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

CASE OF MAMATKULOV AND ASKAROV v. TURKEY

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

JUDGMENT

STRASBOURG

4 February 2005

In the case of Mamatkulov and Askarov v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mrs E. PALM,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr J. HEDIGAN
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr A.B. BAKA,
Mr A. KOVLER,
Mr S. PAVLOVSCHI, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 17 March, 15 September and 15 December 2004,

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 Sultanovich Mamatkulov and Mr Zainiddin Abdurasulovich Askarov ("the applicants"), on 11 and 22 March 1999 respectively.

2. The applicants, who had been granted legal aid, were represented by Mr İ.Ş. Çarsancaklı, a member of the Istanbul Bar. The Turkish Government ("the Government") were represented by Mr M. Özmen, co-Agent.

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). On 31 August 1999 they were declared admissible by a Chamber of that Section, composed of Mrs E. Palm, President, Mr J. Casadevall, Mr Gaukur Jörundsson, Mr R. Türmen, Mr C. Bîrsan, Mrs W. Thomassen, Mr R. Maruste, judges, and Mr M. O'Boyle, Section Registrar.

5. In its judgment of 6 February 2003 ("the Chamber judgment"), the Chamber held unanimously that there had been no violation of Article 3, that Article 6 was not applicable to the extradition proceedings in Turkey and that no separate issue arose concerning the applicants' complaint under Article 6 of the Convention. It also held by six votes to one that there had been a violation of Article 34 of the Convention. Lastly, it held unanimously that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. A partly dissenting opinion by Mr Türmen was annexed to the judgment.

6. On 28 April 2003 the Government made a request for the case to be referred to the Grand Chamber (Article 43 of the Convention).

7. On 21 May 2003 a panel of the Grand Chamber decided to accept the request for a referral (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicants and the Government each filed a memorial. Observations were also received from the International Commission of Jurists and the human rights organisations Human Rights Watch and the AIRE Centre, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 March 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Co-Agent*,
Ms M. GÜLŞEN,
Ms V. SIRMEN,
Ms H. SARI, *Advisers*;

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

The Court heard addresses by Mr Çarsancaklı, Mr Korkut, Mr Özmen and Ms Sırmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants were born in 1959 and 1971 respectively and are currently in custody in the Republic of Uzbekistan. They are members of Erk (Freedom), an opposition party in Uzbekistan.

A. The first applicant

12. On 3 March 1999 the first applicant arrived in Istanbul from Alma-Ata (Kazakhstan), on a tourist visa. He was arrested by the Turkish police at Atatürk Airport (Istanbul) under an international arrest warrant and taken into police custody on suspicion of homicide, causing injuries through the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan.

13. The Republic of Uzbekistan requested his extradition under a bilateral treaty with Turkey.

14. On 5 March 1999 the Bakırköy public prosecutor made an application to the investigating judge for the first applicant to be remanded in custody. The first applicant, who was assisted by his lawyer, was brought before the judge on the same day and remanded in custody for forty-five days, in accordance with the European Convention on Mutual Assistance in Criminal Matters.

15. 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 him in custody pending his extradition. The first applicant, who was assisted by his lawyer and an interpreter, denied the charges and protested his innocence.

16. In written pleadings that were lodged at a hearing on 11 March 1999, the first applicant's representative argued that his client 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 was being prosecuted for an offence of a political nature and, relying on Article 9 § 2 of the Turkish Criminal Code, asked the Criminal Court to refuse Uzbekistan's request for extradition.

17. On 15 March 1999 the first applicant appealed to the Bakırköy Assize Court against the order made under the expedited applications

procedure on 11 March 1999. Having examined the case file, the Assize Court dismissed the first applicant's appeal on 19 March 1999.

B. The second applicant

18. The second 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 through the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan.

19. On 7 March 1999 the Bakırköy public prosecutor made an application to the investigating judge for the second applicant to be remanded in custody. On the same day the second applicant was brought before the judge, who remanded him in custody.

20. At a hearing on 11 March 1999, the second applicant's representative submitted that the offence with which his client 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 second applicant had been in Turkey at the material time on a false passport.

21. In a letter of 12 March 1999 the Fatih public prosecutor applied to the Fatih Criminal Court for a determination of the second 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. On 18 March 1999 the second applicant appealed to the Istanbul Assize Court against the judgment of 15 March 1999. Having examined the case file, the Assize Court dismissed the appeal on 26 March 1999.

C. The extradition of the applicants and subsequent events

24. On 18 March 1999 the President of the relevant Chamber of the Court decided to indicate to the Government, on the basis of Rule 39 of the Rules of Court, that it was desirable in the interest of the parties and of the smooth progress of the proceedings before the Court not to extradite the applicants to Uzbekistan prior to the meeting of the competent Chamber, which was to take place on 23 March 1999.

25. On 19 March 1999 the Turkish government issued a decree ordering the applicants' extradition.

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

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

28. In a letter of 19 April 1999, the Government informed the Court that it had received the following assurances regarding the two applicants from the Uzbek authorities: on 9 March and 10 April 1999 the Uzbek embassy in Ankara had transmitted two notes from the Ministry of Foreign Affairs to which were appended two letters from the Public Prosecutor of the Republic of Uzbekistan, 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.
>
> The Republic of Uzbekistan is a party to the United Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole."

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

> "It appears from investigations conducted by the Uzbek judicial authorities that Mr Mamatkulov and Mr Askarov 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 Mr Mamatkulov and Mr Askarov have committed offences in Kazakhstan and Kyrgyzstan.
>
> Their indictment, which was drawn up on the basis of previously obtained evidence, includes a number of charges: setting up a criminal organisation, terrorism, a terrorist attack on the President, seizing power through the use of force or by overthrowing 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 Mr Mamatkulov and Mr Askarov 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 defendants' 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 representatives of human rights organisations also attend the hearings.

Officials from the embassy of the Republic of Turkey may also attend."

30. 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.

31. In a letter to the Court dated 15 September 1999, the applicants' representatives said that they had not been able to contact their clients, that conditions in Uzbek prisons were bad and prisoners 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 assertion that the applicants' trial was followed by 'members of the local and foreign press and representatives of 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 by either letter or telephone. We still have no means of contacting them. This state of affairs serves to confirm our suspicions that the applicants are not being held in proper prison conditions.

According to the letter sent by the Court on 9 July 1999 and information published in the press, Mr 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 of offences pertaining to freedom of expression, are given additional sentences."

32. On 15 October 2001 the Uzbek Ministry of Foreign Affairs sent the following information to the Turkish embassy in Tashkent:

"On 28 June 1999 the Supreme Court of the Republic of Uzbekistan found R. Mamatkulov and Z. Askarov guilty of the offences 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 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 Zarafshan Prison, which is under the authority of the Office of 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. Abdurasulovich ASKAROV

(a) Ten 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) 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 of Internal Affairs of the province of Kashkadarya. 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."

33. At the hearing on 23 October 2001, the Government informed the Court that on 19 October 2001 two officials from the Turkish embassy in Tashkent had visited the applicants in Zarafshan 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.

34. 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 December 2000 and 2 April 2001 did not reveal any pathological symptoms.

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 Abdurasulovich 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 pathological symptoms ..."

35. On the basis of lists that had been communicated by the Uzbek authorities, the Government informed the Court on 16 April 2004 that the applicants had received a number of visits from close relatives between January 2002 and 2004.

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

II. RELEVANT DOMESTIC LAW

A. Criminal law

37. Article 9 of the Criminal Code provides:

"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. ..."

B. Extradition

38. Extradition between Turkey and Uzbekistan is governed by the Agreement for Mutual Assistance in Civil, Commercial and Criminal Matters between the Republic of Turkey and the Republic of Uzbekistan, which came into force on 18 December 1997. Under the relevant provision 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 has been charged with or found guilty of an offence committed within the jurisdiction of the other Party".

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The Vienna Convention of 1969 on the Law of Treaties

39. 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."

B. Universal systems of human rights protection

1. The United Nations Human Rights Committee

40. Rule 86 of the Rules of Procedure of the United Nations Human Rights Committee 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."

41. In its decision of 26 July 1994 (in *Glen Ashby v. Trinidad and Tobago*), the Committee dealt with the first case of a refusal by a State to comply with interim measures in the form of a request that it 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).

