Application Nos. 46827/99 and 46951/99
Mamatkulov and Askarov v. Turkey
Intervention submitted by
Human Rights Watch and AIRE Centre

I. Introduction

1. This intervention by Human Rights Watch and The AIRE Centre is submitted in accordance with the terms of the Court registry's letter of December 18, 2003. It details relevant general information collected by Human Rights Watch about the human rights situation in Uzbekistan, including specific information about the applicants' experiences on their return to Uzbekistan (Section II), and sets out more general information about reliance on diplomatic assurances as a safeguard against torture in extradition and expulsion cases (Section III).

II. Repression in Uzbekistan

2. The evidence submitted by Human Rights Watch covers five critical time periods with respect to the applicants' Article 3 claims:[1] a) the repression of independent Muslims, including torture, in Uzbekistan during the two years (1997-1998) immediately preceding the extradition of the applicants to Uzbekistan; b) the repression of similarly situated independent Muslims charged with similar crimes in Uzbekistan at the time of the applicants' extradition, including the torture of the relatives of the applicants' codefendants (February-March 1999); c) the repression of independent Muslims, including deaths in custody as a result of torture, at the proximate time of the applicants' trial (May-June 1999); d) the details of the applicants' trial (June 1999); and (e) continuing repression of independent Muslims in the immediate aftermath of the trial (June-July 1999). Only primary evidence collected by Human Rights Watch during these time periods is included.

3. Because the applicants were held incommunicado throughout their detention, Human Rights Watch did not have access to them and was unable to interview them to obtain first-hand testimony regarding the treatment they received at the hands of Uzbek authorities. However, evidence of incommunicado detention, denial of access to counsel of choice and to relatives, and the fact that the trial of Mamatkulov and Askarov was closed to all but a select few, are factors, among others detailed below, that increased the applicants' risk of torture. The fact that police sought out and tortured people associated with the other defendants in the applicants' trial, including relatives of the applicants' codefendants, increases concerns that Mamatkulov and Askarov were at risk of being mistreated.

a. Repression of Independent Muslims in Uzbekistan: 1997-1998

4. Human Rights Watch began receiving consistent and credible reports of mass arrests and mistreatment of "independent Muslims" in late 1997, and those reports continue to the present. Independent Muslims practice their faith outside of state-run mosques, and pray at home or otherwise shun state control in determining and practicing their religion. Repression of independent Muslims at the time periods detailed above came at the hands of the Uzbek authorities, was aimed at preventing the emergence of Islamic political movements, and was focused on Muslim communities in Tashkent and the Fergana Valley region. The initial spate of arrests in late 1997 was carried out, at least nominally, in response to the killings of several police officers and government officials in Fergana in December 1997.[2]

5. In early 1998, Human Rights Watch dispatched a special research mission to investigate the arrests.[3] Researchers found that police and officers from the National Security Service (SNB, formerly the KGB) were responsible for hundreds and possibly thousands of arbitrary

arrests of independent Muslims for their religious beliefs. Human Rights Watch documented a pattern of police fabrication of evidence in these arrests, including planting a small number of bullets, a grenade, or small amount of narcotics in the pockets of independent Muslims to justify their arrest. Some men with beards—a sign of piety—were detained and forced to shave their beards or had them burned off by police, and then were conditionally released with a warning. The wife of one young man told Human Rights Watch that Tashkent police detained her husband in June 1998, held him in custody for ten days in the Ministry of Internal Affairs building, the locale of police headquarters, beat him, and burned his beard with a lighter.[4] Such treatment is particularly humiliating for Muslims who wear the beard as an expression of their faith. The Court will recall that in the case of *Yankov v. Bulgaria*, the Court found that the forced removal of a prisoner applicant's hair constituted a violation of article 3 of the Convention.[5]

6. Uzbekistan state authorities held independent Muslim detainees incommunicado, denying them access to counsel and family, and often failing to notify family members of a person's arrest or whereabouts in custody. Human Rights Watch documented the routine physical mistreatment, including torture, of detainees during this period. Human Rights Watch's research confirmed that police beat detainees with fists and batons and often placed a gas mask over a suspect's face, closing off the air valves, and suffocating the victim. These were common forms of torture in police custody at the time in Uzbekistan.[6]

7. The case of Odil Mamatov was typical of the treatment to which independent Muslims were subjected. An eyewitness to police abuse of Mamatov told Human Rights Watch, "They beat him until he was bloody during the first days following his arrest."[7] "He told me twelve people beat him. They put a gas mask on him, and he had bruises. But he didn't confess even though they tortured him...They tried to get him on charges of killing the policeman, but when he didn't confess they charged him just with [illegal possession of] arms and drugs."[8]

8. Accused "Islamic extremist" Abdurashid Isakhojaev was arrested in June 1998. Authorities did not reveal his whereabouts to his family for five months. Isakhojaev told his mother that police kept him in the basement of the Ministry of Internal Affairs for the first twenty-four days of his detention. Isakhojaev alleged that officers tortured him while he was confined to the basement, causing serious injury. The beatings left Isakhojaev partially paralyzed.[9]

9. Many of the trials of those arrested in the sweeps in late 1997 and throughout 1998 were closed to human rights observers and the public. When Human Rights Watch representatives attempted to attend the trials, the hearings were often postponed indefinitely. However, Human Rights Watch was successful in monitoring and transcribing the proceedings in several well-known trials of independent Muslims, labeled Muslim extremists by the state, held in Tashkent.

