COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF MAMATKULOV AND ABDURASULOVIC v. TURKEY

(Applications nos. 46827/99 and 46951/99)

JUDGMENT

STRASBOURG

6 February 2003

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
4 February 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mamatkulov and Abdurasulovic v. Turkey,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 31 August, 19 June and 23 October 2001, and 4 March 2002 and 15 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 46827/99 and 46951/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Uzbek nationals, Mr Rustam Mamatkulov and Mr Azkarov Z. Abdurasulovic ("the applicants"), on 11 and 22 March 1999 respectively.

2. The applicants were granted legal aid.

3. The applications concern the applicants' extradition to the Republic of Uzbekistan. The applicants relied on Articles 2, 3 and 6 of the Convention and Rule 39 of the Rules of Court.

4. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. The Chamber decided to join the applications (Rule 43 § 1). The President of the Chamber and subsequently the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it would be desirable in the interest of the parties and the proper conduct of the proceedings not to extradite the applicants to the Republic of Uzbekistan pending the Court's decision .

6. In a decision of 31 August 1999, the Chamber declared the applications admissible and decided to reserve the examination of the issues arising under Rule 39.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1). Observations were also received from the International Commission of Jurists in Geneva, which the President had authorised to take part in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 October 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *co-Agent,*
Ms G. ACAR,
Ms I. KOCAYIĞIT, *Counsel;*

(b) *for the applicants*
Mr İ.Ş. ÇARSANCAKLI, *Counsel*.

The Court heard addresses by Mr Çarsancaklı and Mr Özmen.

9. On 23 October 2001, following the hearing, the Chamber decided to inform the parties that it intended to relinquish jurisdiction in favour of the Grand Chamber under Article 30 of the Convention (Rule 72 § 2).

10. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section I.

11. In a letter of 20 November 2001 the Government set out their objections to relinquishment of jurisdiction by the Chamber in favour of the Grand Chamber. The applicants did not indicate their views.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicants were born in 1959 and 1971 and are currently in custody in the Republic of Uzbekistan. They are members of the Erk ("Freedom") Democratic Party of Uzbekistan (*O'zbekiston Erk Demokratik Partiyasi*), an opposition party in the Republic of Uzbekistan.

A. The applicant Rustam Mamatkulov

13. On 3 March 1999 the applicant arrived in Istanbul from Alma-Ata (Kazakhstan), on a tourist visa. He was arrested by Turkish police at Atatürk

Airport (Istanbul) under an international arrest warrant and taken into police custody on suspicion of homicide, causing injuries by the explosion of a bomb in the Republic of Uzbekistan and an attempted terrorist attack on the President of Uzbekistan.

14. The Republic of Uzbekistan requested the applicant's extradition under a bilateral treaty with Turkey.

15. On 5 March 1999 the Bakırköy Public Prosecutor made an application to the investigating judge for the applicant to be remanded in custody. The applicant, who was assisted by his lawyer, was brought before the judge the same day and remanded in custody for forty-five days, in accordance with the European Convention on Mutual Assistance in Criminal Matters, which was opened for signature on 20 April 1959.

16. On 11 March 1999 the first applicant was interviewed by the judge of the Bakırköy Criminal Court. In an order made on the same day under the expedited-applications procedure the judge referred to the charges against the first applicant and noted that the offences concerned were not political or military in nature but "ordinary criminal" offences. The judge also made an order remanding the first applicant in custody pending his extradition. The applicant, who was assisted by his lawyer and an interpreter, denied the charges and protested his innocence.

17. In written pleadings that were lodged at a hearing on 11 March 1999, the first applicant's representative argued that the applicant was working for the democratisation of his country and that political dissidents in Uzbekistan were arrested by the authorities and subjected to torture in prison. He added that the first applicant had been in Kazakhstan at the material time and had asked the Turkish authorities for political asylum as his life was at risk. He argued that his client had been prosecuted for an offence of a political nature and, relying on Article 9 of the Turkish Criminal Code, asked the Criminal Court to refuse the Republic of Uzbekistan's request for extradition.

18. On 15 March 1999 the applicant appealed to the Bakırköy Assize Court against the order made under the expedited-applications procedure on 11 March 1999. The Assize Court examined the file that had been produced to it and dismissed the applicant's appeal on 19 March 1999.

B. The applicant Azkarov Z. Abdurasulovic

19. The applicant entered Turkey on 13 December 1998 on a false passport. On 5 March 1999, acting on a request for his extradition by the Republic of Uzbekistan, the Turkish police arrested him and took him into police custody. He was suspected of homicide, causing injuries to others by the explosion of a bomb in the Republic of Uzbekistan and an attempted terrorist attack on the President of Uzbekistan.

20. On 7 March 1999 the Bakırköy Public Prosecutor made an application to the investigating judge for the applicant to be remanded in custody. On the same day the applicant was brought before a judge, who remanded him in custody.

21. In a letter of 12 March 1999 the Fatih Public Prosecutor applied to the Fatih Criminal Court for a determination of the applicant's nationality and of the nature of the alleged offence.

22. In a decision of 15 March 1999, after hearing the applicant, the Criminal Court determined his nationality and the nature of the offence pursuant to Article 9 of the Turkish Criminal Code. It held that the offences with which he had been charged were not political or military in nature but "ordinary criminal" offences. It also made an order remanding the applicant in custody pending his extradition.

23. At a hearing on 11 March 1999 the applicant's representative submitted that the offence with which the applicant had been charged was political in nature and that political dissidents in Uzbekistan were arrested by the authorities and subjected to torture in prison. He added that the applicant had been in Turkey at the material time on a false passport.

24. On 18 March 1999 the applicant appealed to the Istanbul Assize Court against the judgment of 15 March 1999. The Assize Court examined the file that had been produced to it and dismissed the applicant's appeal on 26 March 1999.

C. The applicants' extradition and subsequent events

25. On 18 March 1999 the President of the Chamber decided to "indicate to the Government, pursuant to Rule 39 of the Rules of Court, that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to the Republic of Uzbekistan until the Court has had an opportunity to examine the application further at its forthcoming session on 23 March 1999".

26. On 19 March 1999 the Turkish Cabinet issued a decree for the applicants' extradition.

27. On 23 March 1999 the Chamber decided to extend the interim measure indicated pursuant to Rule 39 until further notice.

28. On 27 March 1999 the applicants were handed over to the Uzbek authorities.

29. In a letter of 19 April 1999 the Government informed the Court that it had received the following assurances about the two applicants from the Uzbek authorities:

(i) On 9 March and 10 April 1999 the Ambassador of the Republic of Uzbekistan transmitted two notes from the Ministry of Foreign Affairs to which were appended two letters from the Public Prosecutor, stating: "The applicants' property will not be liable to general confiscation, and the

applicants will not be subjected to acts of torture or sentenced to capital punishment";

(ii) The Uzbek authorities added "The Republic of Uzbekistan is a party to the United Nation's Convention against Torture and accepts and reaffirms its obligations to comply with the requirements of the provisions of that Convention both as regards Turkey and the international community as a whole".

30. On 11 June 1999 the Government transmitted to the Court a diplomatic note dated 8 June 1999 from the Ministry of Foreign Affairs of the Republic of Uzbekistan setting out the following points:

> "It appears from investigations conducted by the Uzbek judicial authorities that Mamatkulov and Abdurasulovic have played an active role in planning and organising terrorist acts against the leaders of the Republic of Uzbekistan and its people since May 1997, as members of a criminal organisation led by C.H. and T.Y., who are notorious religious extremists.
>
> It appears from information obtained through cooperation with the intelligence services of foreign countries that Mamatkulov and Abdurasulovic have committed offences in Kazakhstan and Kyrgyzstan.
>
> Their indictment, which was drawn up on the basis of previously obtained evidence, contains a number of counts: setting up a criminal organisation, terrorism, a terrorist attack on the President, seizing power by the use of force or by the overthrow of the constitutional order, arson, uttering forged documents and voluntary homicide.
>
> All the investigations have been conducted with the participation of their lawyers. The defendants have made statements of their own free will on the activities of the criminal organisation and their role within it. That information has been corroborated by the other evidence that has been obtained.
>
> The assurances given by the Public Prosecutor of the Republic of Uzbekistan concerning Mamatkulov and Abdurasulovic comply with Uzbekistan's obligations under the United Nation's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.
>
> The defendants and their lawyers have examined the prosecution evidence relating to the investigation and the proceedings and a copy of the indictment transmitted to the Supreme Court has been served on them.
>
> Arrangements for the accused's security during the investigation and trial have been made through the use of secure premises (with cells specially equipped for that purpose) and appropriate measures have been taken to prevent them being attacked.
>
> The defendant's trial in the Supreme Court has recently begun with hearings in public. The hearings are attended by members of the local and foreign press. Members of diplomatic missions and representative of human-rights organisations also attend the hearings.
>
> Officials from the Embassy of the Republic of Turkey may also attend."