42. In its decision of 19 October 2000 (in *Dante Piandiong, Jesus Morallos and Archie Bulan v. the Philippines*), the Committee stated:

> "By adhering to the Optional Protocol, a State Party to the Covenant recognises 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 and 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.
>
> 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. ...
>
> ...
>
> 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."

The Committee reiterated this principle in its decision of 15 May 2003 (in *Sholam Weiss v. Austria*).

2. The United Nations Committee against Torture

43. Rule 108 § 9 of the Rules of Procedure of the Committee against Torture enables provisional 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."

44. In the case of a Peruvian citizen resident in Venezuela who was extradited to Peru despite the fact that a stay of her extradition had been called for as a provisional measure (see *Cecilia Rosana Núñez Chipana v. Venezuela*, decision of 10 November 1998), the Committee against Torture expressed the view that the State had failed to "comply with the spirit of the Convention". It noted the following:

"... 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."

45. In another decision that concerned the extradition to India of an Indian national resident in Canada (see *T.P.S. v. Canada*, decision of 16 May 2000) despite the fact that Canada had been requested to stay the extradition as a provisional measure, the Committee against Torture reiterated that failure to comply with the requested provisional measures "... could ... nullify the end result of the proceedings before the Committee".

C. The International Court of Justice (ICJ)

46. Article 41 of the Statute of the ICJ 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."

47. The ICJ 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 *Nicaragua v. the United States of America*). In an order of 13 September 1993 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the ICJ stated 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".

48. In its judgment of 27 June 2001 in *LaGrand (Germany v. the United States of America)*, it noted:

> "102. ... 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 recognised 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 ...)."

This approach was subsequently confirmed in the court's judgment of 31 March 2004 in *Avena and other Mexican nationals (Mexico v. the United States of America)*.

D. The Inter-American system of human rights protection

1. The Inter-American Commission on Human Rights

49. Rule 25 of the Rules of Procedure of the Inter-American Commission on Human Rights 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."

50. The scope of the precautionary measures is determined by reference to the scope of the recommendations made by the Commission in respect of the individual petition. In its judgment of 17 September 1997 in *Loayza Tamayo v. Peru*, the Inter-American Court of Human Rights ruled that the State "has the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organisation of American States, whose function is 'to promote the observance and defence of human rights' ...".

2. The Inter-American Court of Human Rights

51. Article 63 § 2 of the American Convention on Human Rights 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."

52. Rule 25 of the Rules of Procedure of the Inter-American Court of Human Rights 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."

53. 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, *Chunimá v. Guatemala*; 2 July and 13 September 1996, 11 November 1997 and 3 February 2001, *Loayza Tamayo v. Peru*; 25 May and 25 September 1999, 16 August and 24 November 2000, and 3 September 2002, *James et al. v. Trinidad and Tobago*; 7 and 18 August 2000, and 26 May 2001, *Haitians and Dominican nationals of Haitian origin in the Dominican Republic v. the Dominican Republic*; 10 August and 12 November 2000, and 30 May 2001, *Alvarez et al. v. Colombia*; see also the judgment of 21 June 2002, *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*).

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 *James et al. v. Trinidad and Tobago*).

IV. BRIEFING AND REPORT OF AMNESTY INTERNATIONAL ON UZBEKISTAN

54. As regards the situation in Uzbekistan at the material time, Amnesty International stated in a briefing for the United Nations Committee against Torture that was made public in October 1999:

> "... 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 democratisation 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 organisation 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 organisation'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* [Freedom] and *Birlik* [Unity], 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 [Liberation Party]. 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 [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] 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 235 of the [Uzbek] Criminal Code criminalises 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 organisation 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 organisations, 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."

55. 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 democratic party *Erk*, 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 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 [2001], 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 organisation 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 memorise 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. ..."

THE LAW

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

56. The applicants alleged that their extradition to the Republic of Uzbekistan had breached Articles 2 and 3 of the Convention, which provide:

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."

In view of the facts of the case, the Court will first examine this complaint under Article 3.

A. The Chamber judgment

57. The Chamber found that the reason it had not been possible for any conclusive findings of fact to be made was that the applicants had been denied an opportunity to have additional inquiries made in order to obtain evidence in support of their allegations under Article 3 of the Convention. It considered that there was insufficient evidence before it to conclude that there had been a violation of that provision (see paragraphs 74 and 77 of the Chamber judgment).

B. The parties' submissions

1. The applicants

58. The lawyers representing the applicants said that at the time of the latter's extradition there were substantial grounds for believing that their return to Uzbekistan would result in their being subjected to treatment proscribed by Article 3. In that connection, they denounced the poor conditions and use of torture in Uzbek prisons.

59. In support of their allegations, they referred to reports by "international investigative bodies" in the human rights field denouncing both 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 stated that the applicants had denied the charges in the extradition proceedings in Turkey and adduced relevant evidence in their defence. Accordingly, the fact that the applicants, who were denied the right to legal assistance from a lawyer of their choosing, had fully admitted the same charges to the Uzbek authorities showed that they had been forced through torture and ill-treatment to "confess" to crimes they had not committed.

2. The Government

61. The Government maintained that in extradition proceedings Article 3 should only apply in cases in which it was certain that the prohibited treatment or punishment would be inflicted in the requesting State and in which the person concerned had produced strong 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 impose the death penalty and to ensure that the applicants would not be subjected to torture or ill-treatment or be liable to confiscation of their property generally. The Uzbek authorities had given an assurance that the Republic of Uzbekistan, which was a party to the United Nations Convention against Torture, accepted and reaffirmed its obligation to comply with the requirements of that convention both as regards Turkey and the international community as a whole. Furthermore, the reports of the human rights organisations did not contain any information to support the allegations of treatment contrary to Article 3.

63. The Government noted that the applicants, who had been charged with 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. They

added that the applicants had been visited in prison in Uzbekistan by two officials from the Turkish embassy whom they had informed that they had not been subjected to ill-treatment either before or after their trial.

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 an extradition agreement, the extraditing State had subjected him to the treatment or punishment he received after his conviction and sentence in the receiving State. Such a decision would interfere with rights under international treaties and 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.

3. Third-party interveners

65. Human Rights Watch and the AIRE Centre referred to the repression of independent Muslims in Uzbekistan at the material time; in particular, they said that close relatives of the applicants' co-accused had been subjected to torture and political prisoners had died as a result of ill-treatment received in Uzbek prisons. Furthermore, in view of the political situation obtaining in Uzbekistan and the lack of effective judicial supervision of the security forces, the assurances that had been obtained from the Uzbek government did not constitute a sufficient guarantee for the applicants.

C. The Court's assessment

1. The relevant principles

66. 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. The right to political asylum is not contained in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 34, § 102).

67. 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 (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 89-91).

68. It would hardly be compatible with the "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (see *Soering*, cited above, pp. 34-35, § 88).

69. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*. 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 extradition; the Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, pp. 29-30, §§ 75-76, and *Vilvarajah and Others*, cited above, p. 36, § 107).

However, if the applicant has not been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1856, §§ 85-86).

This situation typically arises when deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court. Such an indication means more often than not that the Court does not yet have before it all the relevant evidence it requires to determine whether there is a real risk of treatment proscribed by Article 3 in the country of destination.

70. Furthermore, 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 (see *Vilvarajah and Others*, cited above, p. 36, § 107).

Allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30).

2. Application of the above principles to the present case

71. For an issue to be raised under Article 3, it must be established that at the time of their extradition there existed a real risk that the applicants would be subjected in Uzbekistan to treatment proscribed by Article 3.

72. The Court has noted the applicants' representatives' observations on the information in the reports of international human rights organisations 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 stated in its report for 2001: "Reports of ill-treatment and torture by law enforcement officials of alleged supporters of banned Islamist opposition parties and movements ... continued ..." (see paragraph 55 above).

73. However, although these findings describe the general situation in Uzbekistan, they do not support the specific allegations made by the applicants in the instant case and require corroboration by other evidence.

74. The applicants were extradited to Uzbekistan on 27 March 1999, despite the interim measure that had been indicated by the Court under Rule 39 (see paragraphs 24-27 above). It is, therefore, that date that must be taken into consideration when assessing whether there was a real risk of their being subjected in Uzbekistan to treatment proscribed by Article 3.

