of facts and indicating willingness to allow all the legal consequences, attached to that noting in international law, to operate'.[15] It is generally accepted that recognition performs two functions – political and legal, and while the former is declarative in nature, the latter is constitutive. According to Kelsen, political act indicates the willingness of the recognizing state to enter into political and other forms of relations with the recognized state or government, without being indicative of their international legality. Legal act, on the other hand, relates to the establishment of a fact after which the recognized entity becomes a state, at least in its relations vis-a-vis the recognizing state.[16] It should be noted, however, that territorial status is not only a matter of fact but also of law, otherwise the whole notion of recognition and non-recognition would be reduced to expression of political approval or disapproval.

With regard to functions of recognition, Chen distinguishes two scenarios: in cases where legality of establishment of a new state is not in question, recognition is mainly an expression of

[13]Michael Schoiswohl, 'De facto- regimes and human rights obligations – the twilight zone of public international law?' (2001) Austrian Review of International and European Law 6, 45-90
[14]Jonte van Essen, 'De Facto Regimes in International Law' (2012)Merkourios 28:74, 31-49
[15]SergoTurmanidze 'Status of the De Facto State in Public International Law A Legal Appraisal of the Principle of Effectiveness' (2010), 350
<http://ediss.sub.uni-hamburg.de/volltexte/2010/4686/pdf/Doktorarbeit.pdf> accessed 15 October 2012
[16] Hans Kelsem, 'Recognition in international law: Theoretical Observations' (1941) The American Journal of International Law 35:4, 605-617

political attitude, whereas where international legality of an act or situation is questionable, recognition serves 2 purposes; first, it has a quasi-legislative character, provided that sufficient number of states are participating, second, it is a waiver of claims by the recognizing states vis-a-vis the recognized entity. In the former instance, the establishment of a new state or government can be contrary to municipal law, without violating international law. In the latter instance, however, violation of international law makes foreign states interested parties giving them the right to claim satisfaction with the legality of an entity before granting recognition. In this situation, recognition goes beyond confirmation of a fact and may generate rights previously non-existent.[17]Since the obligation of non-recognition refers to non-recognition of the *legality* of an act or situation created in violation of a fundamental norm of international law, this chapter will be particularly concerned with the latter category of situations where the international legality of an entity is in question.

In general, a territorial regime is considered to be illegal if its formation involves serious violation of one or more peremptory norms of international law. Article 53 of Vienna Convention on the Law of Treaties defines peremptory norm as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[18] Examples of peremptory norms identified by International Law Commission (ILC) include the prohibition of aggression and the illegal use of force, prohibition of slavery and the slave trade, genocide, racial discrimination and apartheid, the prohibition against torture, the basic rules of international humanitarian law and the right of self-determination. [19] Since these norms operate ergaomnes, illegality created by their violation also has ergaomnes effect, creating an objective status which goes beyond bilateral relations between the violator and the primary victim, permitting for considering the issue in light of public international law. As Ronen notes:

> The consequence of violation of a peremptory norm is legal nullity which operates ergaomnes. To maintain this nullity, states are prohibited from recognizing the legality of a situation created in violation of a peremptory norm, irrespective of the effectiveness or apparent success of those responsible for the conduct in question.[20]

Raič defines the doctrine of non-recognition in the following terms 'States are under an obligation not to recognize through individual or collective acts, the purported statehood of an

[17] Ti-chiang Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* (first edn Praeger,1951), 411-415
[18]Vienna Convention on the Law of Treaties, 23 May 1969
[19]Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?'(2006) Oxford Legal Studies Research Paper 19, 99-126
[20] Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 5

effective territorial entity created in violation of one or more fundamental norms of international law'.[21] In the present context it is particularly noteworthy that the obligation is not restricted in its application only to states, since international organizations, including Council of Europe and ECtHR, bear the same responsibility under international law.[22]

The obligation is declaratory in nature since states are prohibited to recognize a situation that is already legally invalid. The doctrine is not constitutive in the sense that it does not cause invalidity of otherwise legal situation, or annulment of an act (or its consequences) which is already legally void.[23] In this respect the function of the doctrine may be subjected to challenge, since if the illegality of the factual situation by itself already bars attachment of any legal status to it, then obligation of non-recognition is illogical and unnecessary. However, it is not the illegality of the factual situation, rather the rights and legal status claimed to flow from it that form the reason d'etre of the doctrine, since their recognition may lead to validation of the initial illegality.[24]

The doctrine of non-recognition is sometimes referred to as "collective" non-recognition, which is used to signify "collective" nature of determination of illegality by an international organization (UN, EC, etc.) or a number of states, based on an explicit obligation provided for in the treaty concluded among them. This does not mean, however, that the absence of "collective" determination can release a state from its duty of non-recognition, since the obligation is not collective, but individual.[25] In other words, there is no collective obligation of non-recognition, rather collective state practice can develop to that end.

In order to better understand the nature of the duty of non-recognition and differentiate it from other types of recognition issues, we should separately examine the object, function, legal basis and content of the obligation.

