

## STRASBOURG FOLLOWS SUIT ON PROVISIONAL MEASURES

THE decision of the International Court of Justice in *LaGrand* that its provisional measures under Article 41 of the ICJ Statute were binding (Judgment of 27 June 2001) resolved a question which had occupied international lawyers for many years. The question of the legal effect of provisional measures granted by the European Court of Human Rights (“ECHR”) recently arose in *Mamatkulov and Abdurasulovic v. Turkey* (Judgment of 6 February 2003). Like the International Court, the ECHR has the power to “indicate” interim measures, but this power is not derived from a provision in its constitutive instrument, the European Convention for the Protection of Human Rights and Fundamental Freedoms, but rather from Rule 39 of the Rules of Court. On the basis of earlier jurisprudence (*Cruz Varas v. Sweden*, Judgment of 20 March 1991, Series A, No. 201; *Conka v. Belgium*, Decision of 13 March 2001), it had been thought that interim measures indicated by the ECHR were not mandatory, but in *Mamatkulov*, the ECHR effectively reversed this position and held that its interim measures had binding force.

The applicants in *Mamatkulov* were both Uzbek nationals who were wanted in Uzbekistan for alleged acts of homicide, terrorism and an attempt on the life of the President of Uzbekistan. Both were arrested in Turkey, and Uzbekistan sought their extradition under a bilateral treaty. The applicants argued that they were political dissidents and would be subjected to torture if extradited. The Turkish courts held that the offences for which their extradition was sought were “ordinary criminal” offences, and ordered their extradition. The applicants sought relief from the ECHR, claiming that their extradition to Uzbekistan would constitute violations of three provisions of the Convention: Articles 3 (the right to freedom from torture), 6(1) (the right to a fair trial) and 34 (the obligation on States not to hinder the effective exercise of the right of individual petition). A Chamber of the ECHR indicated interim measures in favour of the applicants, noting that “it was desirable in the interests of the parties and the proper conduct of the proceedings not to extradite the applicants to Uzbekistan until the Court has had an opportunity to examine the matter further” (para. 25). Turkey, citing representations from the Uzbek Government that the applicants would not be subjected to torture or capital punishment, nonetheless permitted the extradition.

In its judgment, the ECHR dismissed the applicants’ complaints under Articles 3 and 6(1) of the Convention on the grounds that

there was insufficient evidence for it to conclude that there had been a violation of those provisions. The evidence available consisted mostly of reports by international human rights organisations on the general situation in Uzbekistan. The ECHR agreed that the lack of evidence was largely due to the fact that the applicants' legal representatives had had no access to them since their extradition, and that this had affected their ability to pursue the application effectively (paras. 74, 87, 96). The question of the alleged breach of Article 34 of the Convention thus became pivotal; was Turkey, by virtue of its non-compliance with the ECHR's indication of interim measures, in violation of its obligation?

The ECHR approached this question in two stages. First, it adopted a teleological interpretation of Article 34, stating that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective" (para. 93), and that "the undertaking not to hinder the effective exercise of individual application precludes any interference with the individual's right to present and pursue his complaint before the Court" (para. 95). The ECHR noted that the Convention was "living instrument" which must be interpreted so far as possible "consistently with the other principles of international law" (paras. 94, 99). Second, the ECHR conducted an extensive review of the powers of international courts and tribunals to grant provisional measures, and the "general principles of law" regarding the binding force of such measures (paras. 39–51, 98–103). Acknowledging its previous decisions, the ECHR noted that in the interests of legal certainty it should not depart from previous jurisprudence without good reason, but held that it would be consistent with previous jurisprudence to maintain a dynamic and evolutive approach to interpretation and to interpret the Convention in a way that renders its rights practical and effective (para. 105). It concluded that States Parties to the Convention must comply with interim measures and refrain from any act or omission that would undermine the authority and effectiveness of the final judgment, and, accordingly, that Turkey was in breach of its obligations under Article 34 (paras. 110–111).

The result reached by the ECHR is correct. As States Parties to the Convention have conferred jurisdiction on the ECHR to determine individual applications, the ECHR must have the power to prevent its jurisdiction from being frustrated by acts of the parties which might prejudice the rights in dispute. Yet the ECHR's reasoning is not unproblematic, in particular with respect to its attempts to distinguish its previous case law on the issue. In *Cruz*

*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