75. By applying Rule 39, the Court indicated that it was not able on the basis of the information then available to make a final decision on the existence of a real risk. Had Turkey complied with the measure indicated under Rule 39, the relevant date would have been the date of the Court's consideration of the case in the light of the evidence that had been adduced (see paragraph 69 above and *Chahal*, cited above, p. 1856, §§ 85-86). Turkey's failure to comply with the indication given by the Court has prevented the Court from following its normal procedure. Nevertheless, the Court cannot speculate as to what the outcome of the case would have been had the extradition been deferred as it had requested. For this reason, it will have to assess Turkey's responsibility under Article 3 by reference to the situation that obtained on 27 March 1999.

76. The Court notes that the Government have contended that the applicants were extradited after an assurance had been obtained from the

Uzbek government. The terms of the document indicate 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 Nations Convention against Torture and accepts and reaffirms its obligation to comply with the requirements of the provisions of that Convention as regards both Turkey and the international community as a whole". The Government also produced medical reports from the doctors of the Uzbek prisons in which Mr Mamatkulov and Mr Askarov are being held (see paragraphs 28 and 34 above).

77. In the light of the material before it, the Court is not able to conclude that substantial grounds existed at the aforementioned date for believing that the applicants faced a real risk of treatment proscribed by Article 3. Turkey's failure to comply with the indication given under Rule 39, which prevented the Court from assessing whether a real risk existed in the manner it considered appropriate in the circumstances of the case, must be examined below under Article 34.

Consequently, no violation of Article 3 of the Convention can be found.

78. Having considered the applicants' allegations under Article 3 (see paragraphs 71-77 above), the Court finds that it is not necessary to examine them separately under Article 2.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

79. The applicants complained of the unfairness of the extradition proceedings in Turkey and the criminal proceedings in Uzbekistan. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "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 Chamber judgment

80. The Chamber found that Article 6 § 1 was not applicable to the extradition proceedings in Turkey (see paragraphs 80-81 of the Chamber judgment). As to the criminal proceedings in Uzbekistan, it found that the evidence produced to it did not establish that the applicants had been denied a fair trial and that no separate question arose under Article 6 § 1 on this point (see paragraph 87 of the Chamber judgment).

B. The extradition proceedings in Turkey

81. The applicants alleged that they had not had a fair hearing in 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 offences they were alleged to have committed.

82. 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 (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X; *Penafiel Salgado v. Spain* (dec.), no. 65964/01, 16 April 2002; and *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I).

83. Consequently, Article 6 § 1 of the Convention is not applicable in the instant case.

C. The criminal proceedings in Uzbekistan

84. The applicants submitted that they had no prospect of receiving a fair trial in their country of origin and 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.

85. 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.

86. The Government maintained that the applicants' extradition could not engage the State's responsibility under Article 6 § 1 of the Convention.

87. Two of the intervening parties, Human Rights Watch and the AIRE Centre, pointed out that the applicants had been held incommunicado until their trial started and that, as they had been assigned lawyers by the prosecutor in charge of the investigation, they had not been able to obtain representation by a lawyer of their choosing.

88. The Court observes that in *Soering* (cited above, p. 45, § 113), it held:

> "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 ..."

89. The Court notes 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 Askarov guilty of various offences and sentenced them to twenty and eleven years' imprisonment respectively (see paragraph 32 above).

90. The Court considers that, like the risk of treatment proscribed by Article 2 and/or Article 3, the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned. When extradition is deferred following an indication by the Court under Rule 39, the risk of a flagrant denial of justice must also be assessed in the light of the information available to the Court when it considers the case (see, *mutatis mutandis*, paragraphs 75-77 above).

91. The applicants were extradited to Uzbekistan on 27 March 1999. Although, in the light of the information available, there may have been reasons for doubting at the time that they would receive a fair trial in the State of destination, there is not sufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of paragraph 113 of *Soering*, cited above. Turkey's failure to comply with the indication given by the Court under Rule 39 of the Rules of Court, which prevented the Court from obtaining additional information to assist it in its assessment of whether there was a real risk of a flagrant denial of justice, will be examined below with respect to Article 34.

Consequently, no violation of Article 6 § 1 of the Convention can be found.

III. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

92. The applicants' representatives maintained that, by extraditing Mr Mamatkulov and Mr Askarov 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 of the Rules of Court provides:

> "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 Chamber judgment

93. In its judgment of 6 February 2003, the Chamber found as follows:

"110. ... 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."

B. The parties' submissions

1. The applicants

94. The applicants' representatives stated that, despite requests to the authorities, they had been unable to contact their clients following the latter's extradition. The applicants had consequently been deprived of the possibility of having further inquiries made in order to obtain evidence in support of their allegations under Article 3. The applicants' extradition had thus proved a real obstacle to the effective presentation of their application to the Court.

2. The Government

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

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

97. In the Government's submission, it was clear from the very terms of the letter indicating the interim measure in the instant case that the measure was not intended to be binding. International courts operated within the scope of the powers conferred upon them by international treaties. If the treaty did not grant them power to order binding interim measures, then no such power existed.

3. Third-party intervener

98. The International Commission of Jurists submitted that in the light of the general principles of international law, the law of treaties and international case-law, interim measures indicated under Rule 39 of the Rules of Court were binding on the State concerned.

C. The Court's assessment

99. The fact that the Government failed to comply with the measures indicated by the Court under Rule 39 of the Rules of Court raises the issue of whether the respondent State is in breach of its undertaking under Article 34 of the Convention not to hinder the applicants in the exercise of their right of individual application.

1. General considerations

(a) Exercise of the right of individual application

100. The Court has previously stated that the provision concerning the right of individual application (Article 34, formerly Article 25 of the Convention before Protocol No. 11 came into force) is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection. In interpreting such a key provision, 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. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement' (see, *mutatis mutandis*, *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 26, § 70).

101. 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" (see *Soering*, cited above, p. 34, § 87, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 18, § 34).

102. 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 decisions. 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. As the Court has noted in previous decisions, "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, *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, pp. 2854-55, § 43; *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2288, § 105; and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1219, § 105). For present purposes, the Court concludes that the obligation set out in Article 34 *in fine* requires the Contracting States to refrain not only from exerting pressure on applicants, but also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure.

(b) Indication of interim measures under the Convention system

103. Rule 39 of the Rules of Court empowers a Chamber or, where appropriate, its President, to indicate interim measures. The grounds on which Rule 39 may be applied are not set out in the Rules of Court but have been determined by the Court through its case-law. As was the practice of the European Commission of Human Rights prior to the entry into force of Protocol No. 11 to the Convention in 1998, the Court applies Rule 39 only in restricted circumstances.

104. Interim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings.

105. In most cases, measures are indicated to the respondent Government, although there is nothing to stop the Court from indicating measures to applicants (see, among other authorities, *Ilaşcu and Others*

v. Moldova and Russia [GC], no. 48787/99, § 11, ECHR 2004-VII). Cases of States failing to comply with indicated measures remain very rare.

106. Rule 36 of the Rules of Procedure of the European Commission of Human Rights, which came into force on 13 December 1974, 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."

Even before the provisions regulating the question of interim measures came into force, the Commission had not hesitated to ask respondent Governments for a stay of execution of measures liable to make the application pending before it devoid of purpose. The Commission adopted that practice very early on, particularly in extradition and deportation cases, and the States concerned proved very cooperative (see, *inter alia*: *Greece v. the United Kingdom*, no. 176/56, Commission's report of 26 September 1958, unpublished; *X v. the Federal Republic of Germany*, no. 2396/65, Commission's report of 19 December 1969, Yearbook 13; *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12; *Denmark, Norway and Sweden v. Greece*, no. 4448/70, Commission's report of 4 October 1976, Decisions and Reports (DR) 6; and *E.R. v. the Federal Republic of Germany*, no. 5207/71, Commission decision of 13 December 1971, Collection of Decisions 39).

In *Brückmann v. the Federal Republic of Germany* (no. 6242/73, Commission's report of 14 July 1976, DR 6), the respondent State even stayed the execution of a domestic measure of its own motion while the case was pending before the Commission.

107. Rule 36 of the Rules of the former Court, which came into force on 1 January 1983, provided:

> "1. Before the constitution of a Chamber, the President of the Court may, at the request of a Party, of the Commission, of the applicant or of any other person concerned, or *proprio motu*, indicate to any Party and, where appropriate, the applicant, any interim measure which it is advisable for them to adopt. The Chamber when constituted or, if the Chamber is not in session, its President shall have the same power.
>
> ..."