1.1 The object of non-recognition

The object of non-recognition can be a state or a government created in violation of a peremptory norm of international law, committed either by the authorities of the territorial regime, by a third state, or by both of them. [26]This type of non-recognition shall be distinguished from other recognition issues with identical objects, in particular, the policy of non-recognition and premature recognition. Policy of non-recognition, which was touched upon in the context of Chen's observations, concerns those situations where the legality of an entity is not in question, i.e., where

[21]Davd Raic, *Statehood and The Law of Self-Determination* (first edn Martinus Nijhoff Publishers, 2002), 442
[22] See e.g., Security Council Resolution 662, 9 August, 1990, or Advisory Opinion of the ICJ on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004).
[23] Davd Raic, *Statehood and The Law of Self-Determination* (first edn Martinus Nijhoff Publishers, 2002),109
[24] Ibid., 107
[25] Ibid., 108
[26] Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (first edn Kluwer Law International, 1990), 274

the fact of its establishment is not contrary to law.[27] In this case recognition is discretionary and is withheld based on political considerations. Here, the function of non-recognition is to bestow international legal personality or establish diplomatic relations, depending on whether one would interpret it from the perspective of constitutive or declarative theory.[28] Therefore, in order to effectively differentiate between policy and obligation of non-recognition not only state practice needs to be examined but also *opinion juris* reflected in that practice.

As to premature recognition, its differences from obligatory non-recognition can be summed up in 2 main points: first, while prohibition of premature recognition is concerned with recognition granted before fulfillment of traditional statehood criteria by a territorial entity, the duty of non-recognition relates to withholding recognition from an effective territorial entity due to its illegal foundation. This distinction, however, is blurred in light of modern statehood criteria calling for legality and not only for effectiveness of a territorial regime. In this regard, the term "premature" can be interpreted to indicate that recognition, as such, is permissible, provided for the prior fulfillment of the requisite criteria, but not sooner. Non-recognition, on the other hand, is deemed not to be qualified and relates to withholding recognition now and in the future. Second, while recognition of an entity not fulfilling statehood criteria and located within a parent state constitutes violation of *erga singulum* obligation (the principle of non-intervention in internal affairs), granting recognition when there is an obligation of non-recognition, is violation of *erga omnes* obligation, though these two instances may well overlap.[29]

1.2 The function of non-recognition

The function of non-recognition is to prevent validation of an act or its consequences which are already legally void. This obligation is closely linked with the maxim *ex injuria jus non oritur* requiring that acts contrary to international law shall not become sources of legal rights for the violator and is, therefore, primarily directed against "poisoned fruits"(results) of the illegal conduct. The reason is that validation of these consequences through recognition may seriously undermine fundamental norm on which the illegality of an act is based, which may, in turn, threaten the whole international legal order. If the consequences of an illegal conduct are recognized by a substantial number of states, it would become very difficult to claim that the breached fundamental norm has not been replaced or modified at least with regard to recognizing states.[30]

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[27]To be clear, the grounds for non-recognition shall be differentiated from the motive behind adoption of such a policy. Here, it does not matter whether the motive for non-recognition is legal or political. What matters. Is whether such a policy can be based on international law.

[28]There are two recognition theories – constitutive and declarative, which are widely discussed in academic literature. According to the first one, recognition creates (constitutes) the state, while the latter claims that recognition is a political act since the factual existence of a state is not dependent upon or determined by it.

[29]Davd Raic, *Statehood and The Law of Self-Determination* (first edn MartinusNijhoff Publishers, 2002), 92-93

[30]Davd Raic, *Statehood and The Law of Self-Determination* (first ednMartinusNijhoff Publishers, 2002), 110

Since non-recognition has negative legal effect by preventing consolidation of illegality, it is described by Marek as a temporary measure directed towards restoration of legal order not only through contestation of the status of a respective entity, but also through serving as a sanction in international plane. In this respect, collective no-recognition shall be differentiated from economic, financial and other enforcement measures, which imply taking positive steps aimed at termination of illegal situation, rather than preservation of status quo ante.[31] Also, it should be differentiated from countermeasures, which are limited to the non-performance of international *obligations* … towards the responsible state', while granting recognition is not an obligation, but a discretion. [32]

1.3 Legal basis of non-recognition

Legal basis of the duty of non-recognition was formulated in early 1930s in form of the well-known Stimson doctrine – U.S. foreign policy of non-recognition adopted with regard to the factual situation in Manchuria and named after then US Secretary of State Henry L. Stimson. The doctrine, that was initially based only on Briand Kellogg pact and restricted to instances of forcible territorial acquisition, was later upheld by March 11, 1932 Resolution of the League of Nations, reading that 'it is *incumbent* upon the Members of the League of Nations not to recognize any situation, treaty or agreement, which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris'.[33] The mandatory language of the Resolution not only clearly indicates transformation of the doctrine from foreign policy to legal obligation, but is also a clear evidence of *opinion juris sive necessitatis*, crucial for its development from treaty obligation to a rule of customary international law.[34] After the Second World War the duty of non-recognition, though still restricted in its scope to attempted acquisition of sovereignty over a territory, was reflected in UN charter, Article 2(4) of which provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…'. Although the article does not make explicit reference to Stimson doctrine, its essence can be inferred from the phrase "territorial integrity or political independence of any state".[35] The evolution of *opiniojuris* can also be discerned from Article 11 of 1949 *Draft Declaration on Rights and Duties of States*, stipulating that "Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9". [36] Moreover, 1970 General Assembly Resolution 2625 (XXV) reads: 'No territorial acquisition or