31. In a letter of 8 July 1999, the Government informed the Court that by a judgment of 28 June 1999 the Supreme Court of the Republic of Uzbekistan had found the applicants guilty of the offences charged and had sentenced them to terms of imprisonment.

32. In a letter of 15 September 1999, the applicants' representatives said that they were unable to contact the applicants. They said that conditions in Uzbek prisons were bad and that prisoners were subjected to torture. They noted, *inter alia*:

> "...
>
> The applicants did not have a fair trial in the Republic of Uzbekistan. The rule requiring trials to be held in public was not complied with. Our only information about the applicants' trial comes from the Uzbek authorities.
>
> We wrote to the Uzbek Embassy in Ankara on 25 June 1999 requesting permission to attend the trial as observers in our capacity as lawyers, but have received no reply.
>
> As to the allegation that the applicants' trial was followed by 'national and international journalists and representatives from human-rights organisations', the only non-governmental organisation present in Uzbekistan that was able to follow the trial was Human Rights Watch. Although we have made express requests to that organisation, we have not been able to obtain any detailed information about the hearings and events at the trial.
>
> Since the applicants' extradition, we have been unable to contact them either by letter or by telephone. We still have no means of contacting them. This state of affairs serves to reinforce our suspicions that the applicants are not being held in proper prison conditions.
>
> According to the letter sent by the Court [ECHR] on 9 July 1999 and information published in the press, the applicant Rustam Mamatkulov has been sentenced to twenty-years' imprisonment. That is the heaviest sentence that can be handed down under the Uzbek Criminal Code. Furthermore, if account is taken of the conditions of detention in Uzbek prisons, and in particular of the use of torture, it is very difficult for prisoners to serve their sentences in the prisons in proper conditions. Moreover, it is generally believed that certain prisoners, in particular those convicted for offences pertaining to freedom of expression, are given additional sentences."

33. On 15 October 2001 the Ministry of Foreign Affairs for the Republic of Uzbekistan forwarded the following information to the Turkish Embassy:

> "On 28 June 1999 the Supreme Court of the Republic of Uzbekistan found R. Mamatkulov and Z. Askarov guilty of the charges listed below and sentenced them to twenty-years' and eleven-years' imprisonment respectively:
>
> R. MAMATKULOV
>
> (a) Eighteen-years' imprisonment pursuant to Articles 28 and 97 of the Criminal Code (homicide with aggravating circumstances, namely:
>
> (i) murder of two or more people,

(ii) murder of a person on official duty or of a close relative of such a person,

(iii) use of means endangering the lives of others,

(iv) use of cruel means,

(v) offence committed in the defendant's own interests,

(vi) offence committed on the basis of religious beliefs,

(vii) offence committed with the aim of concealing another offence or of facilitating its commission,

(viii) offence committed by a group of people or a criminal organisation in the interests of that organisation,

(ix) repeat offence);

(b) Eighteen-years' imprisonment pursuant to Article 155 § 3 (a) and (b) of the Criminal Code (terrorist offence);

(c) Ten-years' imprisonment pursuant to Article 156 § 2 (d) of the Criminal Code (incitement to hatred and hostility giving rise to discrimination on grounds of race and religion);

(d) Eighteen-years' imprisonment pursuant to Article 158 § 1 of the Criminal Code (attempted terrorist attack on the President of the Republic of Uzbekistan);

(e) Eighteen-years' imprisonment pursuant to Article 159 § 4 of the Criminal Code (attempt to undermine the constitutional regime of the Republic of Uzbekistan, conspiracy to take power or overthrow the constitutional regime of the Republic of Uzbekistan);

(f) Fifteen-years' imprisonment pursuant to Article 161 of the Criminal Code (attempt to destroy property or to damage peoples' health, massacres committed with the intention of harming the activities of State bodies and undermining social, political and economic stability);

(g) Twelve-years' imprisonment pursuant to Article 168 § 4 (a) and (b) of the Criminal Code (fraud, obtaining the property of others by fraud or deception, by or in the interests of a group of individuals);

(h) Ten-years' imprisonment pursuant to Article 223 § 2 (b) (entering or leaving Uzbek territory illegally and with premeditation);

(i) Two-years' community service pursuant to Article 228 § 3 (manufacture, use and sale of false documents: seal, stamp, headed notepaper);

(j) Eighteen-years' imprisonment pursuant to Article 242 § 1 (forming an armed organisation or gang to commit offences and holding a position of authority or special position within such organisation or gang).

Is sentenced to twenty-years' imprisonment pursuant to Article 59 of the Criminal Code (aggregation of sentences for several offences) to be served in 'strict-regime' penal institutions.

R. Mamatkulov is currently serving his sentence in Zarafşan Prison, which is under the authority of the Office for Internal Affairs of the Province of Navoi. He is in good health and is entitled to receive visits from close relatives. He did not receive an amnesty under the 'Amnesty Decree' of 22 August 2001.

Z. Abdurasuloviç ASKAROV

(a) Ten-years' imprisonment pursuant to Article 28 and 97 of the Criminal Code (aggravated with aggravating circumstances, namely:

(i) murder of two or more people,

(ii) murder of a person on official duty or of a close relative of such a person,

(iii) use of means endangering the lives of others,

(iv) use of cruel means,

(v) offence committed in the defendant's own interests,

(vi) offence committed on the basis of religious beliefs,

(vii) offence committed with the aim of concealing another offence or of facilitating its commission,

(viii) offence committed by a group of people or a criminal organisation in the interests of that organisation,

(ix) repeat offence);

(b) Ten-years' imprisonment pursuant to Article 155 § 2 (a) and (b) of the Criminal Code (terrorist offence, causing another's death);

(c) Ten-years' imprisonment pursuant to Article 156 § 2 (d) of the Criminal Code (incitement to hatred and hostility giving rise to discrimination on grounds of race and religion);

(d) Nine-years' imprisonment pursuant to Article 158 § 1 of the Criminal Code (attempted terrorist attack on the President of the Republic of Uzbekistan);

(e) Nine-years' imprisonment pursuant to Article 159 § 4 of the Criminal Code (attempt to undermine the constitutional regime of the Republic of Uzbekistan, conspiracy to take power or overthrow the constitutional regime of the Republic of Uzbekistan);

(f) Nine-years' imprisonment pursuant to Article 161 of the Criminal Code (attempt to destroy property or to damage peoples' health, massacres committed with the

intention of harming the activities of State bodies and undermining social, political and economic stability);

(g) Nine-years' imprisonment pursuant to Article 173 § 3 (b) (destruction of or intentional damage to property belonging to others by or in the interests of a group of individuals);

(h) Ten-years' imprisonment pursuant to Article 223 § 2 (b) (entering or leaving Uzbek territory illegally and with premeditation);

(i) Two-years' community service pursuant to Article 228 § 3 (manufacture, use and sale of false documents: seal, stamp, headed notepaper);

(j) Ten-years' imprisonment pursuant to Article 242 § 1 (forming an armed organisation or gang to commit offences and holding a position of authority or special position within such organisation or gang).

Is sentenced to eleven-years' imprisonment pursuant to Article 59 of the Criminal Code (aggregation of sentences for several offences) to be served in 'strict regime' penal institutions.

Z. Askarov is currently serving his sentence in Şayhali Prison, which is under the authority of the Office for Internal Affairs of the Province of Kaşkadarya. He is in good health and is entitled to receive visits from close relatives. He did not receive an amnesty under the 'Amnesty Decree' of 22 August 2001.