The most noteworthy case concerning the indication of interim measures by the former Court is *Soering*, cited above, in which the Court indicated to the British Government under Rule 36 of its Rules that it would be undesirable to extradite the applicant to the United States while the proceedings were pending in Strasbourg. In order to abide by the Convention and the Court's decision, the British Government were forced to default on their undertaking to the United States (p. 17, § 31, and pp. 44-45, § 111). Thus, the judgment resolved the conflict in this case between a State

Party's Convention obligations and its obligations under an extradition treaty with a third-party State by giving precedence to the former.

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

108. In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint. As far as the applicant is concerned, the result that he or she wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it. Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the "effective exercise" of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State.

In the present case, because of the extradition of the applicants to Uzbekistan, the level of protection which the Court was able to afford the rights which they were asserting under Articles 2 and 3 of the Convention was irreversibly reduced.

In addition, the Court considers that it is implicit in the notion of the effective exercise of the right of application that for the duration of the proceedings in Strasbourg the Court should remain able to examine the application under its normal procedure. In the present case, the applicants were extradited and thus, by reason of their having lost contact with their lawyers, 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. As a consequence, the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment and, if so, from ensuring in this respect a "practical and effective" implementation of the Convention's safeguards, as required by its object and purpose (see paragraph 101 above).

109. 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 in conjunction with Rule 39 (former Rule 36), or from any other source, the power to order interim measures that were binding (see *Cruz Varas and Others*, cited above, and *Čonka v. Belgium* (dec.), no. 51564/99, 13 March 2001). In those cases it concluded that such a power could not be inferred from either Article 34, *in fine*, or from other sources (see *Cruz Varas and Others*, pp. 36-37, §§ 102-03).

110. In examining the present case, the Court will also have regard to general principles of international law and the view expressed on this subject by other international bodies since *Cruz Varas and Others*.

111. 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 account must be taken of "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 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 14, § 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 (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 60, ECHR 2001-XI).

112. 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 ICJ. In some instances provision is made for such measures in the treaty itself and in others in the rules of procedure (see paragraphs 40, 43, 46, 49, 51 and 52 above).

113. In a number of recent decisions and orders, international courts and institutions 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.

114. Thus, 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 41 and 42 above).

115. 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 that compliance with interim measures which the Committee considered reasonable was essential in order to protect the person in question from irreparable harm, which could nullify the end result of the proceedings before the Committee (see paragraphs 44 and 45 above).

116. 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 the orders of 25 May and 25 September 1999 in *James et al. v. Trinidad and Tobago*).

117. In its judgment of 27 June 2001 in *LaGrand (Germany v. the United States of America)*, the ICJ stated: "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 ICJ brought to an end the debate over the strictly linguistic interpretation of the words "power to indicate" ("*pouvoir d'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, it held that provisional measures were legally binding. This approach was subsequently confirmed in the court's judgment of 31 March 2004 in *Avena and other Mexican nationals (Mexico v. the United States of America)* (see paragraph 48 above).

118. The Court observes that in *Cruz Varas and Others* (cited above) it determined the question whether the European Commission of Human Rights had power under former Article 25 § 1 of the Convention (now Article 34) to order interim measures that are binding. 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. It added that Article 25 conferred upon an applicant a right of a procedural nature distinguishable from the substantive rights set out in Section I of the Convention or the Protocols to the Convention. The Court thus confined itself to examining the Commission's power to order interim measures, not

its own. 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, pp. 36-37, § 103).

119. The Court emphasises in that connection that, unlike the Court and the Committee of Ministers, the Commission had no power to issue a binding decision that a Contracting State had violated the Convention. 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.

120. In *Čonka* (decision cited above) the Court referred to the argument set out in paragraph 109 above and added: "The Belgian authorities expelled the applicants the same day ..., without giving any reasons for their decision to ignore the measures that had been indicated under Rule 39 of the Rules of Court. In view of the settled practice of complying with such indications, which are given only in exceptional circumstances, such a manner of proceeding is difficult to reconcile with 'good faith co-operation with the Court in cases where this is considered reasonable and practicable'."

121. 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, ECHR 2002-VI). However, 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. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and *Christine Goodwin*, cited above, § 75).

122. Furthermore, the Court would stress that although the Convention right to individual application was originally intended as an optional part of the system of protection, it has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth 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, and the right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now

enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.

123. In this context, 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. The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose (see paragraph 39 above), and also in accordance with the principle of effectiveness.

124. The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending (see, *mutatis mutandis*, *Soering*, cited above, p. 35, § 90).

It has previously stressed the importance of having remedies with suspensive effect when ruling on the obligations of the State with regard to the right to an effective remedy in deportation or extradition proceedings. The notion of an effective remedy under Article 13 of the Convention requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention (see *Čonka v. Belgium*, no. 51564/99, § 79, ECHR 2002-I). It is hard to see why this principle of the effectiveness of remedies for the protection of an individual's human rights should not be an inherent Convention requirement in international proceedings before the Court, whereas it applies to proceedings in the domestic legal system.

125. Likewise, under the Convention system, interim measures, as they have consistently been applied in practice (see paragraph 104 above), play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.

Indications of interim measures given by the Court, as in the present case, permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant 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.

126. Consequently, the effects of the indication of an interim measure to a Contracting State – in this instance the respondent State – must be examined in the light of the obligations which are imposed on the Contracting States by Articles 1, 34 and 46 of the Convention.

127. The facts of the case, as set out above, clearly show that the Court was prevented by the applicants' extradition to Uzbekistan from conducting a proper examination of their complaints in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the Convention as alleged. As a result, the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34 of the Convention, which the applicants' extradition rendered nugatory.

3. Conclusion

128. The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.

129. Having regard to the material before it, the Court concludes that, by failing to comply with the interim measures indicated 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

130. 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

131. Before the Grand Chamber, the applicants' representatives repeated the claims they had made before the Chamber for pecuniary damage and non-pecuniary damage in the sum of 1,000,000 French francs, that is, 304,898 euros (EUR), for each of their clients.

132. The Chamber found as follows (see paragraph 115 of the Chamber judgment):

> "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."

133. The Government said that they could accept the Chamber's findings in the event of the Grand Chamber finding a violation of the Convention. In the alternative, they submitted that the amounts claimed were exorbitant.

134. Like the Chamber, the Court does not consider that the alleged pecuniary damage has been proved.

Conversely, it finds in the circumstances of the case that the applicants undeniably suffered non-pecuniary damage as a result of Turkey's breach of Article 34 which cannot be repaired solely by a finding that the respondent State has failed to comply with its obligations under Article 34.

Consequently, ruling on an equitable basis in accordance with Article 41 of the Convention, the Court awards each applicant EUR 5,000 for non-pecuniary damage.

B. Costs and expenses

135. The applicants' representatives repeated the claims they had made before the Chamber and left the question of their fees for the proceedings before the Grand Chamber to the Court's discretion.

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

137. For the proceedings up until the Chamber judgment, the Chamber awarded the applicants EUR 10,000, less EUR 905 that had been paid by the Council of Europe in legal aid.

138. The Court awards the applicants EUR 15,000 to cover all the costs incurred in the Court, less EUR 2,613.17 received from the Council of Europe in legal aid.

C. Default interest

139. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by fourteen votes to three that there has been no violation of Article 3 of the Convention;

2. *Holds* unanimously that no separate examination of the complaint under Article 2 of the Convention is necessary;

3. *Holds* unanimously that Article 6 § 1 does not apply to the extradition proceedings in Turkey;

4. *Holds* by thirteen votes to four that there has been no violation of Article 6 § 1 as regards the criminal proceedings in Uzbekistan;

5. *Holds* by fourteen votes to three that Turkey has failed to comply with its obligations under Article 34 of the Convention;

6. *Holds* by fourteen votes to three
   (a) that the respondent State is to pay, within three months, the following sums plus any tax that may be chargeable:
      (i) EUR 5,000 (five thousand euros) to each of the applicants for non-pecuniary damage, to be converted into the national currency of each applicant's country of residence;
      (ii) EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, less EUR 2,613.17 (two thousand six hundred and thirteen euros seventeen cents) received from the Council of Europe in legal aid, to be converted into Turkish liras at the rate applicable at 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 applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 February 2005.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Cabral Barreto;

(b) partly dissenting opinion of Mr Rozakis;

(c) joint partly dissenting opinion of Sir Nicolas Bratza, Mr Bonello and Mr Hedigan;

(d) joint partly dissenting opinion of Mr Caflisch, Mr Türmen and Mr Kovler.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I concur with the majority's view that Turkey has failed to comply with its obligations under Article 34 of the Convention in the instant case.

