Varas, the ECHR had considered whether interim measures ordered by the now-defunct European Commission of Human Rights under its Rules of Procedure were binding, and had held by ten votes to nine that the power to order binding interim measures could not be inferred from the Convention, and that such a power could only be conferred by the express agreement of the States Parties (*Cruz Varas*, para. 102). In *Mamatkulov*, the ECHR noted that in *Cruz Varas*, "the Court did not consider its own power to order interim measures but confined itself to examining the Commission's power" (para. 104). This is true; but as was rightly observed by Judge Türmen, who dissented in *Mamatkulov* on the issue of the binding nature of interim measures, the ECHR has since considered its own power to indicate interim measures, and confirmed that such measures were not binding (*Conka*, p. 25). In *Mamatkulov*, the ECHR was at pains to claim that its decision was not a reversal of this previous jurisprudence on the basis that it was maintaining a "dynamic and evolutive approach to interpretation". This is unconvincing, and the ECHR's failure to deal adequately with its previous jurisprudence is a weakness of the judgment. A more honest approach would have been for the ECHR simply to note the powerful minority decision in *Cruz Varas* and to state that the ECHR had in that case, as in *Conka*, got it wrong.

Despite these misgivings about the ECHR's reasoning, the result reached is correct and represents a significant step in the strengthening of the Convention system for the protection of human rights. In addition, in finding that interim measures ordered under a provision in the Rules creates obligations under the Convention, the judgment in *Mamatkulov* bolsters the view that the powers contained in the constitutive instruments of international courts and tribunals need not be exhaustive of those bodies' powers, but are merely declaratory; international courts and tribunals, such as the ECHR, have extra-statutory or inherent powers to ensure the effective fulfilment of their functions.

CHESTER BROWN

NON-RECOGNITION, JURISDICTION AND THE TRNC BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

IN 1983 the Turkish community in Northern Cyprus declared the independence of the Turkish Republic of Northern Cyprus (TRNC). Following UN Security Council Resolution 541 (1983) which declared the purported secession from Cyprus invalid, the

TRNC has remained unrecognised by all States except Turkey, on which it is heavily dependent, militarily and economically. The TRNC and the Government of Cyprus-controlled area of Cyprus are separated by a buffer zone under a UN peacekeeping force. Authorities on both sides restrict movement through the buffer zone.

The TRNC has been discussed in a number of cases before the European Court of Human Rights. The latest of these, *Djavit An* v. *Turkey* (Application no. 20652/92, Judgment of 20 February 2003), concerned a Turkish Cypriot resident of the TRNC, a critic of the TRNC authorities and of the Turkish military presence in it. The TRNC and Turkish authorities had repeatedly refused to grant him permits to cross into the buffer zone and to the government-controlled area, to participate in bi-communal meetings. The applicant alleged violations of Articles 10 (freedom of expression), 11 (freedom of assembly and association) and 13 (right to effective remedy) of the Convention for the Protection of Human Rights and Fundamental Freedoms (''the Convention''). The Court, by a majority, found Turkey responsible for violations of freedom of assembly and of the right to an effective remedy. The judgment raises a number of issues, of which only the most important will be touched on here: the territorial applicability of Convention rights, and the status of TRNC courts as offering domestic remedies.

A. Territorial applicability of Convention rights

The jurisdiction of Contracting Parties under Article 1 of the Convention extends wherever they exercise effective control. Therefore their responsibility can be engaged because of acts of their authorities ''which produce effects outside their own territory'' (*X & Y* v. *Switzerland*, Decision of 14 July 1977, D.R. 9, p. 57). In view of Turkey's effective overall control over the TRNC and the latter's lack of international legal status, Turkey's ''jurisdiction'' covers policies and actions of international the TRNC (*Loizidou* v. *Turkey (Preliminary Objections)*, Series A, No. 310). The ECHR in *Djavit An* thus imputed to Turkey the refusal by TRNC authorities to let the applicant cross the buffer zone.