34. At the hearing on 23 October 2001, the Government informed the Court that on 19 October 2001, two officials from the Turkish Embassy had visited the applicants in Zarafşan Prison and Şayhali Prison, which are respectively 750 and 560 kilometres from Tashkent. According to the Embassy officials, the applicants were in good health and had not complained about their prison conditions either before or after trial.

35. On 3 December 2001 the Uzbek authorities communicated to the Government medical certificates that had been drawn up by military doctors in the prisons in which the applicants were being held. The doctors made the following findings:

"... Mr Mamatkulov was imprisoned on 9 December 2000. He did not present any health problems on arrival. Examinations on 14 February 2000 and 2 April 2001 did not reveal any symptoms of pathology.

On 19 November 2001 the prisoner attended the prison medical centre complaining of general weakness and a bout of coughing. ... on examination he was diagnosed as suffering from acute bronchitis and was prescribed medication ..."

... Mr Abdurasulovic Askarov was imprisoned on 21 July 2001. He did not complain of any health problems on arrival. Examinations conducted on 25 July, 30 August and 23 October 2001 did not reveal any symptoms of pathology..."

36. To date, the applicants' representatives have been unable to contact the applicants.

II. RELEVANT DOMESTIC LAW AND PRACTICE

Criminal law

37. Article 9 of the Turkish Criminal Code reads as follows:

> "The Turkish State shall not accede to a request for the extradition of an alien by a foreign country for offences that are political in nature or related thereto.
>
> When called upon to deal with a request by a foreign State for the extradition of an alien, the criminal court with jurisdiction for the place in which the person concerned is located shall determine that person's nationality and the nature of the offence.
>
> No request for extradition may be granted if the criminal court finds that the person concerned is a Turkish national or that the offence is political or military in nature or related to such an offence.
>
> If the criminal court finds that the person whose extradition is requested is an alien and that the offence is an ordinary criminal offence the request for extradition may be granted by the Government..."

Extradition

38. Extradition between Turkey and the Republic of Uzbekistan is governed by the "Agreement for Mutual Assistance in Civil, Commercial and Criminal Matters between Turkey and the Republic of Uzbekistan", which entered into force on 18 December 1997. Under the relevant provisions of that agreement, "each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions set out in this agreement, anyone found in its territory who is accused or has been found guilty of an offence committed within the jurisdiction of the other Party".

III. RELEVANT INTERNATIONAL LAW INSTRUMENTS AND CASE-LAW ON INTERIM MEASURES

United Nations Human Rights Committee

39. Rule 86 of the Rules of Procedure provides:

> "The Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication."

United Nations Committee against Torture

40. Rule 108 § 9 of the Rules of Procedure of the Committee against Torture enables interim measures to be adopted in proceedings brought by individuals alleging a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It reads as follows:

> "In the course of the consideration of the question of the admissibility of a communication, the Committee or the working group or a special rapporteur designated under rule 106, paragraph 3, may request the State party to take steps to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State party does not imply that any decision has been reached on the question of the admissibility of the communication."

The Statute of the International Court of Justice

41. Article 41 provides:

> "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council."

The American Convention on Human Rights

42 Article 63 § 2 of the Convention states:

> "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

Rules of Procedure of the Inter-American Court of Human Rights

43. Rule 25 provides:

> "1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.
>
> 2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
>
> 3. The request may be made to the President, to any judge of the Court, or to the Secretariat, by any means of communication. In every case, the recipient of the request shall immediately bring it to the President's attention.
>
> 4. If the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government

concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session.

5. The Court, or its President if the Court is not sitting, may convoke the parties to a public hearing on provisional measures.

6. In its Annual Report to the General Assembly, the Court shall include a statement concerning the provisional measures ordered during the period covered by the report. If those measures have not been duly implemented, the Court shall make such recommendations as it deems appropriate."

Rules of Procedure of the Inter-American Commission on Human Rights

44. Rule 25 provides:

1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

2. If the Commission is not in session, the President, or, in his or her absence, one of the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-Presidents shall take the decision on behalf of the Commission and shall so inform its members.

3. The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures.

4. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case."

Interim measures and decisions of the Human Rights Committee of the United Nations

45. In its decision of 26 July 1994 (*Glen Ashby v. Trinidad and Tobago*), the Committee dealt with the first case of a refusal by a State to comply with interim measures requesting it to stay execution of the death penalty. It pointed out that by ratifying the Optional Protocol, the State Party had undertaken to cooperate with the Committee in proceedings under the Protocol, and that it had not discharged its obligations under the Optional Protocol and the Covenant (Report of the Human Rights Committee, Volume I).

46. In its decision of 19 October 2000 (*Piandiong et al v. The Philippines*, Communication No. 869/1999 (15 June 1999), U.N. Doc. CCPR/C/70/D/869/1999), the Committee said:

"5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile...

5.4 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."

Interim measures and decisions of the United Nations Committee against Torture

47. In the case of a Peruvian citizen resident in Venezuela who was extradited to Peru despite the fact that interim measures had been indicated requesting a stay of extradition (*Cecilia Rosana Núñez Chipana v. Venezuela*, 10 November 1998, Committee against Torture, Communication No. 110/1998, § 8), the Committee against Torture expressed the view that the State had failed to "comply with the spirit of the Convention". It noted:

"... the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee."

48. In another decision that concerned the extradition to India of an Indian National resident in Canada (decision of 16 May 2000, *T.P.S. v. Canada*, Communication No. 99/1997) despite the indication of interim measures requesting Canada to stay the extradition, the Committee against Torture reiterated that failure to comply with the requested interim measures "... could ... nullify the end result of the proceedings before the Committee" (§ 15.6).

The system of the Inter-American Court and Commission of Human Rights

49. Provision is made for provisional measures to be ordered under the judicial settlement procedure in cases in which the Inter-American Court of Human Rights has jurisdiction and for precautionary measures under the procedure of individual petition to the Inter-American Commission of Human Rights. The Inter-American Court's power to order provisional measures is derived from the American Convention on Human Rights and the Commission's power to adopt precautionary measures from its Rules of Procedure (see paragraphs 42-43 above). The Inter-American Court has stated on several occasions that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits (see, among other authorities, the following orders: 1 August 1991, *Chumină v. Peru*; 2 July 1996, 13 September 1996, 11 November 1997, 3 February 2001, *Loayza Tamayo v. Peru* ; 25 May and 25 September 1999, 16 August and 24 November 2000, 3 September 2002, *James and Others v. Trinidad and Tobago*; *7* and 18 August 2000, 26 May 2001, *Haitians and Dominican nationals of Haitian Origin in the Dominican Republic v. Dominican Republic*; 10 August 2000, 12 November 2000, 30 May 2001, *Alvarez et al v. Colombia*; judgment of 21 June 2002, *Hilaire, Constantine, Benjamin and Others v. Trinidad and Tobago*).

As regards the scope of its precautionary measures, the Inter-American Commission on Human Rights is bound by the recommendations it has adopted on individual petition. In its judgment of 17 September 1997 in the case of *Loayza Tamayo v. Peru*, (Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997)) the Inter-American Court of Human Rights considered that the State "ha[d] the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission, which [was], indeed, one of the principal organs of the Organization of American States, whose function [was] 'to promote the observance and defense of human rights'...".

In two orders requiring provisional measures, the Inter-American Court of Human Rights ruled that the States Parties to the American Convention on Human Rights "must fully comply in good faith (*pacta sunt servanda*) with all of the provisions of the Convention, including those relative to the operation of the two supervisory organs of the American Convention [the Court and the Commission]; and, that in view of the Convention's fundamental objective of guaranteeing the effective protection of human rights (Articles 1(1), 2, 51 and 63(2)), States Parties must refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims" (see the Orders of 25 May and 25 September 1999, in the case of *James et al. v. Trinidad and Tobago*).

Provisional measures and the International Court of Justice

50. Article 41 the Statute of the International Court of Justice provides for the adoption of provisional measures (see paragraph 41 above).