10. Human Rights Watch observed the trial of Tolib Mamajonov—an alleged "Islamic extremist" accused of the 1997 murders of police officers and government officials, along with a long list of unsolved robberies that the state claimed had been orchestrated to fund Islamic extremist activities and as part of a wider "Islamic fundamentalist conspiracy"—and his codefendants. This was the most high profile case of accused "Islamic extremists" in Uzbekistan to date, until the trial of Mamatkulov, Askarov, and their co-defendants in June 1999.[10]

11. A Human Rights Watch representative who attended the trial saw red marks on Mamajonov's forearms suggesting mistreatment in detention, and witnessed him lose consciousness several times in the courtroom. The Court did not order medical assistance to revive him in these instances. All eight of the defendants appeared extremely pale and listless. Several of Mamajonov's co-defendants testified openly about the torture they had endured in pre-trial detention.[11] At one hearing of the "Mamajonov trial" before the Supreme Court in

June 1998, defendant Nosir Iusupov testified that he had been tortured in police custody, but the judge ignored it, appearing interested only in the history of Iusupov's religious practice:
Nosir Iusupov: Police beat me and my wife at the station. I had a plastic bag put over my head and was beaten violently by police with truncheons and fists. This was when I first arrived at the station.
Judge Iulchi Tursunov: When did you begin to pray?
Iusupov: Since 1989…[12]

12. The presiding judge did not order any investigation of the torture allegations. Article 12 of the United Nations Convention Against Torture Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Uzbekistan is a party, reads, "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." The European Court of Human Rights has repeatedly found that there is an obligation to investigate allegations of torture *(Aksoy v. Turkey (App.No.21987/93) December 1996); Assenov v. Bulgaria (1999) 28 E.H.R.R 652; Aydin v. Turkey (1998) 25 E.H.R.R 251*).

13. Codefendant Jamalikdin Iusupov, the son of Nosir Iusupov, also testified that police beat him after taking him into custody.[13] During a June 15 hearing on the same case, another defendant testified that he too had been tortured in detention:
Isroil Parpiboev: I was arrested. . .[and] gave wrong testimony because I was tortured. I was searched in the police office. . .I was beaten during the investigation. I was forced to give testimony.
Judge: How were you forced to give testimony?
Parpiboev: I was taken outside naked in the winter and made to sit on ice. They poured cold water on me outside. After electric shock, my head was covered with a plastic bag and I was made to sign [a statement] and I couldn't even see what I signed. [14]

14. In some cases, police tortured the relatives of detainees as well as the suspects themselves. Arrested in late December 1998, Uigun and Oibek Ruzmetov were tortured and forced to confess to serious anti-state crimes, including terrorism, and sentenced to death and executed. [15] The young men's parents, Darmon Sultanova and Sobir Ruzmetov, were interrogated at the Urgench police station on January 5, 1999. Sultanova was taken into custody during the night and held at the station for twenty-four hours. She recalled the police interrogation, "They insulted me. They asked me, 'Who comes to visit you? Who reads the Koran in your house?'"[16] The officers stripped her down to her underwear in a basement cell at the police station and handcuffed her to a radiator.[17] They then paraded her bruised and bloody sons past her in an apparent effort to force the young men to sign self-incriminating statements.[18] It was later revealed in court that police had threatened to imprison the young men's parents.[19] Officers also allegedly threatened to arrest or rape Uigun's wife if he did not sign a confession and told him his children had already been placed in an orphanage.[20] The Ruzmetov brothers both signed confessions on serious anti-state charges.

15. Sultanova was released, but she and her daughter Zioda, and her grandchildren, were held under armed house arrest for the next month, until February 6, 1999. In interviews and written communications with Human Rights Watch, Sultanova described the police treatment of her and her daughter during house arrest as unbearable. "They beat me several times, saying I was a Wahhabi and asking me where I got my books," Sultanova recalled. She reported that the five male officers confined her daughter to her room for the forty days and did not allow her to come out even to use the bathroom. She said that the officers occupying her home made repeated threats to kill members of the family.[21] The European Court of Human Rights has held that Article 3 can be violated by threats or ill-treatment of close relatives (*Ilhan v. Turkey (2002)34 E.H.H.R .36)*.

b. The Repression of Independent Muslims at the Time of the Applicants' Extradition: February-March 1999

16. With the explosion of several bombs in Tashkent on February 16, 1999, Uzbek law enforcement agents initiated a new and increasingly intense round of arrests and physical mistreatment in detention of independent Muslims. As with the 1997 killings, Uzbekistan's political leadership blamed "Islamic extremists" for the bombings. During the first months following the bombings, police and National Security Service agents throughout the country arrested hundreds and possibly thousands of independent Muslims in the name of countering the "terrorist threat." Police systematically employed torture to coerce confessions and statements incriminating others. Methods of torture police used against independent Muslim detainees included beatings by fist and with truncheons or metal rods, rape and sexual violence, electric shock, use of lit cigarettes or newspapers to burn the detainee, and asphyxiation with plastic bags or gas masks. Judicial authorities failed to initiate investigations into torture allegations and courts routinely admitted as evidence testimony obtained under torture. This was the environment that governed the treatment of any person suspected of or charged with involvement in the February bombings at the time of the applicants' return to Uzbekistan in March 1999.