[31]Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (first ednKluwer Law International, 1990), 277-278
[32] David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law'(2001) Chinese Journal of International Law 2:1, 105-143
[33]League of Nations, Official Journal, 1932, Special Supplement No. 101, 87- 88
[34] David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law'(2001) Chinese Journal of International Law 2:1, 124
[35] Ibid., 130
[36] Draft Declaration on Rights and Duties of States, 7 December 1951, UN General Assembly

special advantage resulting from the threat or use of force shall be recognized as *legal*'.[37] Here, the phrase "special advantage" signifies enlargement of the scope of the doctrine to situations other than straightforward acquisition of territory. Further, Article 41(2) of International law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) provides: 'No state shall recognize *as lawful* a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining the situation'.[38] Article 40, in its turn, defines "serious breach" as "gross and systematic" violation of 'an obligation arising under a peremptory norm of general international law'.[39] In other words, ILC expressly extends the scope of non-recognition from illegal use of force to situations resulting from serious breach of any *jus cogens* norm, some of which are enumerated in the beginning. The problem here is that while the obligation of non-recognition was examined and confirmed, particularly by ICJ, with regard to violation ofsome *jus cogens* norms, including the right of people to self-determination (Rodesia case), prohibition of the use of force (TRNC case, Israeli wall case) and prohibition of racial discrimination (South Africa case), the existence of the obligation with regard to serious breach ofotherperemptory norms remains debatable. In this relation, Talmon observes that since the obligation may arise only in situations where the object of non-recognition is not a mere factual situation, but claim to a legal status or title deriving from it, (including claimstostatehood, territorialsovereignty, governmentalcapacity, etc.), it is not clear whether and how acts of genocide, slavery or torture can lead to such claims. Later he adds, that with regard to these category of norms the denial of legal effect may have a wider interpretation, including, e.g., refusal by other states to bestow legal validity on property rights obtained by genocide or torture.[40] Here, we should also note that due to the peremptory nature of certain norms, their violation constitute international crime. This was articulated in Art. 6(1)(a) of 1982 Draft Articles stipulating that 'an internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other States not to recognize as *legal* the situation created by such act'. This consideration provides additional justification for the obligation of non-recognition, since the breach of *jus cogens*norms or situations resulting from international crime cannot be validated.[41]

After the pronouncement of *Namibia Advisory Opinion*, some commentators started to strongly advocate for narrow interpretation of the decision, claiming that the obligation of non-recognition may arise only in cases where there is a Security Council mandatory resolution

[37] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 24 October 1970, UN General Assembly
[38]Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, International Law Commission
[39] David Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law'(2001) Chinese Journal of International Law 2:1, 135
[40]Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?'(2006) Oxford Legal Studies Research Paper 19, 99-126
[41] Ibid., 115

expressly referring to it. This argument, however, did not stand the test of time, since in its following decision on *East Timor* (1993), ICJ expressly acknowledged the doctrine of non-recognition referring to Stimson, while the duty was not expressed in any Security Council mandatory resolution under Chapter VII. Judge Skudiszewski specified that '…the obligation not to recognize a situation created by the unlawful use of force does not arise only as a result of a decision of the Security Council ordering non-recognition. The rule is self-executory'. [42] The core question to be addressed is whether an authoritative determination of illegality (in this case by Security Council) is necessary for the establishment of the obligation, since in general international law illegality of an action is not self-evident. This issue is strongly connected with the nature of general international law itself, which, being primitive in nature, is highly decentralized and there is no established body competent to determine in a legal procedure the existence of a certain fact so that the consequences provided by law would flow from it. This function is left on the interested parties and particularly states, each of which bears an individual responsibility for its decisions. Thus, the duty of non-recognition arises when a state forms its view that a serious violation of a peremptory norm of international law was committed. In her separate opinion Judge Higgins rightly noted the importance and authority of Security Council's findings without, however, referring to their central or exclusive role in the establishment of the obligation. Simply stated, though findings of Security Council may contribute to legal certainty, the function of UN's political organs is limited to that of coordination, rather than generation of obligations. State practice,however,indicates that in most cases consistent practice of non-recognitionwas established only after a binding Security Council resolution. This brings us back to the collective aspect of non-recognition and the main feature of law-determination in international law which is more based on authoritativeness rather than on binding character, since for a certain legal stance to produce effects on international plane, concerted efforts of international community is needed, which results in institutionalization of non-recognition policy.[43]

1.4 The content of non-recognition

The content of the obligation of non-recognition form those measures that states should take or abstain from in order to comply with the obligation. The exact nature of these measures may differ on case-by-case basis, depending on the nature of the norm violated and peculiarities of the factual situation not to be recognized as lawful. Both, ILC Draft Articles on State Responsibility and ICJ case law stipulate that the duty not to recognize *legality* of a situation created in violation of a peremptory norm(s) of international law extends not only to formal acts of recognition, but also

[42]David Turns, 'The Stimson Doctrine of Non-Recognition:Its Historical Genesis and Influence onContemporary International Law'(2001) Chinese Journal of International Law 2:1, 134

[43] Policy is referred here as a collective state practice of non-recognition when there is a fundamental illegality created by violation of a peremptory norms of international law.

to those acts or omissions that would imply such recognition. Hans Blinxexplaines the meaning of the phrase "non-recognition as *legal*" in following terms:

> No *formal admission* may be made of the *legality* of a forcible territorial acquisition as described. This would appear to allow States to determine for themselves - in the absence of any collective action by the United Nations – to what extent they would allow practical co-operation and courtesies *without any formal admission of the legality of the situation*.[44]

The obligation, however, would be considerably weakened if it were restricted only to the abovementioned mode of recognition. Subsequent practice illustrated that this duty amounts to more than mere prohibition of formal recognition of legality and extends to acts that may *imply* such recognition. In Namibia Advisory Opinion ICJ noted that UN member states are 'under obligation […]to refrain from any acts and in particular any dealings with the Government of South Africa *implying* recognition of the *legality*' of South Africa's presence in Namibia[45].Thus, the obligation supposes not just passive inaction, but ratheractive abstention.