Turkey's failure to comply with the request for it not to extradite the applicants to Uzbekistan before the Court had examined the case made an effective examination of the application impossible.

Accordingly, the applicants have been hindered in the effective exercise of their right of individual application (see paragraph 127 of the judgment).

However, I find it difficult to agree with the majority's conclusion that: "A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34." (see paragraph 128 of the judgment).

This general conclusion constitutes a departure from the principles that were established in *Cruz Varas and Others v. Sweden* (judgment of 20 March 1991, Series A no. 201) some years ago and effectively reaffirmed in *Čonka v. Belgium* ((dec.), no. 51564/99, 13 March 2001).

If I have correctly understood the reasoning of the majority, the mere fact that a Government have failed to comply with a request to take interim measures *per se* entails a violation of Article 34 of the Convention.

It is this "mechanical" finding of a violation of Article 34 which I am unable to agree with.

To my mind, the fact that the States have always refused to accord binding force to interim measures prevents the Court from doing so and imposing on the States obligations which they have declined to accept.

The States Parties to the Convention have, however, undertaken not to hinder the exercise of the right of individual application.

Thus, if a refusal to comply with a request for interim measures has hindered the exercise of the right of application, the conclusion must be that there has been a violation of the obligations arising under Article 34 of the Convention.

However, the conclusion has to be different if, despite such a refusal, it has been possible for the applicant to exercise his right of application effectively and the Court to examine the case properly.

That, in my opinion, is the effect of the provisions of the Convention and the Rules of Court and warranted highlighting in the judgment.

I see situations in which, despite a Government's failure to comply with a request by the Court, the applicant has been able to exercise his right of individual application effectively and the Court to conduct a proper examination of the application in satisfactory conditions.

I have in mind, in particular, detention cases in which a person is suffering from an illness in conditions which may come within Article 3 of the Convention and are so bad as to justify interim measures being taken to bring the situation to an end.

In such cases, the procedural aspects do not come into play.

While the Government's failure to comply with the Court's request may entail a finding of a violation, even an aggravated violation, of Article 3, it will not give rise to a violation of Article 34 as the applicant has exercised his right of application and the Court has duly examined the complaint.

Another type of case that also comes to mind is where a person is extradited to a country which has the death penalty despite a request from the Court not to extradite before the application has been examined.

However, the fact that the applicant was represented by a lawyer who worked in the requesting State will have allowed useful contact between the applicant and his lawyer and, in a way, helped the applicant to present his complaint in better conditions.

While regretting that the member States of the Council of Europe have not given the Court the power to impose binding interim measures, I am forced to conclude that there will be a violation of Article 34 of the Convention only if the Contracting State's failure to comply with interim measures prevents the applicant from exercising his right of application and thereby makes an effective examination of his complaint by the Court impossible.

PARTLY DISSENTING OPINION OF JUDGE ROZAKIS

While I share the opinion of the majority of the Court that in the circumstances of the case there has been a violation of Article 34 and no violation of Article 3 of the Convention, I am unable to follow them in their finding that there has been no violation of Article 6, for the reasons elaborated by Judges Sir Nicolas Bratza, Bonello and Hedigan in their joint partly dissenting opinion, to which I fully subscribe.

JOINT PARTLY DISSENTING OPINION OF JUDGES Sir Nicolas BRATZA, BONELLO AND HEDIGAN

1. While we share the conclusion and reasoning of the majority of the Court that, in extraditing the applicants to Uzbekistan, Turkey failed to comply with its obligations under Article 34 of the Convention, we are unable to agree with their conclusion that the extradition of the applicants did not also give rise to a violation of Articles 3 and 6 of the Convention. In our view there was, in the circumstances of the present case, a violation of the applicants' rights under both those Articles.

Article 3

2. The general principles governing the application of Article 3 of the Convention to cases of extradition or expulsion of an individual are summarised in paragraphs 66 to 70 of the judgment. We would only add to that summary that the prohibition in Article 3 against ill-treatment is an absolute prohibition even in the case of expulsion and extradition and that the activities of the individual in question, however undesirable or dangerous and whether or not terrorist-related, cannot be a material consideration where a real risk of treatment contrary to Article 3 has been shown (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1855, §§ 79-80). Nor, where such a risk has been shown, is it any answer that a refusal to extradite would interfere with rights under international treaties or conflict with the norms of international judicial process or would inevitably involve an assessment of conditions in the requesting country which is not a Party to the Convention against the standards of Article 3 of the Convention (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 32-33, § 83, and pp. 34-36, §§ 88-91).

3. As is noted in the judgment, the existence of the risk that the individual concerned will, if returned, be subjected to treatment proscribed by Article 3 in the receiving country must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State responsible for returning the person at the time of the extradition or expulsion in question. The Court is not precluded from having regard to information which comes to light subsequent to the return of the person, such information being of potential value in confirming or refuting the appreciation made by the Contracting State or the well-foundedness or otherwise of an applicant's fears. However, as is apparent from *Vilvarajah and Others v. the United Kingdom* (judgment of 30 October 1991, Series A no. 215, p. 37, § 112), evidence as to the actual treatment received by the

applicant on his return to the receiving country is not conclusive, the essential question being whether it was foreseeable at the time of the expulsion that the person would be subjected to ill-treatment reaching the threshold of Article 3.

4. The two applicants were detained in Turkey on 3 and 5 March 1999 respectively. On 18 March the President of the Chamber applied Rule 39 of the Rules of Court, indicating to the Turkish Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court that the applicants should not be extradited to Uzbekistan until the Chamber had had an opportunity to examine the application at its meeting on 23 March 1999. On 19 March the Turkish Government issued a decree ordering the applicants' extradition. On 23 March the Chamber decided to extend until further notice the interim measure indicated under Rule 39. On 27 March the applicants were handed over to the Uzbek authorities. The question to be determined is accordingly whether at the latter date there existed substantial grounds for believing that the applicants faced a real risk of treatment proscribed by Article 3.

5. By applying Rule 39 the Chamber of the Court was necessarily satisfied that there existed at least a prima facie case for the existence of such a risk. There appears to us to have been a strong basis for such a view. As noted in the judgment, the general human rights situation in Uzbekistan at the relevant time was very poor, the contemporary reports of international human rights organisations denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents in that country. In particular, Amnesty International's briefing for the United Nations Committee against Torture, which was made public in October 1999, found a failure on the part of Uzbekistan fully to implement its obligations under the Convention against Torture. The briefing recorded, *inter alia*, a growing number of reports of ill-treatment and torture by law enforcement officials of persons perceived to be members of Islamic congregations since 1997 and noted especially reports of the arrest, ill-treatment and torture of suspected supporters of the banned political opposition parties and movements (specifically Erk and Birlik) in the wake of bomb explosions in the capital, Tashkent, in February 1999. The briefing further cited independent and credible reports that 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 the finding of guilt. The briefing also referred to public statements by Uzbek officials, including the President of Uzbekistan himself, which, if not directly sanctioning the use of violence by State agents, could be perceived at the very least as condoning the use of torture and ill-treatment.

6. While accepting that the findings of the various reports of human rights organisations accurately described the general situation in

Uzbekistan, the majority of the Court consider that those findings did not support the specific allegations made by the applicants in the instant case and required corroboration by other evidence (see paragraph 73 of the judgment). It is their view that insufficient corroborative evidence has been adduced to enable the Court to conclude that substantial grounds existed at the date of the applicants' extradition to believe that they faced a real risk of treatment proscribed by Article 3 (see paragraph 77 of the judgment).

7. We cannot agree that the undisputed findings concerning the general situation in Uzbekistan afford no support for the specific allegations of the applicants that they ran a real risk of ill-treatment if returned to that country. We consider that, on the contrary, the findings provide strong grounds for believing that the applicants were at particular risk of such treatment. Not only were both applicants members of Erk but both were arrested in March 1999 (shortly after the reported terrorist bomb attacks in Tashkent) on suspicion of homicide, causing injuries by explosions and an attempted terrorist attack on the President of Uzbekistan himself.