The International Court of Justice has pointed out in a number of cases that the purpose of provisional measures is to preserve the respective rights of the parties to the dispute (see, among other authorities, the judgment of 27 June 1986, in the case of *Nicaragua v. United States of America*). In an order of 13 September 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia*), the International Court of Justice said (§ 35) that the power of the Court to indicate provisional measures:

> "... has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; and ... the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent."

51. In its judgment of 27 June 2001 in the *LaGrand* case (*Germany v. United States of America*), the International Court of Justice noted:

> "102. ... The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.
>
> 103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of 'the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute' (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79, p. 199*).

The Vienna Convention on the Law of Treaties 1969 (Vienna Convention of 1969)

52. Article 31 of the Vienna Convention of 1969, which is headed "General rule of interpretation", provides:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

IV. OTHER RELEVANT INTERNATIONAL MATERIALS

53. In a briefing for the United Nations Committee against Torture that was made public in October 1999, Amnesty International stated:

"... Amnesty International remains concerned that Uzbekistan has failed to implement its treaty obligations fully despite numerous, wide-ranging and officially endorsed national initiatives in the fields of human rights education and democratization and judicial and legislative reforms aimed at bringing national legislation into line with international standards.

Since December 1997, when several murders of law enforcement officials in the Namangan region sparked a wave of mass detentions and arrests , the organization has received a growing number of reports of ill-treatment and torture by law enforcement officials of people perceived to be members of independent Islamic congregations or followers of independent imams (Islamic leaders). Hundreds of these so-called 'Wahhabists' were sentenced to long terms of imprisonment in trials that fell far short of international fair trial standards. The organization's concern was heightened in February 1999 when hundreds of people, men and women, were detained following a reported six bomb explosions in the capital Tashkent. This time the list of those reported to have been arrested, ill-treated and tortured included suspected supporters of the banned political opposition parties and movements *Erk* and *Birlik*, including family members and independent human rights monitors, as well as alleged supporters

of banned Islamic opposition parties and movements, such as *Hizb-ut-Tahrir*. In the majority of these cases, if not all, that have come to the attention of Amnesty International, those detained were denied prompt access to a lawyer of their choice, to their families and to medical assistance. The responsible authorities, from procurators to courts at all levels and the parliamentary ombudsman, persistently failed to launch timely, full and independent investigations into widespread allegations of torture and ill-treatment. According to independent and credible sources, self-incriminating evidence reportedly extracted by torture was routinely included in trial proceedings and served in many of the cases reviewed by Amnesty International as the basis for a guilty verdict. Amnesty International was disturbed by public statements by Uzbek officials, including the President of Uzbekistan, in the wake of both the Namangan murders and the Tashkent bombings, which, if not directly sanctioning the use of violence by state agents against certain sections of the population, could be perceived at the very least to condone the use of unlawful methods such as torture and ill-treatment. In April 1999, for example, President Karimov, portrayed as the guarantor of democracy and human rights, stated publicly that he was prepared to tear off the heads of two hundred people in order to protect Uzbekistan's freedom and stability... Amnesty International is concerned that such statements together with the authorities' persistent failure to initiate impartial and thorough investigations into allegations of torture and ill-treatment, may create an impression that torture and ill-treatment by law enforcement officials is acceptable, and even necessary conduct, and that they can engage in such conduct with impunity.

This briefing does not attempt to be a comprehensive study of torture and ill-treatment in Uzbekistan. Instead it concentrates on those articles of the Convention which are most relevant to Amnesty International's current and most pressing concerns.

Failure to ensure that all acts of torture are offences under the criminal law (Article 4)

Uzbekistan fails to fully meet the requirements under Article 4 of the Convention to ensure that all acts of torture are offences under its criminal law and that such offences are punishable by appropriate penalties which take into account their grave nature.

Neither the constitution nor the criminal code, although respectively prohibiting and punishing acts of torture, contain a definition of torture as set out in Article 1 of the Convention. Article 26 of the Uzbek Constitution guarantees under point 2 that no one may be subject to torture, force, or other treatment which is cruel or demeaning to the dignity of the person.

Article 235 of the criminal code criminalizes obtaining a confession by coercion. Although explicit in its description of prohibited methods of coercion (beatings, inflicting grievous or less grievous bodily harm, torture) and specific in naming the perpetrators (investigating and interrogating officers, procurators) the article is still far more narrow in its definition of torture than Article 1 of the Convention. The maximum penalty prescribed under this article is five to eight years' imprisonment.

Other articles, including Article 110 of the Uzbek Criminal Code, punish various assaults but do not relate specifically to agents of the state... The Uzbek press has reported that law enforcement officers have been prosecuted for using unlawful methods in detaining and interrogating suspects. However, to Amnesty International's knowledge, in the period under review, none of the law enforcement officials

identified as perpetrators of acts of torture by victims of human rights violations whose cases the organization has taken up has been charged under the above articles of the criminal code...

Time and again Amnesty International has received credible reports that suspects were denied access to a lawyer of their choice. Often the lawyers are only given access by law enforcement officials after the suspect has been held in custody for several days, which is when the risk of torture or ill-treatment is the greatest. In many cases law enforcement officials will only grant access to the lawyer after the suspect has signed a confession. Meetings between lawyers and clients, when they are granted, are generally infrequent, because unlimited access to a client as prescribed by the law is difficult for lawyers to obtain. Defence lawyers are rarely allowed to be present at all stages of the investigation...

Article 17 of the Code of Criminal Procedure explicitly prohibits the use of torture and obliges judges, procurators, investigators and interrogators to respect a person's honour and dignity at every stage of legal proceedings. Nevertheless, Amnesty International has received countless reports from different sources – former prisoners, relatives of prisoners, defence lawyers, human rights monitors, international human rights organizations, diplomats, copies of court documents – that law enforcement officials continue to routinely violate legal obligations not to subject any person to torture or cruel, inhuman or degrading treatment.

...

Prison conditions

Conditions under which detainees are held pre-trial are reportedly so poor as to amount to cruel, inhuman and degrading treatment. In 1997 the Uzbek authorities admitted that conditions of detention fall far short of the UN basic minimum standards for the treatment of prisoners. Overcrowding is the norm, with at least two inmates to a bunk bed, sleeping in turns. Inadequate sanitation, shortages of food and basic medication exacerbate the risk of disease, such as tuberculosis. Former prisoners have described punishment cells as underground 'holes', one square metre with standing room only near the door. The rest of the cell is said to be only 1.5 metres in height, allowing the prisoner only to crouch or sit. Cells are also said to be overrun with vermin. As with the conditions on death row, these allegations are difficult to verify independently given the Uzbek authorities' refusal to allow access to independent monitors."

54. In its Annual Report of 28 May 2002, Amnesty International noted with respect to the Republic of Uzbekistan:

"Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements, such as *Hizb-ut-Tahrir*, continued unabated. Thousands of devout Muslims and dozens of members or supporters of the banned secular political opposition parties and movements *Erk* and *Birlik* were serving long prison sentences, convicted after unfair trials of membership of an illegal party, distribution of illegal religious literature and anti-state activities. Reports continued to be received that devout Muslim prisoners were singled out for particularly cruel, inhuman and degrading treatment in places of detention, particularly prison camps. Several prisoners, among them a prominent human rights defender, died

in custody, allegedly as a result of torture. There were at least 22 death sentences, reportedly imposed after unfair trials, and at least four executions were carried out.

...

In November Muhammad Salih, the exiled leader of the banned opposition *Erk Democratic Party*, was detained by Czech police at Prague airport, Czech Republic. He was remanded in custody while an extradition request from Uzbekistan was being examined. In December he was released and returned to Norway, where he had received refugee status in 1999, after Prague City Court ruled against extradition to Uzbekistan.

In September President Karimov publicly stated that around 100 people were executed each year. In October the number of offences punishable by death was reduced to four.

Allegations of torture and ill-treatment

Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements, including women, continued unabated. Thousands of devout Muslims and dozens of members or supporters of the banned secular political opposition parties and movements *Erk* and *Birlik* were serving long prison sentences, convicted after unfair trials of membership of an illegal party, distribution of illegal religious literature and anti-state activities. The courts were reported to have systematically failed to investigate or take into account the defendants' allegations of torture. Defendants accused of non-political criminal activities were also reported to have been tortured and ill-treated in detention in attempts to coerce confessions.