The concept of implied recognition is discussed in Oppenheim's International law, where it is described in the following way: 'Implied recognition takes place through acts which , although not referring expressly to recognition, leave no doubt as to the *intention* to grant it'.[46] Since recognition is widely regarded as a matter of intention, any act which clearly indicates such intention is sufficient to be regarded as recognition.[47] Hence, recognition cannot be implied when there is an unequivocal indication to the contrary. The issue here is to identify those acts, the mere existence of which would be sufficient to justify intention without additional necessity to apply to its subjective aspect. Otherwise, requiring intention to be revealed would contradict to the very notion of *implied* recognition.[48]

Taking into account that international law does not specify the exact contentof the obligation, the answer should be sought in the practice of international community, and particularly UN,adopted with regard to concreteinstances of non-recognition. Where General Assembly, Security Council or ICJ elaborated on the content of implied recognition, they generally defined it in broad terms, encompassing *any dealing* which could imply formal recognition of illegality. The nature of specific measures can be uncovered referring to UN resolutions adopted in the context of different non-recognition policies, including 'obligation not to recognize passports or travel

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[44]Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?'(2006) Oxford Legal Studies Research Paper 19, 110

[45]David Turns, 'The Stimson Doctrine of Non-Recognition:Its Historical Genesis and Influence onContemporary International Law'(2001) Chinese Journal of International Law,2:1, 114

[46] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (4th edn Pearson Education Ltd, 1992), 169

[47] W.E. Hall, *Treatise on International Law* (4thednClarendon Press 1895), 93

documents issued by a regime, to withdraw consular representation, to withdraw diplomatic missions, to deny the legal validity of any public or official acts of the regime, and to refuse any claim to membership of an international organization'[49].

Turning to the practice of ICJ, two cases worth examination- Advisory Opinions concerning Namibia and Wall. In Namibia the court framed the content of the obligation in fivetypes of proscribed measures, enjoining states from 1) entering into treaty relations with South Africa where it purported to act on behalf of or concerning Namibia, 2) invoking or applying existing bilateral agreements with South Africa concluded on behalf of or concerning Namibia where there is active inter-governmental cooperation involved, 3) sending diplomatic or special missions to South Africa, which would include Namibia in their jurisdiction, 4)sending consular agents to South Africa, and 5) entering into 'economic and other forms of relationships or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory'. The court also recognized the qualified nature of the obligation in paragraphs 122 and 125, where it stated that for the sake of preventing adverse consequences for the inhabitants of the territorynon-performance shall not affect treaties of humanitarian nature and general invalidity shall not extend toacts of local administration.

Conversely to Namibia, in Wall Advisory Opinion the court did not go beyond determination of general illegality, leaving delineation of the exact content of the obligation on the political organs of the UN. This ruling left the states in perplexity with regard towhat exactly they are supposed to do to avoid implied recognition of legality.

[48] Ti-chiang Chen, *The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* (first edn Praeger,1951), 189

[49] Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford (ed), *The Law of International Responsibility* (first edn Oxford University Press 2010), 685

2. Namibia Exception: Interpretations

Broadly speaking, Namibia exception is about balance between two, seemingly contradictory principles *ex injuria jus non oritur*(legality) and *ex factis jus oritur*(effectiveness).The former is the general rule prohibiting any form of recognition while the latter provides for an exception with regard to certain category of acts of territorial regimes. The qualified nature of the doctrine of non-recognition is outlined in paragraph 125 of Namibia Advisory Opinion, where ICJ addresses the status of internal acts of South Africa adopted with regard to or concerning Namibia:

> 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.[50]

The doctrinal basis of this approach is the theory of necessity upon which consequences of acts ofDFRs can be given effect when doing otherwise 'would run contrary to peace and good order'.[51]Since from the outset the primary purpose of the doctrine was to avoid much hardship and inconvenience at private lawlevel, in English jurisprudence the doctrine is also called "private law exception". The first hint of judicial awareness of thisposition was reflected in *Texas v. White* case of 1868 by United States Supreme Court, where it was ruled that irrespective of non-recognition of Confederate States established during the Civil War shall not extend on the validity of

> acts necessary for peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and domestic relations, governing the course of descents, regulating the conveyance and transfer of property real and personal, and providing remedies for injuries to person and estate…[52]

Later, the same approach was reflected in UK jurisprudence in a number of cases which will be discussed below. Nowadays, this judicial stance is widely accepted to be well-established in international law, having objective, rather than subjective status dependent on the discretion of individual states.