17. The case of Okoidin Khajimukhamedov illustrates the treatment inflicted on detainees by police during this period. Okoidin Khajimukhamedov was arrested on January 25, 1999. Police tortured him and appeared to have compelled him to confess to serious charges, similar to those brought against Mamatkulov and Askarov, regarding involvement in the February 1999 Tashkent bombings. According to a letter written by Khajimukhamedov's wife, Mamura Khajimukhamedova, and provided to Human Rights Watch, following Khajimukhamedov's arrest in January 1999, Tashkent police "burned his groin with a cigarette lighter" in order to compel him to incriminate himself.[22] Khajimukhamedova told Human Rights Watch, "They [police] said they would rape me and our daughters, in order to get him to confess."[23]

18. Khajimukhamedov's lawyer told Human Rights Watch that Khajimukhamedov had made statements to her that police had threatened him with rape while in custody and that in response he had attempted suicide by gnawing through the veins on his wrists. The attorney confirmed that she saw his bandaged wrists, as well as signs of extensive beatings.[24] Khajimukhamedov was convicted on terrorism charges (deriving from the 1999 bombings) and other charges, and sentenced to death by the Tashkent Province Court in August 1999.[25]

19. Writer Mamadali Makhmudov was arrested in February 1999. Police tortured him in an attempt to compel him to confess to involvement in the bombings and to implicate exiled political leader Muhammed Solih (see below). At trial, Makhmudov described the torture methods and threats used by Uzbek authorities to force him to confess: "…in the basement, they regularly beat me…they burned my legs and arms. They put a [gas mask] on me and cut off the air… [and] hung me up by my hands, which they tied behind my back." He also said, "They told me they were holding my wife and daughters and threatened to rape them in front of my eyes."[26] In a letter, Makhmudov wrote: "They stuck needles under my nails, pulled out my nails, thrust a pistol into my mouth and knocked out my teeth. They beat me with truncheons and covered my body with bruises and sores. Three times they suffocated me with the cellophane bag (the so-called bag of death), injected substances into my veins, and forced me to drink unknown liquids."[27] The other five defendants in the Makhmudov trial also reported that authorities threatened to rape their wives. Four of the men, Muhammed Bekjanov, Iusuf Ruzimuradov, Kobil Diyarov, and Nemat Sharipov were extradited from Ukraine to Uzbekistan in March 1999.[28]

20. In a case where the charges and facts bore substantial similarity to those of the applicants, Muhammed Bekjanov, accused of complicity in the February 1999 bombings, was arrested on March 15, 1999, in Kiev, Ukraine, where he was a permanent resident, and extradited to

Uzbekistan on March 18. In a letter provided to Human Rights Watch in January 2003, Bekjanov's brother Mahsoud Bekjanov wrote that guards had broken Muhammed's leg in prison.[29] In written statements, Bekjanov's fellow detainee in pre-trial detention, Mamadali Makhmudov, stated that Bekjanov was tortured in police custody, as were the other codefendants in their case. Makhmudov wrote in 2003 that, "On April, 23, 2000, early in the morning, I was urgently brought alone to [the office of the guard on duty]. There, in the corner. . . Muhammad [sic]. . . was sitting with his hands chained behind his head….With curses, the guards started beating us with truncheons."[30]

21. Some Uzbeks alleged to have been involved in the February 1999 bombings did successfully challenge their extraditions from Europe to Uzbekistan based on claims that they would be at risk of torture. In November 2000, the Supreme Court of Uzbekistan sentenced Muhammed Solih (aka Salai Madaminov) *in absentia* on charges of terrorism and anti-state activities, including allegedly masterminding the 1999 Tashkent bombings. Solih, who had refugee status in Norway, traveled to the Czech Republic in November 2001. Persuant to a warrant for his arrest and extradition sent by the government of Uzbekistan to Interpol, Czech police arrested Solih on November 28. A Prague court denied the extradition request in part on the grounds that Solih would be at risk of torture if returned to Uzbekistan. In its decision of December 14, 2001, the court stated, "The above stated evidence indicates that Salai Madaminov [Solih] will almost certainly face torture and illegal imprisonment by Uzbek judicial bodies, as well as possible threat of death. Independent international organizations documented the systematic use of torture methods by the Uzbek police, in particular when dealing with political prisoners. In accordance with this, by extraditing Salai Madaminov [Solih] [to Uzbekistan], the Czech Republic would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms…Article 33 of the Convention Relating to the Status of Refugees…and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment…all of which the Czech Republic ratified and is bound by…."[31]