However, although the act (the refusal of exit permission) took place within Turkish jurisdiction, the consequences of that act, *i.e.* the inability of the applicant to participate in meetings, occurred outside it. The problem of extra-jurisdictional effects would not have arisen had the matter been considered in terms of freedom of movement rather than of assembly, as suggested by Judge Gölcüklü in dissent. Turkey, however, is not a Party to Protocol 4 of the Convention, which guarantees freedom of movement. This is not

the first time that the ECHR has held that restrictions on movement constitute an interference with other rights (*Guzzardi* v. *Italy*, Judgment of 2 October 1980, Series A, No. 39). It is the first time, however, that the effects of the restrictions have occurred outside the jurisdiction of the Contracting Party.

In *Soering* v. *UK* (Judgment of 7 July 1989, Series A, No. 161) the ECHR addressed the problem of extra-jurisdictional effects when it examined whether Article 3 (prohibiting inhuman treatment) prohibited extradition from a Contracting Party when adverse consequences may be suffered outside its jurisdiction as a result of treatment administered in a receiving State. It did not hold the Contracting Party directly responsible for extra-jurisdictional effects. Instead, it included in Article 3 a prohibition on putting the individual at risk of exposure to adverse consequences. The effect of extradition thus crystallised under the Contracting Party's jurisdiction. However, this interpretation has never been extended beyond Article 3 and does not reflect a principle of State responsibility for the extra-jurisdictional effects of its acts.

There are at least two possible interpretations of the Court's ruling in *Djavit An*. One is that freedom of assembly is protected also outside the jurisdiction of the Contracting Party. However, the Court did not single out this freedom in any way. Moreover, its finding that there was no law "regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the 'green line' into southern Cyprus in order to assemble peacefully with Greek Cypriots" (at [67]) indicates that it did not consider the situation to be wholly divorced from the question of freedom of movement. An alternative interpretation is that the responsibility of a Contracting Party for acts carried out within its jurisdiction is engaged regardless of where the effects of these acts are produced. This interpretation is supported by the ECHR's declared effort to strengthen the Convention as a constitutional instrument of European public order and to avoid a vacuum in the system of human rights protection. Nevertheless, it would have been preferable to articulate the basis on which the respondent Party was held responsible for these effects.

B. The requirement to exhaust domestic remedies available in the TRNC

In *Djavit An* the Court applied for the first time its thin-majority ruling in *Cyprus* v. *Turkey* (Judgment of 10 May 2001, ECHR 2001-IV), that the TRNC courts may be regarded as offering "domestic remedies" for the purposes of Article 35 of the

Convention (the requirement to exhaust domestic remedies). This, according to the ECHR, followed from the 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)* [1971] I.C.J. Reports 16 at [125]), that international law recognises, as an exception to the duty of non-recognition, "the legitimacy of certain legal arrangements and transactions ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory". The Court took the view that since TRNC courts filled a potential vacuum in the protection of human rights, they were beneficial to the population, and therefore account must in principle be taken of them for the purposes of Article 35 (*Cyprus* v. *Turkey*, para. [86]). In *Djavit An*, the issue was once again raised and the ruling confirmed.

There are a number of difficulties in the Court's resort to the *Namibia* opinion:

First, the Court's application of the *Namibia* opinion is inconsistent with attribution of responsibility to Turkey. If Turkey is in effective control of the TRNC, the Court should have examined its obligations as an occupying power, which may include the provision of remedies to the local population and the application of Article 35. Non-recognition of the TRNC is irrelevant to this issue.

Secondly, even if the duty of non-recognition and its exception apply, in principle, to the TRNC courts (other than as Turkish institutions), there is still a question whether the exception validates their authority or only the effects of their acts. This question has not been decided definitively. In addition, the *Namibia* opinion authorises legal validation of acts that are beneficial to the population. It is far from clear that treating TRNC courts as offering domestic remedies for the purposes of Article 35 meets this criterion.

Finally, it is usually thought that the main thrust of the *Namibia* opinion is in the context of domestic, private law matters, such as personal status and property transfers. Reliance on the *Namibia* opinion to endorse the TRNC courts as offering domestic remedies means that they acquire some legitimacy—as State institutions—in the international sphere. This is difficult to reconcile with a policy or rule of non-recognition.

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