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[50]Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971

[51] Yael Ronen, 'Status and (Human Rights) obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland' by Michael Scholoiswohl' (2005) The American Journal of International Law 99:4, 953-959

[52] *Texas v. White* - 74 U.S. 700 (*1868*), 240

The issue of validity of internal acts may arise in different contexts, such as recognition of citizenship for tax revenue assessment purposes, recognition and enforcement of foreign judicial or administrative acts, etc. This question may alsoemerge before ECHR,in the context of examining the requirement to exhaust domestic remedies under article 35.1 before launching international proceedings. Considering that precise scope of acts falling under the validity exception has never been conclusively defined, Namibia principle received different interpretations with regard to its scope and content of acts enjoying validity. One of the approaches is reflected in Judge de Castro's dissenting opinion, where he suggested that for determining whether a particular act should be granted legal validity, distinction should be made between public and private acts:

> It would seem that the acts of the de facto authorities relating to the acts and rights of private persons should be regarded as valid (validity of entries in the civil registries and in the land registry, validity of marriages, validity of judgements of the civil courts, etc.). On the other hand, other states should not regard as valid any acts and transactions of the authorities relating to public property, concessions etc. States will thus not be able to exercise protection of their nationals with regard to any acquisitions of this kind.[53]

A different interpretation is provided by Judge Onyeama in the form of so called "entrenchment - routine test", providing that acts which are aimed at or capable of entrenching an illegal regime cannot be granted legal validity. In this regard, routine acts of day-to day activity fall under the validation exception. The phrase"entrenchment of the *authority*" was used by the Court to refer to consolidation ofactual controlrather than formal statusover the territorywhich was already denied to the regime.[54]According to Ronen, bearing in mind the consequences that validation of internal acts may have on the entrenchment of the authority of an illegal regime, Judge Onyeama's approach implies that, e.g., nationality granted under such a regime shall not be granted legal effect, given its motivation and effect on facilitation of entrenchment. The issue is disputable with regard to residence status, since its potential for legitimizing an illegal regime is relatively small. However, if it is directed at changing the demographic pattern of the territory, the type of the settlers' status does not matter, since in any case they are regarded as legitimately present in the territory.[55]

There is no clear-cut separation line between these two forms of interpretation and they might well overlap. For instance, acts most likely to contribute to the entrenchment of a regime,

[53]Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 84

[54]Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 78

[55]Yaël Ronen, 'Status of Settlers Implanted by Illegal Territorial Regimes', (2008) The British Yearbook of International Law 79:1, 194-263

usually belong to public sphere. From this perspective, public-private distinction can be viewed not only as an independent validation criteria, but also as subordinate to the entrenchment test – a supplementary criterion for evaluating the possible impact of an act on the entrenchment of a regime.

Adherence to combined application of the abovementioned interpretations is also reflected in the practice of domestic courts. For example, in *Caglar v. Billingham* (1996), the UK Special Commission while reviewing tax appeal of the TRNC representative in London, formulated the principle in the following terms: 'The courts may acknowledge the existence of an unrecognized foreign government in the context of the enforcement of laws relating to commercial obligations or matters of private law between individuals *[private-public test]* or matters of routine administration such as the registration of births, marriages or deaths *[entrenchment-routine test]*', except for the cases when acknowledgement of an unrecognized entity would be inconsistent with the foreign policy or diplomatic stance of the United Kingdom.[56]

Though UK courts have been quite steadfast in denying any exception to no-recognition strongly adhering to "one voice" policy, [57] there have been suggestions for application of "private law exception" by individual judges. For instance, in Carl Zeiss Stiftung v Rayner& Keeler Ltd (No.2) [1967] 1 AC 853, 954, Lord Wilberforce made a reservation that 'where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned… the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question'.[58] Similarly, in *Gur Corporation v Trust Bank of AfricaLtd* [1987] 1 QB 599, 622, Lord Donaldson whilecommentingon Lord Wilberforce's reservation in *Carl Zeiss*, noted that 'it is one thing to treat a state or government as being 'without the law', but quite another to treat the inhabitants of its territory as 'outlaws' who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences'. Another judge, Lord Denning MR, said in *Hesperides Hotels Ltd v Aegean Holidays Ltd* [1978] 1 QB 205 which concerned expropriation of property in northern Cyprus, that he is of firm opinion that UK courts are capable of granting recognition to the laws or actsof a non-recognized effective territorial regime 'at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth'.

Finally, according to the third interpretation of paragraph 125 of Namibia Opinion, the meaning of the exception shall be read literally. Since the obligation of non-recognition is not qualified per se, then no act shall be recognised ipso facto,irrespective of the level of its

[56] Ibid., 85

[57] The essence of the policy is that judiciary and the executive should speak with one voice , so that judiciary shall abstain from frustrating executor's policy of non-recognition by validating such acts, which are dependent on the unrecognized status. This policy is also clearly discernable in the abovementioned Carl Zeiss judgment.

contribution to the entrenchment of the authority, because any recognition, whether direct or indirect, entrenches the regime.[59] In this respect Judge Ammoun conceived any interaction with South Africa having entrenchment power, stating that the Court's opinion shall be read in light of the General Assembly's aiming to dissuade member states from providing any form of assistance to South Africa, even not directly aimed at consolidation of the regime.[60] In the meantime, it acknowledges the possibility of exceptional retrospective recognition of any act, provided that such recognition is necessary for averting detriment to the inhabitants of the territory. Under this interpretation Namibia principle becomes more flexible, suggesting that each situation shall be examined on its own merits on the background of the specific circumstances giving rise to it, in order to determine whether refusal to grant legal effect to a specific internal act may have detrimental effects for the inhabitants of the territory. In other words, here we can see vindication of individual approach which unlike previous exegesis does not seek to establish a preliminary "formula" for categorisation of acts falling under vindication exception. Hence, even if a certain act can have significant effect on consolidation of the regime, the "community interest" rationale maybe sufficient to give it legal effect.Advocacy of wider interpretation of the prohibition was also reflected in UN Secretary General's commentary on Namibia Advisory Opinion, noting that determination of legal validity of any act taken under South Africa's illegal presence shall be the prerogative of Namibia's Legislative Assembly.[61]The dark side here is that individual states or international organs are left with a wide margin of discretion, which not only bearsrisk of abuse, but may also lead toinconsistences in international law.