Reports continued to be received that devout Muslim prisoners were singled out for particularly cruel, inhuman and degrading treatment in places of detention, especially in strict regime prison camps...

...

In June, 73 ethnic Tajik mountain villagers were found guilty of collaborating with the IMU during their incursion into Uzbekistan in August 2000 and sentenced to between three and 18 years' imprisonment in four separate closed trials. This was despite earlier government assurances to the UN Human Rights Committee that the action to evacuate the villagers was taken in order to improve the living conditions of the people concerned and that no criminal cases would be opened against these forcibly displaced villagers. The group trials, which opened simultaneously and without prior notice at the end of May in Tashkent, were held in separate court buildings cordoned off by armed police. Relatives trying to gain access to the court proceedings were reportedly intimidated and attempts were made to force them to leave the city.

Only one foreign observer, representing the non-governmental organization Human Rights Watch, obtained access to one of the trials. All others, including foreign diplomats, local human rights monitors and the media, were barred.

According to the Human Rights Watch observer, the prosecution failed to provide any substantive evidence to prove the defendants' guilt. All the defendants had

allegedly been held incommunicado until their trial and had not been granted the right to be represented by a lawyer of their own choice. In court the defendants reportedly withdrew their confessions and alleged that they had been tortured in order to force them to confess to fabricated charges. They alleged that they had been forced to memorize and recite prepared confessions on film. Some of the men showed the court marks on their bodies allegedly caused by torture. The court, however, failed to take any of these allegations into consideration.

..."

V. THE COURT'S PRACTICE UNDER RULE 39 OF THE RULES OF COURT

55. Rule 39 of the Rules of Court empowers a Chamber or, where appropriate, its President, to indicate interim measures which it considers should be adopted. Past practice shows that in principle requests for interim measures under Rule 39 are made in cases in which there is an imminent danger to the applicant's life or of torture, or inhuman or degrading treatment or punishment. Such requests generally refer to Articles 2 and 3 of the Convention and concern a person's deportation, extradition or repatriation to his or her country of origin (whether it be the Contracting Party or another State) by the State against which the complaint has been lodged.

56. Rule 36 of the European Commission of Human Rights Rules of Procedure provided:

"The Commission, or when it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it."

THE LAW

III. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

57. The applicants alleged that their extradition to the Republic of Uzbekistan would constitute a violation of Articles 2 and 3 of the Convention, which provides:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court considers that this complaint must be examined under Article 3.

A. Arguments of the parties

1. The applicants' submissions

58. The lawyers representing the applicants said that they had been unable to contact the applicants, either by telephone or by letter, after their extradition and had received no response from the Turkish and Uzbek authorities to their requests for access to them. In that connection, they complained that conditions in Uzbek prisons were bad and prisoners subjected to torture.

59. In support of their allegations, they referred to reports by international bodies responsible for investigating human-rights abuses denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents and the Uzbek regime's repressive policy towards dissidents.

60. They asserted that the applicants had adduced relevant evidence in the extradition proceedings in Turkey refuting the accusations against them. Accordingly, the fact that the applicants, who had been denied the right to legal assistance from a lawyer of their choosing, had fully admitted identical accusations to the Uzbek authorities, showed that they had been forced by torture and ill-treatment to "confess" to crimes which they had not committed.

The Government

61. The Government maintained that in extradition proceedings Article 3 of the Convention should only apply in cases in which it was certain that the impugned treatment or punishment overseas would be inflicted and in

which the person concerned had produced persuasive evidence that substantial grounds existed for believing that he or she faced torture or ill-treatment.

62. The Government observed that the applicants had been extradited after assurances had been obtained from the Uzbek authorities. Those assurances included an undertaking not to sentence the applicants to capital punishment, to ensure that the applicants would not be subjected to torture or ill-treatment and would not become liable to general confiscation of their property. They said that the Uzbek authorities had given an assurance that "the Republic of Uzbekistan [was] a party to the United Nation's Convention against Torture and accept[ed] and reaffirm[ed] its obligations to comply with the requirements of the provisions of that Convention both as regards Turkey and the international community as a whole". The Government further observed that the reports of the human-rights organisations did not contain any information that might support the allegations of treatment contrary to Article 3.

63. As to whether the guarantees were sufficient to eliminate all possible risk, the Government maintained that the circumstances of the instant case were different from those in the case of *Soering v. the United Kingdom* (judgment of 7 July 1989, Series A no. 161), in which the Court had held that the "decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3" (§ 111). In that connection, they noted that the applicants, who were accused of acts of terrorism, had been sentenced by the Uzbekistan Supreme Court to twenty- and eleven-years' imprisonment respectively and that their trial had been attended by some eighty people, including officials from the Turkish and other Embassies and representatives of Helsinki Watch. The Government added that the applicants had been visited in prison in Uzbekistan by two officials from the Turkish Embassy and had informed them that they had not been subjected to ill-treatment following their extradition from Turkey, either before or after their trial. In the light of that evidence, and regard being had to the criteria set out in *Cruz Varas and Others v. Sweden* (20 March 1991, Series A no. 201), the applicants did not face a real risk of being subjected to torture or persecution in Uzbekistan.

64. The Government argued that Article 3 was not to be construed in a way that would engage the extraditing State's responsibility indefinitely. The State's responsibility should end once the extradited person had been found guilty and had started to serve his or her sentence. It would be straining the language of Article 3 intolerably to hold that by surrendering a suspect in accordance with the terms of extradition agreements, the extraditing State had subjected him to the treatment or punishment he received after his conviction and sentence in the receiving State. So to hold would interfere with international-treaty rights and lead to a conflict with the norms of international judicial process, as it would entail adjudication

on the internal affairs of foreign States that were not Parties to the Convention. There was a risk that it would cause serious harm to the Contracting State by restricting its ability to cooperate in the fight against international terrorism and organised crime.

B. The Court's assessment

65. As the Court has previously stated, the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or its Protocols (*Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 34, § 102).

66. However, it is the settled case-law of the Court that extradition by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (*Soering* cited above, p. 35, §§ 89-91).

67. The Court reiterated that in determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, it will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (*Vilvarajah and Others* cited above, p. 36, § 107).

68. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears (*Cruz Varas and Others* cited above, p. 30, § 76).

69. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects (*Soering* cited above, p. 39, § 100).

70. The Court stresses that in order to raise an issue under Article 3, it must be established that, in the particular circumstances of the case, there was a real risk that the applicants would be subjected to treatment contrary to Article 3.

71. The Court has noted the observations made by the applicants' representatives on the information contained in the reports of international bodies responsible for investigating human-rights abuses denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents and the Uzbek regime's repressive policy towards such dissidents. It notes that Amnesty International alleges, *inter alia*, "Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements, including women, continued..." (see paragraphs 53-54 above).

72. While it is true that the attainment of the required evidentiary standard may follow from the co-existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions (*Aydın v. Turkey*, 25 September 1997, *Reports of Judgments and Decisions* 1997-VI, p. 1888, § 73), their evidential value must be considered in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State.

In the instant case, the Court considers that, in spite of the serious concerns to which they give rise, the reports only describe the general situation in the Republic of Uzbekistan. There is nothing in them to support the specific allegations made by the applicants in the instant case, which require corroboration by other evidence.

73. The Court notes that the applicants' representatives say that they have been unable to contact the applicants since their extradition and have therefore had difficulty in obtaining evidence corroborating the applicants' version of events as alleged in the documents.

74. As regards the facts in issue, the Court considers on the basis of the evidence before it that the reason it has not been possible for any conclusive findings of fact to be made is that the applicants were denied an opportunity to have additional inquiries made in order to obtain evidence supporting their allegations under Article 3 of the Convention.

75. In the instant case, the Court observes that the Turkish Government contend that the applicants were extradited after an assurance had been obtained from the Uzbek Government. It notes that the assurance that "[t]he applicants' property will not be liable to general confiscation, and the

applicants will not be subjected to acts of torture or sentenced to capital punishment" was given by the Public Prosecutor of the Republic of Uzbekistan, who added: "The Republic of Uzbekistan is a party to the United Nation's Convention against Torture and accepts and reaffirms its obligations to comply with the requirements of the provisions of that Convention both as regards Turkey and the international community as a whole" (see paragraph 29 above).