22. February and March 1999, in the immediate aftermath of the bombings, marked a period of particular brutality in police custody. For example, Nakhmiddin Juvashev was detained on charges of "religious extremism" and held first at the Jizzakh branch of the National Security Service and then in the basement of the Jizzakh city detention facility in February and March 1999. He was held incommunicado for almost two months, during which time he was repeatedly beaten. He wrote statements complaining of the torture, in an attempt to put a stop to the abuse. He wrote that on March 13, 1999, a National Security Service investigator, police officers, and several other unidentified men took Juvashev down to the basement of the Ministry of Internal Affairs in Tashkent, where they fastened his wrists in handcuffs, and kicked him and beat him with their nightsticks for nine hours. They then insisted he write whatever they instructed. "My legs and body became swollen. I lost consciousness several times," Juvashev recalled.[32]

23. Juvashev was transferred to a detention facility in Uchtepa, where he was held from March 16 to April 6. There, he was beaten and humiliated by officers from the Ministry of Internal Affairs. According to Juvashev, one officer threatened, "I am going to subject you to such torture that you will do everything they demand, and then you will die." The day after his arrival at Uchtepa, presumably March 17, Juvashev was having trouble breathing; his condition was so dire that officers were forced to call an ambulance to give him emergency assistance. Officers responded to Juvashev's complaints by stripping him down to his underwear, handcuffing him, hanging him from an elevated, horizontal bar, and beating him for more than three hours with truncheons. "With the aid of this kind of torture, humiliation and threat, Shavkat Iakshiev forced me to write a dictated letter stating that I supposedly broke my leg and received a massive number of bruises on my body from falling off the second tier bunk, and not from their having beaten me," Juvashev alleged.[33]

b(i). Torture and Ill-Treatment of Relatives of Codefendants in the Case of Mamatkulov and Askarov at the Time of the Applicants' Return in 1999

24. Uzbek law enforcement agents also detained, tortured, and ill-treated the relatives of those accused of involvement in the February 1999 bombings. The sister of one of the suspects who later stood as a codefendant along with Mamatkulov and Askarov at trial was detained on February 20, 1999, and held in custody along with other family members.[34] She told Human Rights Watch:

On February 22, we were all questioned. We did not see each other. We were interrogated and they asked us "Where is [name of defendant]?" and they threatened us and said "Tell us where he is, or else everyone will be put in prison.". . .My older sister had a pre-existing [heart problem] and she lost consciousness . . .The cells were cold and humid. . .We were in the basement. There was no place to sleep, just an iron cot and I could not lie down. They gave us one meal a day of terrible quality. For ten days in the GUVD [Tashkent municipal police station] I didn't eat. During the investigation, they gave us misinformation that they had found a machine gun on my sister. They said, "If you have it [information] then you should confess, and if you don't tell us the truth, we will arrest you and your husband." . . . They threatened to put my two children in an orphanage if I did not confess. After ten days [in the GUVD], they kept us one more week, in the Sobir Rakhimov [district] police station. They said we were detained because our brother was involved in terrorist acts. . . [35]

25. The same relative stated: "Later [after he was released], my husband told me that all of the males, husbands of the sisters, were all tortured with electric shock. My husband told me he was hung by his legs from the ceiling for five hours. This was in the GUVD."[36] She also told Human Rights Watch that police abuse and harassment played a role in the death of her father, whom police held under house arrest:

My father was released from the Sobir Rahimov police station after two days and when he came back [home], his health was bad…At my parents' house, police stayed for one month [beginning February 19 or 20, 1999]. My parents and sister-in-law could not leave the house, they were under house arrest. They were hungry, but were not allowed to go shop for food. They could not feed their cow and it died…The police left my parents' house on March 20 and we took our father to the hospital and put him in intensive care for forty days and then he died on May 15.[37]

26. The brother of the same codefendant in the Mamatkulov and Askarov case was also detained in February 1999 and beaten. He was eventually placed under formal arrest and charged with attempted overthrow of the constitution, later changed to a charge of illegal possession of narcotics. A local rights defender who spoke with the man's lawyer told Human Rights Watch, "[His] lawyer said that he had been severely beaten. He was constantly shaking his head [in his meeting with the lawyer]. They gave him an injection and he confessed."[38]

c. Repression of Independent Muslims at the Proximate Time of the Applicants' Trial: May-June 1999