Broad interpretation of Namibia exception was also supported byECtHR practice, for example in *Loizidou v. Turkey* (1995), ECHR disregarded the question as to the entrenchment of a regime in finding constitutional article of TRNC illegal. In a different case, *Cyprus v. Turkey*(2001), where ECtHR was asked to determine legal status of judicial organs of TRNC under article 35.1 of the Convention, the court again disregarded entrenchment issue finding that in the interest of the inhabitants of the territory TRNC judicial organs can be regarded as local remedies. This finding would have been impossible in light of other, narrower interpretations of the exceptionsince, inter alia, TRNC judicial organs are not a perfunctory tool of administration regulating merely private law relations established andsustained under an illegal regime. [62]

[59]Yaël Ronen, 'Status of Settlers Implanted by Illegal Territorial Regimes', (2008) The British Yearbook of International Law 79:1, 233
[60]Yael Ronen, *Transition from Illegal Regimes under International Law* (first edn Cambridge University Press, 2011), 87
[61] Ibid., 87
[62] Ibid., 88

3. Requirement to Exhaust Domestic Remedies: Expansion of Namibia Principle

Current developments in ECtHR practice demonstrate tendency to go beyond recognition of *effects* of local judicial or administrative acts, recognizing rather the *authority* of those bodies, i.e. their power to local administration which is a necessary prerogative for responsibility under international law.Nevertheless, any attempt to impose human rights obligations on DFRs encounters the gap between capacity and authority to fulfill them. While the problem with other non-state actors is in their limited capacity to local administration, DFRs have this effective power, what they lack is legal capacity (recognized authority) to fulfill these obligations. Hence, the reason for limiting the scope of human rights obligations for DFRs is not a practical but a normative one which raises a question as to whether legal capacity is a necessary prerogative for DFRs to discharge their human rights obligations. This barrier is possible to overcome by extending the scope of Namibia exception from *ex post facto* to *ex ante* recognition.[63] The difference between these two approaches is that while the former is backward looking and represents retroactive and exceptional validation of the effects of local judicial or administrative acts, ex ante recognition is forward looking, since it validates the authority of administrative and judicial organs rather than simply effects of their acts.

To explore the development of this phenomenon in the context of ECHR, it is necessary to examine the Court's approach concerning legality of local acts of northern Cyprus. Throughout Greek-Cypriot applications it was constantly claimed at ECtHR that acts of TRNC authorities cannot be granted legal validity and domestic remedies devised under the regime cannot be considered effective due toa numberof factors: Turkey's illegal military actions in 1974 resulting in creation of the puppet state (TRNC); Turkey's "illegal presence and control" in northern Cyprus; relations between TRNC and Turkey. Simply stated, the core of the arguments is the basic illegality that led to the creation of TRNC and continues to sustain it, including its infrastructures. In this regard it is interesting to look at the way the court treated the question of illegality of TRNC's creation in requiring exhaustion of domestic remedies under article 35.1of the Convention in light of Namibia exception.

3.1. General principles of exhaustion

Article 35.1 of the Convention stipulating admissibility criteria provides that 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law'.[64] The rationale behind this requirement is reflected in the well-establishedprincipleof subsidiarity proclaimed by the Court requiring that 'States are dispensed from answering before an international body for their acts before they have

[63] Ibid., 89-90

had an opportunity to put matters right through their own legal system'[65]. This principle is supported by the assumption reflected in Article 13 that national systems provide for an effective domestic remedy against alleged violations. Considering that contracting parties bear primary responsibility for implementation of conventional guarantees, it was noted in a number of cases that the role of the Court is to supervise observance rather than ensure realization of conventional rights and freedoms. Furthermore, this admissibility requirement is sustained not only by normative but also by practical considerations relating to scarcity resources of the Court. In this regard it was mentioned in *Demopoulos and others v. Turkey* that

> The Court cannot emphasize enough that *it is not a court of first instance*; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions.[66]

Under classical broad interpretation of Namibia exception described in the previous section, requirement to exhaust domestic remedies should not be applied to effective territorial regimes, since the exception relates to retrospective recognition of individual acts for the purpose of averting detriment to the inhabitants of the territory. Recent developments in the case law concerning TRNC acts demonstrate that the Court went one step further, applying this requirement to judicial and administrative organs of the regime, which seems to render some legitimacy on them (on their legal basis) and, hence, conflict with the obligation of non-recognition. To demonstrate the contrary two issues need to be proven:

1. the requirement to exhaust domestic remedies provided by DFRs is compatible with the function of exhaustion rule and purpose of the Convention;

2. the Court's interpretation is compatible with the obligation to abstain from implied recognition of legality of a territorial regime and entrenchment of its de facto authority, hence, remaining within the scope of Namibia exception.