76. The Court takes formal cognisance of the diplomatic notes from the Uzbek authorities that have been produced by the Turkish Government and of the judgment of the Supreme Court of the Republic of Uzbekistan finding the applicants guilty of the offences with which they were charged and sentencing them to twenty- and eleven-years' imprisonment respectively (see paragraphs 30, 31 and 33 above). It notes further that the medical certificates issued by the prison doctors in the prisons in which Mr Mamatkulov and Mr Abdurasulovic are being held do not support the allegations made by the applicants' representatives that the applicants have been subjected to treatment contrary to Article 3 in Uzbekistan (see paragraph 35 above).

77. Having regard to the circumstances of the case and the evidence before it, the Court considers that there is insufficient evidence for it to conclude that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

78. The applicants complained that the extradition proceedings in Turkey and the criminal proceedings against them in Uzbekistan had been unfair. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. The extradition proceedings in Turkey

79. The applicants complained that they had not had a fair hearing before the Criminal Court that had ruled on the request for their extradition, in that they had been unable to gain access to all the material in the case file or to put forward their arguments concerning the characterisation of the offence they were alleged to have committed.

Applicability of Article 6 § 1

80. The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning

of Article 6 § 1 of the Convention (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

81. Consequently, Article 6 § 1 is not applicable in the instant case.

B. The criminal proceedings in Uzbekistan

82. The applicants submitted that there was no possibility of their being given a fair trial in their country of origin and that they faced a real risk of being sentenced to death and executed. They argued in that connection that the Uzbek judicial authorities were not independent of the executive.

83. The applicants' representatives alleged that the applicants had been held incommunicado until the start of their trial and had not been permitted representation by a lawyer of their choosing. They said that the depositions on which the finding of guilt had been based had been extracted under torture.

84. The Government said that the applicants' extradition could not engage the Turkish Government's responsibility under Article 6 § 1 of the Convention.

85. The Court noted that in its aforementioned *Soering* judgment (p. 45, § 113), it said;

> "The right to a fair trial in criminal proceedings, as embodied in Article 6 holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country..."

86. The Court noted that in the instant case the applicants were handed over to the Uzbek authorities on 27 March 1999. On 28 June 1999 the Supreme Court of the Republic of Uzbekistan found Mr Mamatkulov and Mr Abdurasulovic guilty of various offences and sentenced them to twenty- and eleven-years' imprisonment respectively (see paragraph 33 above).

87. On the basis of the evidence before it, the Court has held that it has not been shown that Mr Mamatkulov and Mr Abdurasulovic faced a real risk of being subjected to torture or inhuman or degrading treatment as a result of their extradition.

Referring to its findings under Article 3 (see paragraphs 73-77 above), the Court holds that it has not been established by the evidence produced to it that the applicants have been denied a fair trial.

Accordingly, no issue arises under Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

88. The applicants' representatives maintained that by extraditing Mr Mamatkulov and Mr Abdurasulovic despite the measure indicated by

the Court under Rule 39 of the Rules of Court, Turkey had failed to comply with its obligations under Article 34 of the Convention.

Article 34 of the Convention provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 § 1 of the Rules of Court states:

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
>
> 2. Notice of these measures shall be given to the Committee of Ministers.
>
> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. The parties' submissions

89. The applicants' representatives said that although they had made several requests to the authorities for permission to contact the applicants following their extradition, they had been unable to do so, with the result that the applicants had been denied an opportunity to have further inquiries made in order to obtain evidence in support of their allegations under Article 3. They said in conclusion that the applicants' extradition had proved a real obstacle to the effective presentation of their application to the Court.

90. The Government submitted that no separate issue arose under Article 34 of the Convention, as the complaint under that provision was the same as that the applicants had raised under Article 3 of the Convention, which the Government said was unfounded.

91. As regards the effects of the interim measures the Court had indicated in the instant case under Rule 39, the Government referred to the aforesaid *Cruz Varas and Others* judgment as authority for the proposition that the Contracting States had no legal obligation to comply with such indications.

B. The Court's assessment

1. General considerations

92. The Court has previously stated that former Articles 25 and 46 of the Convention are essential to the effectiveness of the Convention system,

since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions the Court must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms (see, *mutatis mutandis*, *Loizidou v. Turkey* (*preliminary objections*), 23 March 1995, Series A no. 310, § 70).

93. 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, as part of the system of individual applications. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (*Soering* cited above, § 87; *mutatis mutandis*, *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, p. 18, § 34).

94. The principle that the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law. The Court has applied that principle not only to the substantive rules of the Convention (see, among other authorities, *Soering* cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; X, *Y and Z v. the United Kingdom*, 22 April 1997, *Reports* 1997–II; *V. v. the United Kingdom* [GC] no. 24888/94, § 72, ECHR 1999–IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999–I), but also when interpreting former Articles 25 and 46 of the Convention with regard to a Contracting State's acceptance of the jurisdiction of the Convention institutions (*Loizidou* (*preliminary objections*) cited above, § 71). The Court said in the latter judgment that former Articles 25 and 46 of the Convention could not be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago. Thus, even if it had been established that the restrictions concerned were considered permissible under those provisions at the material time when a minority of the Contracting Parties adopted the Convention, such evidence could not be "decisive".

95. Further, the undertaking not to hinder the effective exercise of the right of individual application precludes any interference with the individual's right to present and pursue his complaint before the Court effectively. That issue has been considered by the Court in previous judgments. It is of the utmost importance for the effective operation of the system of individual application instituted under Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to

withdraw or modify their complaints. "Pressure" includes not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see, among other authorities and *mutatis mutandis*, *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV, p. 1219, § 105; *Kurt v. Turkey*, 25 May 1998, *Reports* 1998-III, p. 1192, § 159; *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV; *Şarlı v. Turkey,* no. 24490/94, §§ 85-86, 22 May 2001; and *Orhan v. Turkey*, no. 25656/94, 18 June 2002).

2. Did the applicants' extradition actually hinder the effective exercise of the right of individual application

96. The Court notes that the fact that the respondent Government extradited the applicants without complying with the measures indicated under Rule 39 of the Rules of Court raises the issue whether, in view of the special nature of the alleged violation of Article 3 of the Convention, there has been a violation of Article 34. In the present case, once they had been extradited the applicants were unable to remain in contact with their representatives. The Court reiterates in that connection that it is implicit in the notion of the effective exercise of the right of individual application that for the duration of the proceedings in Strasbourg the principle of equality of arms should be observed and an applicant's right to sufficient time and necessary facilities in which to prepare his or her case respected. In the present case, the applicants' representatives were not able to contact the applicants, despite their requests to the Turkish and Uzbek authorities for permission to do so. The applicants were thus denied an opportunity to have further inquiries made in order for evidence in support of their allegations under Article 3 of the Convention to be obtained.

97. The Court has previously considered whether, in the absence of an express clause in the Convention, its organs could derive from Article 34 (former Article 25), taken alone or together with Rule 39 (former Rule 36) or from any other source, the power to order interim measures (*Cruz Varas and Others* cited above; *Conka and Others v. Belgium*, no. 51564/99, decision of 13 March 2001). In those cases, it concluded that the power to order binding interim measures could not be inferred from either Article 34 *in fine*, or from other sources, but that a decision not to comply with an indication given under Rule 39 would have to be seen as aggravating any subsequent breach of Article 3 found by the Court (*Cruz Varas and Others* cited above, pp. 36-37, §§ 102 and 103).

In the aforementioned *Conka and Others* case, the Court also found: "As regards the difficulties encountered by the applicants following their expulsion to Slovakia, it does not appear that they attained a level such that

they were hindered in the exercise of their right under Article 34 of the Convention".

98. The Court will also examine the present case by reference to general principles of international law, in particular those concerning the binding force of interim measures indicated by other international courts.

99. The Court reiterates in that connection that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which states that there shall be taken into account "any relevant rules of international law applicable in the relations between the parties". The Court must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human-rights protection (*Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 29). Thus, the Convention must be interpreted so far as possible consistently with the other principles of international law of which it forms a part (*Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 60, ECHR 2001-XI).