27. Highly credible accounts of torture multiplied in 1999. These included cases of deaths in custody of alleged "religious extremists" as a result of torture at the hands of Uzbek law enforcement officers. Accused "Islamic extremist" Hasan Umarliev died in pre-trial detention in Margilan in May 1999. State medical experts conducted two medical exams to determine the cause of death. The first exam found that Umarliev, a man in his twenties, had died of a heart attack. The second concluded that he had died from something stuck in his throat. According to sources close to the case, those who saw the body when it was returned to the family said his body was bruised and had marks on the wrists and legs "as if he had been hung by them."[39] Human Rights Watch has previously published its findings regarding the

complicity of prison medical personnel in torture: "In practice there is little hope medical personnel will dare state that a patient has been tortured. One expert in the field says 'a lawyer can ask for a specialist [medical] examination, but the conclusion will be that no physical injuries were found, because it's all interconnected: the expert is dishonest and afraid of the police.'"[40]

28. Police arrested forty-eight-year-old Azim Khojaev on charges of possession of marijuana on April 4, 1999—the very day that a senior government official publicly announced a policy to make fathers pay for the supposed wrongdoings of their sons. Khojaev's sons were wanted by police for alleged "Islamic extremism." (One son was later convicted on terrorism-related charges.) Khojaev was convicted on June 11, 1999, and sent to Jaslyk prison.[41] He died there on July 2, 1999. The official death certificate gave the cause of his death as "acute failure of the left stomach."[42] The family was denied the right to view his body or to be present during the Muslim burial rites when the body was delivered some eleven days after Khojaev's death.[43] A person who saw the body briefly and who spoke with someone who washed Khojaev's body in preparation for burial, told Human Rights Watch that the body showed signs of torture.[44] This source told Human Rights Watch that Khojaev's body was bruised on the right-hand side, that there was grazing on his side and buttocks, a cut to the back of the head, and that he had no fingernails.

29. Abdumalik Nazarov was the youngest brother of a well-known imam considered "extremist" by the government. He was convicted on charges of narcotics possession in 1999. His attorney, Irina Mikulina, told Human Rights Watch that Nazarov arrived at Jaslyk prison by airplane along with 250 other prisoners, their hands and feet bound, on May 29, 1999.[45] Upon arrival they were shoved to the ground "like sacks" and then forced to run a "living corridor" or gauntlet of prison guards approximately one hundred meters long (about one hundred yards) up to the prison entrance, while the officers beat them with metal rods and kicked them, causing some to fall.[46]

d. The Applicants' Trial: June 1999

30. The trial of Mamatkulov and Askarov and their twenty codefendants took place at the Supreme Court of the Republic of Uzbekistan, in Tashkent, from June 2 to June 28, 1999.[47] The Supreme Court was selected as the court of first instance because of the seriousness and national security implications of the case. A civilian judge presided, along with two lay assessors.[48]

31. The trial was closed to the public. Attorneys hired for the defense; all family members of the defendants, including relatives of Mamatkulov and Askarov; local human rights defenders; and the general public were excluded. A Human Rights Watch representative witnessed government security forces deny relatives of defendants and local rights defenders access to the trial. No explanation was given for excluding certain people from attending the trial.

32. Human Rights Watch's representative was able to attend the trial, but only with special permission from the Ministry of Foreign Affairs. Selected diplomats and selected foreign and local media representatives were also able to attend with special permission from the government of Uzbekistan. At various times, Turkish diplomats attended the trial, and at least one Turkish journalist also attended. Police officers and plainclothes officers presumed to be agents of the National Security Service or Ministry of Internal Affairs (in some cases officers known to be agents of these organs) filled the majority of the seats in the courtroom.

33. Security forces fenced off the entire block surrounding the Supreme Court, where the trial was held. Armed officers and soldiers patrolled the streets in the neighborhood surrounding the courthouse. Family members of the defendants were forced by armed officers to remain across the street on a separate city block and were monitored throughout the duration of the

trial by plainclothes officers presumed to be National Security Service agents. Family members of the defendants were not provided prior official notification of the time or place of the trial.

34. The defendants were denied the right to be represented by counsel of their choice. Human Rights Watch interviewed numerous family members of those on trial and obtained testimony that attorneys hired by the defendants were not allowed to meet with their clients and were not given access to the courtroom. A Human Rights Watch representative approached relatives of defendant Mamatkulov, but they were unable to answer her questions, possibly due to the presence of numerous security agents surrounding them. However, relatives of one of Mamatkulov's codefendants, Zokhidjon Dekanov, told Human Rights Watch, "We were not allowed to hire our own attorney for him."[49] The relatives of another of Mamatkulov and Askarov's codefendants told Human Rights Watch, **"**Our family hired an attorney and paid him, but he has not been allowed into the court."[50] Guards who turned the lawyer and relatives away from the court offered no explanation for refusing access. Human Rights Watch understands that for all defendants, including Askarov and Mamatkulov, private attorneys were denied access. The right to legal representation by the by the lawyer of the accused's choice is a fundamental element of fairness and is enshrined in Article 6(3)(c) of the ECHR.

35. The procuracy [prosecuter] appointed counsel of its choice to Askarov and Mamatkulov, and their codefendants. Independent rights defender Mikhail Ardzinov, who followed the bombing-related arrests and investigation closely, told Human Rights Watch that the state investigator in the case had "told the state lawyers how to defend each defendant. He instructed them during the investigation. He told them what to write and what to say. The lawyers only met with the defendants after the investigation was over."[51] One relative of a codefendant said, "It's obvious that the investigators have tried to hire the kind of lawyers who will cooperate with them [the prosecution]."[52] State-appointed counsel refused to speak with Human Rights Watch.