8. It is unclear to us what further corroborative evidence could reasonably be expected of the applicants, particularly in a case such as the present, where it was Turkey's failure to comply with the interim measures indicated by the Court which has prevented the Court from carrying out a full and effective examination of the application in accordance with its normal procedures. In such a situation, we consider that the Court should be slow to reject a complaint under Article 3 in the absence of compelling evidence to dispel the fears which formed the basis of the application of Rule 39.

9. In concluding that the required level of risk had not been sufficiently shown, the majority of the Court place reliance on three particular features of the case – the assurances given by the Uzbek government; the statement by the Public Prosecutor of the Republic of Uzbekistan, which accompanied those assurances, to the effect that Uzbekistan was a party to the United Nations Convention against Torture and accepted and reaffirmed its obligation to comply with the requirements of that convention; and the medical reports from the doctors of the Uzbek prisons in which the two applicants were being held.

10. We do not consider any of these factors to be compelling or to be sufficient, either individually or collectively, to allay the serious concerns concerning the treatment which was liable to await the applicants on their return. As to the assurances, we find it striking that the only assurance which was received prior to the applicants' surrender (namely, that of 9 March 1999) was not even communicated to the Court until 19 April 1999, well after the application of Rule 39 and after the extradition had been effected in disregard of the Court's interim measures. Moreover, an assurance, even one given in good faith, that an individual will not be

subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation (see, for example, *Chahal*, cited above, p. 1861, § 105). The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time. The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety.

11. The same applies to the majority's reliance on the fact that Uzbekistan was a party to the Convention against Torture. In this regard we note, in particular, the finding of Amnesty International that Uzbekistan had failed to implement its treaty obligations under that convention and that, despite those obligations, widespread allegations of ill-treatment and torture of members of opposition parties and movements continued to be made at the date of the applicants' arrest and surrender.

12. As to the medical reports from the doctors at Zarafshan and Şayhali Prisons, we would draw attention to the fact that these very brief and unspecific reports followed medical examinations apparently carried out in December 2000 and April 2001 (in the case of the first applicant) and between July and October 2001 (in the case of the second applicant), that is at least twenty-one months after the extradition of the applicants and some eighteen months after their trial and conviction. In so far as any regard may be had to events occurring after the extradition had taken place, we can attach very little weight to these reports which cast no light on the treatment received by the applicants in the intervening period and, more particularly, in the period leading up to their trial. Certainly, evidence as to the applicants' physical integrity so long after the events in question cannot in our view be relied on as refuting the well-foundedness of the applicants' fears at the time of their extradition.

13. For these reasons we consider that substantial grounds have been shown for believing that the applicants faced a real risk of ill-treatment and that, in returning the applicants despite this risk, Article 3 of the Convention has been violated.

Article 6

14. While the Court has not to date found that the expulsion or extradition of an individual violated, or would, if carried out, violate Article 6 of the Convention, it has on frequent occasions held that such a possibility cannot be excluded where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country (see, for example, *Soering*, cited above, p. 45, § 113; *Drozd and Janousek v. France*

and Spain, judgment of 26 June 1992, Series A no. 240, pp. 34-35, § 110; *Einhorn v. France* (dec.), no. 71555/01, § 32, ECHR 2001-XI; *Razaghi v. Sweden* (dec.), no. 64599/01, 11 March 2003; and *Tomic v. the United Kingdom* (dec.), no. 17837/03, 14 October 2003). What constitutes a "flagrant" denial of justice has not been fully explained in the Court's jurisprudence, but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. As the Court has emphasised, Article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention (see *Soering*, cited above, pp. 33-34, § 86). In our view, what the word "flagrant" is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

15. As in the case of the risk of treatment proscribed by Article 3 of the Convention, the risk of a flagrant denial of justice in the receiving State for the purposes of Article 6 must be assessed primarily by reference to the facts which were known or should have been known by the respondent State at the time of the extradition.

16. The majority of the Court acknowledge that, in the light of the information available, there "may have been reasons for doubting at the time" that the applicants would receive a fair trial in Uzbekistan (see paragraph 91 of the judgment). However, they conclude that there is insufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of *Soering*.

17. We consider, on the contrary, that on the material available at the relevant time there were substantial grounds not only for doubting that the applicants would receive a fair trial but also for concluding that they ran a real risk of suffering a flagrant denial of justice. The Amnesty International briefing document afforded, in our view, credible grounds for believing that self-incriminating evidence extracted by torture was routinely used to secure guilty verdicts and that suspects were very frequently denied access to a lawyer of their choice, lawyers often being given access to their client by law enforcement officials after the suspect had been held in custody for several days, when the risk of torture was at its greatest. In addition, it was found that in many cases law enforcement officials would only grant access to a lawyer after the suspect had signed a confession, and that meetings between lawyers and clients, once granted, were generally infrequent,

defence lawyers rarely being allowed to be present at all stages of the investigation.

18. So, far from the fears of an unfair trial being allayed in the case of the two applicants, the information coming to light after their extradition serves only to confirm in our view the well-foundedness of those fears. We note at the outset that, while the Turkish Government received assurances concerning the property rights and treatment of the applicants in Uzbekistan, no assurances appear to have been sought by the Turkish Government or obtained from the Uzbek authorities as to the fairness of the criminal proceedings to which the applicants were to be subjected. More particularly, despite the gravity of the charges faced by the applicants, no attempt appears to have been made to safeguard the applicant's continued contact with their legal representatives or to ensure that, once returned to Uzbekistan, they would have access to legal advice and assistance from independent lawyers of their own choosing. In fact, according to the undisputed evidence of their legal representatives, once the extradition had taken place, they were unable to have any contact with either applicant, by letter or by telephone, prior to their trial or thereafter. The Uzbek authorities have asserted that the self-incriminating statements on which their convictions were principally based were made of the applicants' own free will, that their trial was held in public and that the trial was attended by, among others, "representatives of human rights organisations". However, these assertions must be viewed in the light of the other material before the Court, notably the evidence of the third-party interveners – Human Rights Watch – which was the only human rights organisation in fact permitted to be represented at the applicants' trial. According to that evidence, the applicants were denied the right to be represented by counsel of their own choice, defending counsel being appointed by the public prosecutor; the applicants were held incommunicado until the commencement of their trial in June 1999; the trial was closed to the general public, to all family members of the applicants and to attorneys hired on behalf of the defence; and the self-incriminating statements used to convict the applicants included those signed during the pre-trial police investigation, while the applicants were in custody and without access to their own lawyers.

19. In our view, the evidence before the Court in the present case is sufficient to establish the existence at the date of extradition of a real risk that the applicants would suffer a flagrant denial of justice. In these circumstances, the surrender of the applicants was also in violation of Article 6 of the Convention.

JOINT PARTLY DISSENTING OPINION OF JUDGES CAFLISCH, TÜRMEN AND KOVLER

1. Preliminary observations

140. The judgment from which we partly dissent is ambiguous about the binding effect of interim measures indicated by the Court. Although, without any doubt, this is an essential issue, there is no direct reference to the legal consequences of interim measures "indicated" under Rule 39 of the Court's Rules of Procedure. Nevertheless, it can be deduced from paragraph 128 of the judgment that the majority wishes to attribute binding effect to such measures. The judgment bases the mandatory nature of interim measures essentially on Article 34 of the Convention. Paragraph 128 of the judgment states that the failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint, as impeding the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention (right of individual application).

141. We are of the view that Article 34 of the Convention cannot serve as a basis for holding that the Court's interim measures are binding on the States Parties to the Convention. But even if one were to admit – which we are not prepared to do – that non-compliance may occasionally amount to a violation of Article 34, one would have to determine in each case whether such non-compliance indeed prevents the Court from examining the applicant's complaint and hinders the effective exercise of the individual's right of application. There are certainly cases where the Court has all the elements to examine the applicant's complaint despite non-compliance; and there are also cases where the Court applies Rule 39 to the applicant (for instance, in cases of hunger strike) and not to the Government.