3.2 Compatibility of the Court's interpretation with the function of exhaustion rule and purpose of the Convention

In *Loizidou v. Turkey* (1995), ECtHR refused to give legal validity to article 159 of the TRNC constitution taking into account international practice and different resolutions signifying non-recognition of TRNC. Though the Court stated that it 'does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of

[64]Convention for the Protection of Human Rights and Fundamental Freedoms, 5 November 1950, Council of Europe
[65]*Akdivar and Others v. Turkey* App no 99/1995/605/693 (ECHR 30 August 1996) para 65
[66]*Demopoulos v. Turkey* App no 46113/99 (ECHR 1 March 2010), para 69

legislative and administrative acts of TRNC', it invoked Namibia exception acknowledging that international law recognizes legitimacy of "certain legal arrangements and transactions". The Court abstained from viewing the question from the perspective of Turkey's responsibility as an occupying power, finding that legal validity of TRNC's judicial and administrative acts should be determined based on their compatibility with the Convention principles and what DFRs can do based on their position in international law.[67]

In the following landmark decision on *Cyprus v. Turkey* (2001) case, the Grand Chamber shifted from declaratory acknowledgement of the principle to recognizing the courts of TRNC as domestic remedies to be exhausted before international proceedings can be launched. In addressing challenges against extensive interpretation of Namibia exception, the Court observed that Namibia Opinion, read in conjunction with pleadings and explanations, reveals that the obligation of non-recognitions is not an absolute one. Taking due allowance of the fact that inhabitants continue to stay under effective authority of the territorial regime, the court said:

> Life goes on in the territory concerned. That life must be made tolerable and 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 depriving them even of the minimum standard of rights to which they are entitled'.[68]

For the purposes of the Convention and in order to avoid vacuum in human rights protection, the inhabitants may be required to exhaust the remedies provided by TRNC courts, unless their inexistence or ineffectiveness can be proved, which should be examined on a case by case basis on the background of the general legal and political context of the country in which they operate. The Court found that TRNC courts can fill this potential gap in legal protection and their absence could work to the detriment of the population, hence, they must be taken into account for the purposes of Article 35.1 of the Convention. [69]

Further attempts to challenge validity of TRNC's legislative framework were made in *Foka v. Turkey* (2008) and *Protopapa v. Turkey* (2009) cases. In *Foka* a woman of Greek-Cypriot origin living in the TRNC was subjected to detention and interrogation and the issue before the court was whether in the given circumstances detention was a legitimate interference with her right to liberty. Since, according toArticle 5 of the Convention for an interference to be legitimate it must be "prescribed by law", a question arose as to the validity of national law. The court recognized validity of the TRNC legislation considering it as an important elementfor TRNC (or Turkey) to

[67] *Loizidou v. Turkey* App no 15318/89 (ECHR, 23 March 1995)
[68] *Cyprus v. Turkey* App no 25781/94(ECHR, 10 May 2001), para 96
[69] Ibid.

discharge its human rights obligations and, hence, beneficial to the population.[70] Similarly, in *Protopapa v. Turkey*, the applicant who participated in demonstrations and was later subjected to criminal proceedings in TRNC, brought the same arguments complaining about violation of her right to liberty. The court followed its *Foka* decision stating that acts carried out under TRNC legislation should be regarded as lawful for the purposes of the Convention, taking into account that such recognition is necessary for the protection of human rights and beneficiary for population in the meaning of Namibia exception.[71]Aside from this, independent consideration should be given to practicality reasons, i.e. contribution of this admissibility criteria to avoiding case overload with excessive and irrational complaints.

The culmination of the Court's interpretation was recorded in *Demopoulos and others v. Turkey* (2010) case, where the court found application inadmissible based on non-exhaustion of domestic (TRNC) remedies, since the applicant did not approach Immovable Property Commission (IPC). Here, it was once again emphasized that the key idea of Namibia exception was to obviate legal vacuum where no redress can be provided for human rights violations. The Court concluded that local remedies were not exhausted by ruling on the obligation to approach the Commission rather than recognizing validity of its decisions.[72] This judgment was subjected to strong criticism, including by dissenting judges. One of the arguments raised was that by ruling so the court confused the role of domestic remedies as provided under Article 13 with its role as a bar to international adjudication, as provided under article 35. Article 13 relates to the state's obligation to establish remedies and provide redress against human rights violations and, in fact, decisions of such bodies can be granted recognition on exceptional ex post facto basis, but this does not mean that it should create obligation on individuals to exhaust them ex ante. It should be noted, however, that as it reveals from travaux preparatoires of the Convention the objective behind Article 13 is to ensure effective protection of conventional guarantees on domestic level by requiring 'to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court'.[73] Moreover, bearing in mind that the objective of the convention is to protect rights and interests of individuals, its articles shall be interpreted in a manner rendering these rights practical and effective rather than theoretical and illusory. Based on this, the Court views the duty of exhaustion as directly complementary to the state's obligation to provide effective remedies under Article 13 and a necessary prerogative for the latter's effectiveness. While addressing discrepancy in the applicants argument in *Cyprus v. Turkey* case,the court noted that 'it cannot be asserted, on the one hand, that there has been a violation of that Article [article 13] because a State has not provided a