36. With no known exceptions, all of the defendants, including Mamatkulov and Askarov, were held incommunicado throughout their respective detentions until commencement of the trial on June 2, 1999.[53] None of the defendants' counsel of choice nor family members were given access to them. For example, the relatives of one of Mamatkulov and Askarov's codefendants told Human Rights Watch that they had not been allowed any visits with their relative since he was taken into police custody on February 19, 1999.[54] In some cases, the Uzbek authorities also failed to notify the defendants' families and lawyers of their place of detention, so that there was no opportunity to provide the detainees with essential food and medicine. Detainees and prisoners in Uzbekistan rely on family members to provide food, medicine and clothing, which are severely inadequate in detention facilities. Lack of provision of basic necessities in detention facilities violates the Standard Minimum Rules for the Treatment of Prisoners[55] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[56] Moreover, the U.N. Committee against Torture has expressed concern regarding Uzbekistan's failure to provide detainees, in the immediate aftermath of apprehension, with access to independent counsel, a doctor or medical examiner, and to family members; all important safeguards against torture.[57]

37. The state failed to provide any material evidence throughout the course of the trial linking the twenty-two defendants, including Mamatkulov and Askarov, to the crimes of which they were accused. Whereas forensic evidence was offered which proved that the February bombings had taken place and suggested the type and amount of explosive materials used, no forensic evidence was presented to link the defendants with the bombings. Witness testimony primarily came from relatives of those killed or injured in the bombings, and did not include testimony germane to a decision regarding the guilt or innocence of those on trial.

38. The primary evidence used to convict Mamatkulov and Askarov, and their codefendants was their own self-incriminating statements, including those signed during the pre-trial police investigation, in custody, and the defendants' oral statements made in court. Self-incriminating testimony given by Mamatkulov in court appeared scripted and stilted. Mamatkulov himself appeared cowed and fearful. Following the verdict, Mamatkulov's relatives told Human Rights Watch that they did not believe he had been given a fair trial and that they had lost faith in the judicial system.[58] Defendant Zainiddin Askarov appeared extremely nervous and agitated, at times almost hysterical, speaking unusually quickly and at a high pitch. His testimony included elements from the testimony of his codefendants, such as a plea for the president of Uzbekistan and nation to forgive him, and also fantastical claims, such as that he held sway with foreign heads of state and that Muhammed Solih was his slave. In his statements he incriminated others, including Muhammed Solih and his own brother, also a defendant in the trial, as well as himself. In an interview with foreign journalists on November 26, 2003, Askarov recanted his court testimony, including his accusations against Solih and others. The government of Uzbekistan moved quickly to dismiss and discredit Askarov's remarks to the press, claiming that he was mentally ill.[59]

39. In instances where court testimony departed from statements signed in police custody, codefendants on trial with Mamatkulov and Askarov were scolded by the prosecutor and judge, and instructed to keep their testimony consistent with the written versions. For example, at the hearing on June 4, 1999, the procurator asked defendant Zokir Hasanov to name the people who had elected other codefendants leaders of an alleged Islamic militant group. The procurator and Hasanov had the following exchange:
Hasanov: I don't know. Abdullaev, B. was an emir [leader], but I don't know who elected him.
Procurator: On 15 March [during the police investigation] you testified that Zokirov told you to stay in Chechnya to do *jihad*.
Hasanov: I have sclerosis. I wanted to say this, but forgot this, please pardon me. I do not deny my statements during the investigation.
Procurator: [You] testified that you asked Zokirov…You are giving different information.
Hasanov: No, I am not.

e. Continuing Repression of Independent Muslims in the Immediate Aftermath of the Applicants' Trial (June-July 1999)

40. Some of the most egregious rights abuse documented by Human Rights Watch during the past eight years happened in quick succession at the same time the trial of Mamatkulov, Askarov and their codefendants was taking place. Information about arbitrary arrests and testimony regarding police torture of independent Muslims were so numerous it was impossible for Human Rights Watch to follow up on every case. Local rights defenders who were documenting these cases, including those of the applicants, along with Human Rights Watch were also targeted by law enforcement agencies: they were harassed and intimidated, arrested, and tortured.

41. On July 25, just days before the verdict was handed down in the applicants' trial, Human Rights Watch documented the death in custody of a man accused of being an "Islamic extremist." Police had detained Farhod Usmanov, the son of a well-known imam, on June 14, 1999, for alleged possession of a Hizb ut-Tahrir leaflet.[60] Tashkent police held Usmanov incommunicado for eleven days. At 5:00 p.m. on June 25, authorities returned his body to his family with a death certificate attesting that the forty-two-year-old father of six had died in detention of heart failure the previous day. Authorities who delivered Usmanov's body ordered the family to conceal his death and not to show his body to anyone.