100. The Court notes that different rules apply to interim, provisional or precautionary measures, depending on whether the complaint is made under the individual-petition procedures of the United Nations organs, or the Inter-American Court and Commission, or under the procedure for the judicial settlement of disputes of the International Court of Justice. In some instances provision is made for such measures in the treaty itself and in others in the rules of procedure (see paragraphs 39 to 44 above).

101. The Court notes that in a number of recent decisions and orders, international courts have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits. In proceedings concerning international disputes, the purpose of interim measures is to preserve the parties' rights, thus enabling the body hearing the dispute to give effect to the consequences which a finding of responsibility following adversarial process will entail.

102. Under the jurisprudence of the Human Rights Committee of the United Nations, a failure to comply with interim measures constitutes a breach by the State concerned of its legal obligations under the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and of its duty to cooperate with the Committee under the individual-communications procedure (see paragraphs 45-46 above).

The United Nations Committee against Torture has considered the issue of a State Party's failure to comply with interim measures on a number of occasions. It has ruled: "[c]ompliance with interim measures which the Committee considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end

result of the proceedings before the Committee" (see paragraphs 47-48 above).

In various orders concerning provisional measures, the Inter-American Court of Human rights has stated that in view of the fundamental objective of the American Convention on Human Rights, namely guaranteeing the effective protection of human rights, "States Parties [had to] refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims" (see, among other authorities, the orders of 25 May and 25 September 1999 in the case of *James et al. v. Trinidad and Tobago*).

103. In its judgment of 27 June 2001 in the case of *LaGrand* (Germany v. United States of America), the International Court of Justice said: "The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The [purpose of] Article 41 ... is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article".

Furthermore, in that judgment, the International Court of Justice brought to an end the debate over the strictly linguistic interpretation of the words "power to indicate" ("*pouvoir indiquer*" in the French text) in the first paragraph of Article 41 and "suggested" ("*indication*" in the French text) in the second paragraph. Referring to Article 31 of the Vienna Convention on the Law of Treaties, which provides that treaties shall be interpreted in the light of their object and purpose, the International Court of Justice held that provisional measures were legally binding.

104. The Court points out that in the aforementioned case of *Cruz Varas and Others*, in which it had to decide whether the Commission had power under former Article 25 § 1 to order interim measures, it noted that that Article applied only to proceedings brought before the Commission and imposed an obligation not to interfere with the right of the individual to present his or her complaint to the Commission and to pursue it. Article 25 conferred upon an applicant a right of a procedural nature distinguishable from the substantive rights set out under Section I of the Convention or its Protocols. It may thus be seen that in that case the Court did not consider its own power to order interim measures but confined itself to examining the Commission's power. It considered the indication that had been given in the

light of the nature of the proceedings before the Commission and of the Commission's role and concluded: "Where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 ... would have to be seen as aggravated by the failure to comply with the indication" (*Cruz Varas and Others* cited above, § 103).

The Court emphasises in that connection that the Commission was not empowered to issue a binding decision that a Contracting State had violated the Convention, whereas the Court and the Committee of Ministers were. The Commission's task with regard to the merits was of a preliminary nature and its opinion on whether or not there had been a violation of the Convention was not binding.

105. While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents (see, among other authorities, *mutatis mutandis*, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, 11 July 2002). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (*Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, 28 May 2002). In the circumstances of the present case, the Court notes that in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect.

106. The Court will now re-examine this problem. It would stress that although the Convention right to individual application was intended as an optional part of the system of protection, it has over the years become of the highest importance and is now a key component of the machinery for protecting the rights and freedoms set out in the Convention. Under the system in force until 1 November 1998, the Commission only had jurisdiction to hear individual applications if the Contracting Party issued a formal declaration recognising its competence, which it could do for a fixed period. The system of protection as it now operates has, in that regard, been modified by Protocol No. 11, so that the right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoy at the supranational level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.

107. In the light of the foregoing considerations, it follows from Article 34 that, firstly, applicants are entitled to exercise their right to

individual application effectively, within the meaning of Article 34 *in fine* – that is to say, Contracting States must not prevent the Court from carrying out an effective examination of the application – and, secondly, applicants who allege a violation of Article 3 are entitled to an effective examination of the issue whether a proposed extradition or expulsion will entail a violation of Article 3. Indications given by the Court, as in the present case, under Rule 39 of the Rules of Court, permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention.

Consequently, the terms of an indication given by the Court under Rule 39 must be interpreted against that background.

108. In the instant case, compliance with the indication given by the Court would undoubtedly have helped the applicants to argue their case before the Court. The material in the case file shows that the fact that Mr Mamatkulov and Mr Abdurasulovic were unable to take part in the proceedings before the Court or to speak to their lawyers hindered them in contesting the Government's arguments on the factual issues and in obtaining evidence.

109. In view of the duty of State Parties to the Convention to refrain from any act or omission that might undermine the authority and effectiveness of the final judgment (see Article 46), and in the light of the foregoing considerations, the Court finds that the extradition of Mr Mamatkulov and Mr Abdurasulovic, in disregard of the indications that had been given under Rule 39, rendered nugatory the applicants' right to individual application.

The Court reiterates in that connection that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness. That rule applies also to regulatory provisions which must be interpreted in the light of the provisions of the treaty to which they relate.

110. The Court accordingly concludes that any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.

111. Consequently, by failing to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention.

iv. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

113. The applicants' representatives claimed for each of their clients 1,000,000 French francs (FRF) for pecuniary damage and FRF 1,000,000 for non-pecuniary damage, making a total of 304,898 euros (EUR).

114. As their main submission, the Government argued that no redress was necessary in the instant case. In the alternative, they submitted that the sums claimed were exorbitant and unjustified. They maintained that if the Court were to find a violation of the Convention, that finding would in itself constitute sufficient just satisfaction, since no causal link had been established between the matters complained of and the alleged damage.

115. As the applicants have not specified the nature of their alleged pecuniary damage, the Court has no alternative but to dismiss that claim. As regards the alleged non-pecuniary damage, the Court holds that its finding concerning Article 34 constitutes in itself sufficient just satisfaction for the purposes of Article 41.

B. Costs and expenses

116. The applicants claimed FRF 50,120, that is to say EUR 7,640, for the communication and preparation of the documents that had been produced before the domestic courts and in Strasbourg. They left the assessment of the lawyers' fees to the Court's discretion.

117. The Government considered that the claim for costs and expenses had not been properly proved.

118. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicants EUR 10,000, less EUR 905 paid by the Council Europe in legal aid.

C. Default interest

119. The Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed in euros should be based on the marginal

lending rate of the European Central Bank, to which should be added three percentage points (*Christine Goodwin* cited above, § 124).

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

2. *Holds* unanimously that Article 6 of the Convention is not applicable to the extradition proceedings in Turkey;

3. *Holds* unanimously that no issue arises concerning the applicants' complaint under Article 6 of the Convention;

4. *Holds* by six votes to one that there has been a violation of Article 34 of the Convention;

5. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

6. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) less EUR 905 (nine hundred and five euros) for legal costs and expenses, plus any tax that may be chargeable, to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 6 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Türmen is annexed to this judgment.

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEN

I regret that I have been unable to agree with the majority in finding a violation of Article 34 for non-compliance with Rule 39.

I can accept that there may be a need for indicating an interim measure with binding effect in order to ensure the protection of the rights under the Convention. However, I cannot find sufficient legal basis for holding that a power to order binding interim measures exists under the present Convention system.

In the international field, there is a wide variety of statutes and rules of procedure which provide for some form of interim measures. In certain international arbitral bodies such measures are to be found in their rules of procedure. In others they are in their statutes. Due to there being such a wide variety of means of applying interim measures, it is not possible to draw a general rule from them regarding the obligatory character of such measures.

Furthermore, international tribunals including the Court operate within a jurisdictional competence assigned to them by virtue of an international treaty. If the treaty does not provide for a power to order provisional or interim measures with binding effect, then no such power is given. This is also true for the Court. If the Contracting States had the intention to attribute such a power to the Court, they would have said so explicitly in the Convention. Article 31 of the Vienna Convention on the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty..."