[70]*Foka v. Turkey* App no 28940/95 (ECHR, 24 June 2008)
[71]*Protopapa v. Turkey*App no 16084/90 (ECHR, 22 September 2009)
[72]*Demopoulos v. Turkey* App no 46113/99 (ECHR 1 March 2010)
[73]*Kudłav. Poland*Appno. 30210/96 (ECHR 26 October 2000), para 152

remedy while asserting, on the other hand, that any such remedy, if provided, would be null and void'.[74] Similarly, in *Foka v. Turkey* the Court said:

> It would not be consistent if the adoption by the authorities of the "TRNC" of civil, administrative or criminal law measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no "lawful" basis in terms of the Convention.[75]

Validity of the Court's interpretation was additionally questioned against the rationale of the exhaustion rule, that is ensuring respect towards state sovereignty and avoid replacing national courts with international ones. Based on this, many authoritative commentators reasonably claim that since DFRs are already denied sovereignty there can be no justification for application of this requirement. This could be right, if respect towards state sovereignty was the only or primary function of the rule conditioning its existence. However, in addition to practical contributions, ECtHR practice confirms that when it comes to non-recognised regimes the role of exhaustion requirement changes becoming supportive element for the effectiveness of Article 13 which was already discussed above.

3.3 Compatibility of the Court's interpretation with the obligation to abstain from implied recognition of legality of a territorial regime and entrenchment of its de facto authority

Interpretation of Namibia principle provided by the Court was subjected to criticism by dissenting judges and legal scholars, noting that requirement to exhaust remedies of unrecognized territorial regimes may amount to implied recognition since 'the entire court system in the "TRNC" derives its legal authority from constitutional provisions whose validity the Court cannot recognize […] without conferring a degree of legitimacy on an entity from which the international community has withheld recognition'. [76] To address this challenge, we need to turn back to the essence of the notion of implied recognition discussed in subsection 1.4, where it was noted that recognition is largely a matter of intention and there are certain category of acts that have special characteristics implying recognition when the intention is not explicitly stated. However, when intention of a state or international organization is expressed in a clear and unequivocal manner, there is no necessity to guess it. Given that in its judgment ECtHR constantly and consistently noted illegality of the establishment of the "TRNC" invoking the texts of different resolutions as well as international practice of non-recognition, considering "TRNC" courts as domestic remedies does not amount to implied recognition.

[74] *Cyprus v. Turkey* App no 25781/94(ECHR, 10 May 2001), para 101
[75] *Foka v. Turkey* App no 28940/95 (ECHR, 24 June 2008), para 83
[76] *Cyprus v. Turkey* App no 25781/94(ECHR, 10 May 2001), 101

The other issue concerns obligation of states and international organizations to abstain from facilitating entrenchment of "TRNC" authority, i.e. its factual hold over the territory. Many dissenting judges noted that the Court should not assume too readily that by encouraging inhabitants to apply to local measures, they are acting in their best interests. Nevertheless, one should note that this requirement does not exist in isolation, neither it is an absolute one, since one of the challenges facing the Court was to balance it with basic human needs, considering that holding otherwise would fail to contribute to "peace and good order" in the territory necessary for effective protection of conventional guarantees. Moreover, it was already noted that under broad interpretation of Namibia exception, entrenchment of the authority is not an absolute bar to validation, and any act can be granted exceptional validation, including those that may actually entrench the regimes, if it is necessary to prevent detriment to the inhabitants of the territory.

Conclusion

Being closely linked with international politics, it is particularly difficult to separate the issue of non-recognition of effective territorial regimes and study it in isolated province of law. Though certain aspects of this obligation are relatively easy to discern, many questions still remain as to the content of the obligation, i.e. what exactly need to be done to comply with the duty of non-recognition. The reluctance of international community to grant international legal personality to illegal regimes and necessity not to deprive population of such regimes from basic human rights leads to controversies around the problem. Developments in this field face the difficulty of reconciling two equally important interests, i.e., necessity to preserve international peace and order and the need to protect rights and interests of individuals under the authority of such regimes. Paragraph 125 of ICJ Namibia Advisory Opinion was an attempt of such reconciliation. Throughout ECtHR practice, however, Namibia principle undergone essential modifications with regard to its essence and scope. Recent practice of the Court's case law demonstrates that it has extended the application of the Namibia Principle from ex post facto to ex ante validation, which was not directly envisaged by the Opinion. The rationale for the expanded interpretation of the rule is protection of the interest of inhabitants and necessity to prevent emergence of legal vacuum in the field of human rights. The court consistently noted that such broad interpretation was particularly envisaged and applied for the restricted purposes of the Convention, in order to effectively realize its objectives. Contrary to ICJ, ECtHR adopted more formal, rather than functional approach to recognition, disregarding issues relating to the entrenchment of the regime and relying exclusively on "community interest" rationale. This attitude was and is still highly criticized by many authoritative scholars as too liberal and posing threat to the whole international legal order. One should note here, however, that modification of law should not be objectionable, provided that it does not pose threat to the system of law itself. Since the rationale behind the principle of non-recognition is maintenance of international peace and order by abstaining from validation of illegal acts, the rule cannot be absolutely irreversibly, especially considering that reversion of rules is envisaged even with regard to jus cogens norms (with subsequent norms of similar nature). Moreover, international peace and order is not only dependent on strict adherence to existing rules and sometimes the need to further public good or avert a threat may justify their adjustment, modification or even replacement with new norms.

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