42. However, that same night a Human Rights Watch representative viewed the body, which was covered with large and small black bruises. The Usmanov family alleged that he had

been in good health prior to police detention and charged that authorities had tortured him to death. Usmanov's family reported that authorities failed to prosecute those responsible for his death. A letter from the Ministry of Internal Affairs to his family, sent in September 1999, stated simply that the criminal case against Usmanov had been closed upon the occasion of his demise[61] *(Aksoy v. Turkey (App.No.21987/93) December 1996); Assenov v. Bulgaria (1999) 28 E.H.R.R 652; Aydin v. Turkey (1998) 25 E.H.R.R 251*).

43. Human rights defenders following the trial of Mamatkulov and Askarov also suffered abuse at the hands of the Uzbek authorities. On June 25, 1999, law enforcement authorities detained Mikhail Ardzinov, chairman of the Independent Human Rights Organization of Uzbekistan (IHROU). Ardzinov was interrogated, brutally beaten and threatened with criminal charges. Tashkent police officers kicked him and beat him in the chest, ribs, and kidneys. A Human Rights Watch representative saw Ardzinov on June 26, the next day, approximately nine hours after his release. She witnessed the blood on his shirt and injuries to his face and arms. A U.S. Embassy medical officer examined Ardzinov approximately twelve hours after his release and confirmed that he had suffered two broken ribs, contusions to his kidneys, and a concussion. He was also dehydrated and in considerable pain. Although he did not have access to the proceedings, Ardzinov was known to have been following the progress of the Mamatkulov and Askarov trial. After the beating, he was forced to abandon his work for more than one month, fearing serious injury if detained and beaten again.[62]

44. On July 10, Mikhail Ardzinov's colleague, rights defender Ismail Adylov, who had also been monitoring the trials of independent Muslims and interviewing torture victims, was arrested on fabricated charges of "Islamic extremism" and held incommunicado for ten days. He was denied access to the attorney of his choice. Adylov was convicted in September 1999. Upon his release from prison in summer 2001, he told Human Rights Watch that he was tortured in prison every day, multiple times each day, for a year and a half.[63]

III. Reliance on Diplomatic Assurances

45. In recent years states have increasingly relied upon diplomatic assurances that a person will not be subject to torture or inhuman or degrading treatment or punishment upon return to send people back to countries where they are at risk. In the aftermath of the September 11, 2001 terrorist attacks in the United States and the adoption of Security Council Resolution 1373, some states appear to be using diplomatic assurances as a means of returning persons who are alleged national security threats to the host country or suspected of terrorism-related acts in their countries of origin or third countries. For example, in submissions to the U.N. Committee against Torture explaining its summary expulsion in December 2001 of two Egyptian asylum seekers suspected of terrorism-related acts, following diplomatic assurances of fair treatment from the Egyptian authorities, Sweden invoked its responsibility under U.N. Security Council Resolution 1373 to "deny safe haven to those who finance, plan, support or commit terrorist acts, or themselves provide safe haven."[64] In a similar vein, after Georgia extradited five Chechens to Russia following Russian assurances, despite an indication for interim measures from the European Court of Human Rights, then-President Eduard Shevardnadze replied to criticism of the returns by stating that "International human rights commitments might become pale in comparison with the importance of the anti-terrorist campaign."[65] In the most extreme cases, some states appear to be returning people based on diplomatic assurances to countries where torture is routinely used to extract information and confessions.

46. Under Protocol 6, Council of Europe member states cannot expel or extradite any person to face the death penalty *(Aylor-Davis v. France,(Application No. 22742/93), January 1994; Raidl v. Austria, (Application No. 25342/94) September 1995).* Member states must thus secure reliable assurances that the death penalty will not be sought or carried out before a person can be returned. While it is beyond the scope of this brief to discuss diplomatic

assurances in the context of the death penalty, such assurances differ from the relatively novel practice of assurances against torture and ill-treatment in several respects. It is generally more straightforward to monitor a requesting state's compliance with assurances regarding the death penalty than with assurances against ill-treatment as execution is a legal outcome, usually more immediately visible than torture or ill-treatment in detention, which by nature are illegal and practiced in secret.

47. Negotiations for the use of diplomatic assurances are often conducted at a political level and are not transparent. In some jurisdictions there appears to be no opportunity for a person to challenge the reliability and adequacy of such assurances. The section below provides examples regarding the use of diplomatic assurances from the United Nations system, North America, and the Council of Europe region. It includes reference to relevant court cases where the judiciary has ruled on the adequacy of such assurances as an effective safeguard against violations of states' international obligations.

a. Diplomatic Assurances and the United Nations System

48. Several United Nations human rights mechanisms have commented on the use of diplomatic assurances in the context of member states' *nonrefoulement* obligations. As with ECHR Article 3, the prohibition against torture enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is absolute and no derogation is permitted, even in times of public emergency that threaten the life of the nation. Various U.N. mechanisms have commented or deliberated on the circumstances in which diplomatic assurances can be used and what safeguards should be in place to ensure that, if used, they are effective in protecting the person in question from torture or ill-treatment upon return and throughout the duration of his or her custody.