142. In the present case, the Court did have the necessary elements to examine the applicants' Article 3 complaint. The respondent State received official guarantees from the Uzbek authorities that the applicants would not be sentenced to death, that they would not be subjected to torture and that their property would not be confiscated. The medical reports submitted to the Court, after the applicants were sentenced and imprisoned, indicate that they had not been ill-treated and were in good health, both physically and psychologically. Furthermore, 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 could visit them regularly.

143. Having made these initial observations, we now turn to the specific issue motivating our dissent: the Court's conclusion that failure to abide by interim measures "indicated" by the Court amounts to a violation of Article 34 of the Convention. We shall deal with this issue by examining successively: (i) the Court's case-law; (ii) the case-law of the International Court of Justice (ICJ); (iii) the European Convention on Human Rights in the light of the canons of treaty interpretation; and (iv) the relevant rules of general international law.

2. The Court's case-law

144. The Court's position in the matter is summed up in *Cruz Varas and Others v. Sweden* (judgment of 20 March 1991, Series A no. 201). In that case, the applicants had argued that, while the Convention contained no specific rules on interim measures indicated by the European Commission of Human Rights (whose Rule of Procedure 36 contained a text similar to Rule of Procedure 39 of the present Court), it was necessary to attribute binding force to such measures in order fully to secure the right to present individual applications guaranteed by Article 25 § 1 [now Article 34] of the Convention. The Court replied that "[i]n the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties" (p. 35, § 98), that "[i]t would strain the language of Article 25 [now 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 36 [current Rule 39 of the Rules of Court]" (pp. 35-36, § 99), and that "the power to order binding interim measures cannot be inferred from either Article 25 *in fine*, or from other sources" (p. 36, § 102). This was so, added the Court, even though there had been, in practice, "almost total compliance with such indications" (p. 36, § 100; see also, on this point, paragraphs 7 and 18 below). This "subsequent practice" "could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision [reference is being made here to the Court's *Soering* judgment and to Article 31 (3) (b) of the Vienna Convention on the Law of Treaties of 23 May 1969] *but not to create new rights and obligations which were not included in the Convention at the outset* [reference to the *Johnston and Others* judgment of 18 December 1986, Series A no. 112, pp.24-25, § 53]" (emphasis added). "[T]he practice of complying with Rule 36 indications", concluded the Court, "cannot have been based on a belief that these indications gave rise to a binding obligation ... It was rather a matter of good-faith cooperation with the Commission in cases where this was considered reasonable and practicable", in other words a matter of expediency and comity.

145. The precedent described above was recently confirmed by the Court, in connexion with *its own provisional measures* – which had not been heeded by the defendant State – in *Čonka v. Belgium* ((dec.), no. 51564/99, 13 March 2001). The majority's view in the present case – that in *Cruz Varas* the Court had examined the *Commission's* power to order interim measures and not its own – is not very persuasive in the light of the *Čonka* decision, where the Court reiterated the principles set out in *Cruz Varas* with regard to its own jurisdiction. We do not think that there has been any change since *Čonka* which would justify the Court on a re-examination of its case-law reaching a diametrically opposite conclusion. As stated in the present judgment, "in the interests of legal certainty and foreseeability, [the Court] should not depart, without good reason, from its own precedents" (see paragraph 121).

146. The above-mentioned case-law means, in essence, that while the Court is entitled to interpret the provisions of the Convention it may *not* – by way of interpretation or through the enactment of rules of procedure, or both – write *new rules* into the Convention, not even if there is a fairly widespread practice in the desired sense, as long as that practice is not uniform (see Belgium's attitude in *Čonka* or that of Turkey in the present instance), accompanied by a corresponding *opinio juris*. Only the States Parties as a whole may amend the Convention by supplementing it. A comment to be added here is that if the binding character of interim measures could be derived from the necessity of giving full effect to the right of individual application enshrined in Article 34 of the Convention, what would the situation in inter-State cases be? Would measures indicated in such cases continue to be optional? Or would they be considered binding, by analogy, to give the fullest effect possible to Article 33 (inter-State cases) of the Convention?

3. The case-law of the ICJ: *LaGrand*

147. The Court's judgment relies on the recent decision of the ICJ in *LaGrand* (judgment of 27 June 2001, ICJ Reports 2001, §§ 48 and 117). This reliance seems misguided, as there is an essential difference between the position in which the ICJ found itself and this Court's situation.

148. In *LaGrand* the ICJ was called upon to interpret a provision *of its own constitutive treaty*, that is, Article 41 of its Statute. The States Parties to that Statute had unquestionably acquiesced in that Article and were bound by it. Consequently, the issue was one of pure treaty interpretation, namely, whether the verb "indicated" used in Article 41 must be taken to mean that measures formulated under that provision are *binding* on the States parties to the dispute. After years of avoiding coming to grips with this issue, the ICJ, in *LaGrand*, reached an affirmative conclusion, basing itself on the

rules of interpretation found in the 1969 Vienna Convention on the Law of Treaties and, in particular, on the *object and purpose* of Article 41 of the Statute, which was and is a treaty provision binding on all States Parties. In connection with Article 41, the "object and purpose" in question are "to preserve the respective rights of either party" and to enable the court to render binding decisions in accordance with Article 59 of its Statute; and it certainly made sense to hold that this result depended on the binding character of the interim measures. There is here, in other words, a *close relation* between the enabling treaty provision and the aim pursued.

149. It is to be expected that the States Parties to other international dispute settlement mechanisms which contain provisions on interim measures using language similar to that of Article 41 of the Statute of the Hague Court will fall in line with the latter's new case-law. They are certainly entitled to do so since all that they will be doing is examining *a provision on interim measures enshrined in the mechanism's constitutive instrument* which they are authorised to interpret.

150. By contrast, *no such provision* can be found in the European Convention on Human Rights; and neither Article 26 (d) of that Convention, empowering the Court to enact Rules of Procedure, nor Article 34, instituting the right of individual application, is sufficiently connected to the issue under consideration to fill a "gap" in the Convention by instituting *binding* interim measures *ex nihilo,* thereby imposing on the States Parties to the Convention an obligation without their consent. To put it differently, there is a wide difference between the mere *interpretation* of a treaty and its *amendment*, between the exercise of judicial functions and international law-making.

151. What the Court's Grand Chamber has done, and the Chamber before it, in *Mamatkulov and Askarov* is to exercise a *legislative function*, for the Convention as it stands nowhere prescribes that the States Parties to it must recognise the binding force of interim measures indicated by this Court. This is why, in our view, the Court cannot go down the path shown by the Hague Court and why there is no reason to depart from the existing case-law.

4. The European Convention on Human Rights in the light of the canons of treaty interpretation

152. It has been shown that the existing case-law of the European Court offers no possibility or reason for reading a rule asserting the binding force of interim measures into the Convention; nor has such a reason or

possibility come to the fore after the ICJ's recent rulings. It remains to be seen, however, whether, independently of these two factors, the canons of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties support the conclusions drawn by the Court in the present judgment. In this connection, the following rules on interpretation of the 1969 Vienna Convention may be considered: the text of the treaty; teleological interpretation; the subsequent practice of the Contracting Parties; the preparatory work; and relevant rules of international law.

153. As already pointed out, the *text* of the Convention is silent on interim measures and their binding force. The only basis for such measures can be found in Article 26 (d) of the Convention authorising the plenary Court to enact Rules of Procedure. The Court has done exactly that and has inserted Rule 39 in its Rules of Procedure. It is obvious that it was allowed to do that, given that the Rule in question did not contravene the Convention by imposing on States Parties obligations not provided for by it. It is also obvious that the Parties, when drawing up the Convention, had no intention whatsoever of asserting a duty to comply with interim measures indicated by the Court on the sole strength of the Rules of Procedure it would enact; nor did they have any intention of doing so later on, as is shown by the absence of any mention of interim measures and of their binding nature in the Additional Protocols and by the non-acceptance of proposals to introduce in a protocol a provision on the binding character of interim measures (see paragraph 18 below).

154. The *teleological* method of interpretation ("object and purpose" of the treaty), applied by the Court under the "living instrument" doctrine, is heavily relied on in the judgment, but we see little reason to do so. In *Cruz Varas*, that method had not even been expressly mentioned. Moreover, regarding the nature of interim measures, nothing much has changed between the time when that judgment was adopted and now: binding interim measures were as desirable then as they are today, yet they cannot be justified without an enabling provision in the Convention, the Court's constitutive instrument. Furthermore, *Cruz Varas* was confirmed, regarding measures issued by the *Court itself*, in the *Čonka* decision, only three months before the *LaGrand* judgment of the ICJ.