The preparatory work for the Convention and for Protocol No. 11 confirms this view.

The intention of the Contracting Parties to the Convention regarding the non-binding nature of interim measures has been unequivocal since the inception of the Strasbourg organs and there is every reason to believe that it is maintained also today.

In the text of the Convention no provision is made for interim measures. During the drafting of the Convention, the draft of 12 July 1949 contained a rule on interim measures with language almost identical to that of article 41 of the International Court of Justice Statute which was subsequently rejected. In 1971 the Consultative Assembly recommended to the Committee of Ministers that an additional Protocol to the Convention should be drafted providing explicit power to order interim measures. The Committee of Ministers declined to comply with the recommendation.

The Contracting Parties maintained the same position during the preparatory work for Protocol No. 11.

Article 32 of the Vienna Convention on the Law of Treaties states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,

in order to confirm the meaning resulting from the application of Article 31...”At the Committee of Experts for the Improvement of the Procedure under the European Convention on Human Rights' (DH-PR) extraordinary meeting in early 1994, the Committee received reform proposals prepared by the European Commission of Human Rights on 21 January 1994 and from the European Court of Human Rights on 31 January 1994 (Docs. DH-PR(94)2 and DH-PR(94)4). Both the Commission and the Court considered that the new Court should have the power to issue interim measures with legally binding effect which should be provided for in the text of the Convention. The Court's proposal was similar to Article 63, paragraph 2 of the 1969 American Convention on Human Rights. The Commission's preference was for the interim-measure rules contained in the Commission's (Rule 36) and the Court's (Rule 36) Rules of Procedure to be included in the text of the Convention. On the other hand, the Swiss Delegation also submitted a proposal with a view to including an Article in the Convention on interim measures to the effect that “the Court may ... prescribe any necessary interim measures” (Doc. DH-PR(93)20, 8 November 1993).

All three proposals were rejected by the Governments' experts.

Meanwhile, the Committee on Migration, Refugees and Demography made a proposal that Rule 36 of the Court should be made obligatory for member States (Draft Report, AS/PR (1997)2 revised 19 February 1997). In spite of this, the Committee of Ministers declined to include a provision in the Convention on interim measures.

The above-mentioned facts constitute a clear expression of intention by the Contracting Parties. They do not wish to see an interim-measure regime with legally binding effect. On the contrary, the *opinio juris* of the Contracting States is to have an interim measure which is not mandatory. This may change in the future. As the Court said in the *Cruz Varas* judgment, it is up to the Contracting Parties to decide whether it is expedient to remedy this situation by adopting a new provision in the Convention (§ 102).

In the absence of such a decision, to attribute binding effect to Rule 39, directly or through the interpretation of Article 34 of the Convention, would be to create a new obligation for the Contracting States that is not stipulated in the Convention and which is contrary to the intention of the Contracting Parties.

Moreover, in the letter of 18 March 1999 addressed to the respondent State indicating an interim measure, the First Section seems to accept the non-binding character of Rule 39. The text of the letter is as follows:

“*La présidente de la première section a décidé, aujourd'hui, d'indiquer à votre Gouvernement, en application de l'article 39 du règlement de la Cour, qu'il était souhaitable, dans l'intérêt des parties et du bon déroulement de la procédure devant la Cour, de ne pas extrader le requérant vers la*

République Ouzbek avant la réunion de la chambre compétente, qui se tiendra le 23 mars 1999."

In view of the word "*souhaitable*" (desirable) in the text, in sharp contrast to the words "*doit respecter*" (must comply with) in paragraph 110 of the judgment, the respondent Government could not be expected to interpret the Section's letter as attributing mandatory effect to the interim measure.

Can the power to order binding interim measures arise from Article 34 of the Convention? I share the opinion of many outstanding jurists in international law (such as Sir Ian Sinclair, Professor Matthias Herdegen, Professor Heribert Golsong, Colloquium organized by Max Planck Institute on Interim Measures, on 22 January 1993) that the power to indicate interim measures is attributed by the constituent instrument and not derived from an extra-statutory general principle of law. If this is the case, then it would be contrary to the constituent instrument, that is to say, the Convention and to the express intention of the Contracting Parties to give binding effect to Rule 39 by virtue of Article 34 of the Convention.

This is also the view of the Court as expressed in the *Cruz Varas* judgment and reiterated in the *Conka* decision of 13 March 2001 (date of the decision). In the *Cruz Varas* judgment, the Court states that "the power to order binding interim measures cannot be inferred from either Article 25(34) *in fine*, or from other sources. It lies within the appreciation of the Contracting Parties to decide..." (§ 102).

Furthermore, it is doubtful whether the language of Article 34 permits such a broad interpretation.

Judge Sperduti in his dissenting opinion to the decision of the Commission in the *Cruz Varas* care is of the opinion that "the words 'effective exercise' in Article [34] is to be interpreted in the light of that Article's purpose, i.e. firstly, the declaration recognizing the right to petition the Commission, secondly, an undertaking to allow free exercise of that right in its different forms".

The Court, in its judgment in *Cruz Varas* stated that "it would strain the language of Article [34] to infer from the words 'undertake not to hinder in any way the effective exercise of this right' an obligation to comply with a Commission indication under Rule [39]."

I subscribe to those views.

The majority's view to the effect that in the *Cruz Varas* judgment the Court examined the Commission's power to order interim measure and not its own power (see paragraph 104 of the judgment) is not convincing as in the *Conka* decision in 2001, after the Commission had been abolished, the Court reiterated for its own jurisdiction the same principles as those set out in *Cruz Varas*. Moreover, in the *Cruz Varas* judgment, the Court establishes the general principles of law with regard to interim measures.

Even if we assume that the Court has the power to order interim measures with binding effect and that non-compliance may constitute a

breach of Article 34, I do not think that the circumstances lead to such a conclusion in the present case .

In deciding whether the applicant's effective exercise of the right of application is hindered by virtue of non-compliance with Rule 39, it must be shown that irreparable damage has been caused by such non-compliance. In the present case, the applicants have not suffered irreparable damage for the following reasons:

First of all, in the judgment it is concluded that there is no violation of Article 3 or any other Article of the Convention. Therefore, no irreparable damage can be caused.

Secondly, the majority's opinion that Article 34 has been violated is based on one single fact: the applicants after they were extradited to Uzbekistan could not see their Turkish lawyers. This single fact, in my opinion, is not sufficient to find a violation of Article 34, as it does not take into account a number of other facts:

(a) The respondent State received official guarantees from the Uzbek authorities that the applicants would not be sentenced to the death penalty, would not be subjected to torture and that their property would not be confiscated. Uzbekistan is a party to the UN Convention against Torture.

(b) The applicants had a public trial and a number of foreign observers followed the trial. During the investigation and trial, they benefited from the assistance of their lawyers.

(c) The medical reports submitted to the Court after the applicants were sentenced and imprisoned indicated that they had not been ill-treated and were in good health, both physically and psychologically.

(d) Two members of the Turkish Embassy in Tashkent visited the applicants in prison and reported their observations to the Court. According to their reports the applicants were in good health, they had not been subjected to any kind of ill-treatment in detention either before or after trial, and their families can visit them regularly.

On the other hand, no evidence has been submitted by their lawyers in support of their allegations.

Moreover, the applicants' lawyers are Turkish citizens. It is a well-established principle of international law that States have the right to control the entry, residence and expulsion of aliens (*Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102). We do not know exactly why the Uzbek Government denied the Turkish lawyers permission to enter the country. They may have their own reasons which this Court cannot contest. What is important is that under international law the Uzbek Government has an undeniable right to deny permission to the Turkish lawyers to enter the country. However, the applicants had lawyers in the proceedings in Uzbekistan. It should have been possible for the Turkish lawyers to cooperate with the Uzbek lawyers for the proceedings before the Strasbourg Court and for the Uzbek lawyers to visit the applicants. If their families can

visit them regularly, there is no reason to think that their Uzbek lawyers cannot do the same. Such cooperation was realised in the Öcalan case, where the applicant's foreign lawyers were not permitted to enter the country and therefore were not able to meet their client. However, no attempt was made by the applicants' Turkish lawyers to this effect.