155. It has been contended that the right of individual application established in Article 34 of the Convention makes little sense without a power conferred on the Court to issue *binding* interim measures and that, accordingly, to meet the object and purpose of that Article, it is indispensable to accept the mandatory character of such measures. It has in fact been said that, domestically as well as internationally, a right of application without the possibility of attracting binding interim measures is not an effective right at all. This may be so on the domestic level, where the principle of *compulsory jurisdiction* of the courts prevails. It is certainly not

on the international level. Firstly, States are entirely free *to accept or to refuse compulsory jurisdiction* of international courts and, if they do accept it, to limit its scope, for instance by not including rules on the binding character of provisional measures. This is the case in the framework of the arbitration procedure instituted by the Washington (World Bank) Convention of 18 March 1965 on the Settlement of Investment Disputes (Article 47). Secondly, one should not forget that for many years international tribunals such as the Permanent Court of International Justice (1920-39) and its successor, the ICJ, for most of its existence (1946 to 2001), confined themselves to indicating provisional measures without specifying their binding character. Thirdly, Article 34 of the Convention requires States "*not to hinder* in any way *the effective exercise* of [the right to make individual applications]" (emphasis added). By not providing for interim measures and, *a fortiori,* by not vesting them with binding force, the right of individual application is "hindered" in no way; and to say the contrary would stretch the interpretation of Article 34 to a point at which the Court *ceases to interpret* and *assumes legislative functions*. That this is so is shown by other instruments of dispute settlement: nowhere else have jurisdiction and the right of application been linked to the issuance and the binding force of interim measures. Thus, in *LaGrand*, the Hague Court refrained from relying on Article 35 of its Statute – the approximate equivalent of Article 34 of the European Convention on Human Rights – to determine the nature of its interim measures. It interpreted Article 41 of its Statute, finding that *that* provision would not meet its aim if the measures indicated were optional. If the *Convention of 1950* contained a provision comparable to Article 41 of the Statute of the Hague Court, we would likely have concluded, on the basis of *that* provision, that to "indicate" interim measures must, as a matter of teleological interpretation, mean to "order" or "prescribe" such measures. In the case of the Inter-American Court of Human Rights, whose *constituent instrument* – not Rules of Procedure! – contains a provision similar to Article 41 of the ICJ Statute, this is not even an issue since Article 63 § 2 of the 1969 American Convention on Human Rights enables the Court to *order* interim measures. The problem in the present case is that there is no reasonable legal basis for drawing a similar conclusion. Article 34 of the Convention cannot serve as such, which makes it impossible to read the notion of *binding* interim measures into the text of the Convention.

156. The *travaux préparatoires* of the Convention may be referred to by virtue of Article 32 of the Vienna Convention of Treaties. The European Court's judgment in *Cruz Varas* shows that, despite proposals to include in the 1950 Convention a provision similar to Article 41 of the Statute of the ICJ, this was not done (p. 34, § 95) – a circumstance which is certainly not favourable

to reading a power to issue binding provisional measures into the Convention.

157. Another element to be examined, also discussed in *Cruz Varas*, is the *subsequent practice* of the Contracting Parties mentioned as an element of interpretation in the Vienna Convention on the Law of Treaties. Article 31 § 3 (b) of that convention refers to "any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation". This practice was equally considered in *Cruz Varas*. After describing early unsuccessful attempts of the Convention institutions at adopting recommendations in the matter (pp. 34-35, § 96), the Court found that the prevailing – but not complete – compliance with provisional measures was inspired by the desire of States Parties to cooperate. There was, in other words, no evidence that that practice, as is required by the Vienna Convention, "established the *agreement* of the Parties regarding its interpretation". That the contrary is true is first shown by the fact that, at its extraordinary meeting in early 1994, the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) received reform proposals from the European Commission 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 and that this should be provided for in the Convention. The Court's proposal was similar to Article 63 § 2 of the 1969 American Convention on Human Rights. The Commission's preference was for the interim-measure rules of the Commission's (Rule 36) and the Court's (Rule 36) Rules of Procedure to be included in the text of the Convention. The Swiss delegation also submitted a proposal with a view to including an Article in the Convention on provisional measures to the effect that "the Court may ... prescribe any necessary interim measures" (doc. DH-PR(93)20, 22 November 1993).

158. All three proposals, if accepted, would have made it possible to argue (as with Article 41 of the ICJ's Statute) that the Court's interim measures must be regarded as mandatory. All three proposals were, however, rejected by the government experts. Later on, the Committee on Migration, Refugees and Demography suggested that interim measures indicated pursuant to Rule 36 of the Court's Rules of Procedure be made obligatory for member States (Draft Report, AS/PR(1997)2 revised, 19 February 1997). The Committee of Ministers declined to include a provision on interim measures in the Convention. This can only mean that the widespread acceptance of the practice in question rests on courtesy, cooperation and convenience, but not on an agreed interpretation. Nor has the Committee of Ministers seen fit to suggest the introduction of a provision on binding provisional measures in Draft Protocol No. 14. Again

this must have been so because there was no agreement on making such measures compulsory and not because the Committee thought it superfluous to do anything on the assumption that provisional measures *were* binding.

159. In the present case, *the Court itself* considered its interim measures to be optional. This is evident from the wording of Rule 39, which uses the words "indicate" and "should be adopted", as well as from the text of the letter of 18 March 1999 addressed to Turkey, the respondent State, which reads:

> "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 ouzbèke avant la réunion de la chambre compétente, qui se tiendra le 23 mars 1999."[1]

160. What, finally, about the "*relevant rules of international law applicable in the relations between the Parties*", relied on by the Chamber on the basis of Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties? It is true that many treaties constitutive of international courts and tribunals do authorise the "indication" of provisional measures, that being the term used in most of them. The meaning attributed to it by the ICJ in the recent *LaGrand* case will undoubtedly have a considerable impact on the interpretation of these treaties; but it cannot have such an impact *on the present Court* as long as the latter's constitutive instrument – the European Convention – contains no authorisation to "indicate" interim measures at all.

5. The relevant rules of international law

161. There remains the question of whether the Court may, on the basis of a *rule of general international law* or a *general principle of law recognised by civilised nations*: (i) indicate provisional measures; and (ii) *order* such measures. If that were the case, the Court could justify the enactment of mandatory interim measures by such a rule or principle even in the absence of any enabling treaty provision. Regarding *general principles of law recognised by civilised nations*, there may well be a widespread rule on obligatory interim measures on the domestic level, based on the rule of compulsory jurisdiction applicable on that level. By contrast, as pointed out earlier (see paragraph 16 above), that rule does not prevail on the international level, which is why it cannot be applied as such on that

---

[1] 1. Translation: "The President of the First Section has decided to *indicate* to your government, on the basis of Rule 39 of the Rules of Court, that it is *desirable*, in the interest of the parties and of the smooth progress of the proceedings before the Court, not to extradite the applicant to the Republic of Uzbekistan prior to the meeting of the competent Chamber, which will take place on 23 March 1999."

level. In other words, the principle cannot be transposed to the business of international courts.

162. There must, however, be a *customary rule* allowing international courts and tribunals, even in the absence of a treaty provision, to enact Rules of Procedure, a rule which may include the power to *formulate* interim measures. But that rule cannot be taken to include the power to *prescribe* such measures.

6. Conclusion

163. It follows from all the above that the compulsory nature of interim measures "indicated" by this Court cannot be derived from the rules of general international law, nor from Articles 34 (right of individual application) or 26 (d) (right of the Court to enact rules of procedure) of the Convention, as interpreted in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. The same conclusion results from the practice of the European Court of Human Rights itself, including its initial attitude in the instant case (see paragraph 24 of the present judgment).

164. Our basic conclusion is, therefore, that the matter examined here is one of *legislation* rather than of *judicial action*. As neither the constitutive instrument of this Court nor general international law allows for holding that interim measures must be complied with by States, the Court cannot decide the contrary and, thereby, impose a new obligation on States Parties. To conclude that this Court is empowered, *de lege lata*, to issue binding provisional measures is *ultra vires.* Such a power may appear desirable; but it is up to the Contracting Parties to supply it.