U.N. Special Rapporteur on Torture

49. In his February 2002 report, the first in the immediate aftermath of the September 11, 2001 terrorist attacks in the United States, the Special Rapporteur on Torture concluded that "the legal and moral basis for the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies, and practices."[66] The Special Rapporteur's July 2002 interim report, specifically focusing on the prohibition of torture in the context of counter-terrorism measures, reaffirms the absolute nature of the prohibition, and calls on states not to extradite anyone "unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity."[67]

50. The Special Rapporteur emphasizes a two-pronged approach to gauging the reliability of diplomatic assurances. Before a person may be returned, assurances must be "unequivocal," that is, leaving absolutely no doubt that no torture or ill-treatment will occur. Second, there must be a "system to monitor" the protection of the returned person from torture and ill-treatment. Such a systematic program of rigorous and on-going diplomatic monitoring and evaluation is created by advance agreement of the two states involved and will ascertain that the objective conditions exist—and will continue to exist—for protection against mistreatment. Any effective post-return monitoring system would thus seem to require both the good faith and the requisite logistical capacity of both governments to provide a reliable safeguard against the risk of torture.[68]

51. The Special Rapporteur thus creates the highest of bars to reliance on diplomatic assurances in the context of extradition or expulsion where a person would be in danger of torture or ill-treatment. This raises the question of whether assurances can be an effective safeguard for returns to countries where the practice of torture is systematic, widespread or endemic. The Special Rapporteur's February 2003 report, finding that torture or other similar ill-treatment is "systematic" in Uzbekistan, relies on the following definition, currently in use by the United Nations Committee against Torture:

Torture is practised systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.[69]

52. The U.N.-authorized definition of "systematic" appears to preclude reliance on diplomatic assurances from countries where systematic torture is practiced. The definition allows for two possibilities: 1) torture is state policy, and its practice is intended and sanctioned at the highest levels of government; 2) torture is practiced, but governmental authorities do not have effective control over the forces at local level that perpetrate acts of torture. In both cases, the use of diplomatic assurances could not provide the guarantees necessary to meet the returning state's international obligations. States where recourse to torture is a matter of state policy routinely deny the practice, often despite well-documented evidence that torture is, in fact, systematic. Their assurances that a particular person would not be subject to torture if extradited or otherwise returned cannot therefore be considered as offered in good faith. The credibility of the government offering such assurances is seriously undermined by repeated denials that torture is used as an instrument to effect state policy. For example, in his February 2003 report on Uzbekistan, which illustrates the practice of systematic torture there with cases going back to 1992, the Special Rapporteur concludes that denials by Uzbek authorities that torture is systematic and sanctioned at the highest levels of authority are disingenuous:

…the Special Rapporteur has no doubt that the system of torture is condoned, if not encouraged, at the level of the heads of the places of detention where it takes place…If the top leadership of these forces and those politically responsible above them do not know of the existence of a system which the Special Rapporteur's delegation was able to discover in a few days, it can only be because of a lack of desire to know. Moreover, in light of the information repeatedly conveyed to the authorities by the Special Rapporteur himself, [U.N.] human rights monitoring bodies,…and NGOs, the lack of such awareness may well reflect an unwillingness to look too closely at the problem. The very hierarchical nature of the law enforcement bodies also makes it difficult to believe that the top leadership of these forces is not aware of the situation…[70]

53. The Special Rapporteur's findings indicate that diplomatic assurances from a government that persistently denies systematic torture or fails to take measures to halt the practice cannot be deemed reliable, and thus cannot comprise an adequate safeguard against torture and ill-treatment.

54. Recent research by the United Nations High Commissioner for Refugees (UNHCR) regarding the nexus between asylum and extradition similarly concludes that: "Assurances by the requesting State that it will not expose the person concerned to torture, or to inhuman or degrading treatment or punishment, will not normally suffice to exonerate the requested state

from its human rights obligations, particularly where there is a pattern of such abuses in the State seeking extradition. In such cases, the requested State is bound to refuse the surrender of the wanted person."[71]

U.N. Human Rights Committee

55. The U.N. Human Rights Committee has also considered the link between the return of non-nationals and the prohibition against torture in its conclusions and recommendations on individual country reports. The Committee has questioned the adequacy of such assurances as an effective safeguard. In its response to the Swedish government for expelling two alleged terrorists to Egypt in December 2001, the Committee expressed doubts about whether the assurances were adequate and whether Sweden had agreed "credible mechanisms" to monitor the mens' treatment post-return:

The Committee is concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities) (articles 6 and 7 of the Covenant). The State party should maintain its practice and tradition of observance of the principle of non-refoulement. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion.[72]

56. The Committee took the extraordinary step of requiring Sweden to report back to it in one year, instead of the required four, regarding the steps the government took to ensure Egyptian compliance with the assurances and to offer evidence that the men were in fact not subject to treatment contrary to ICCPR Article 7.[73]

57. Likewise, in its 2002 conclusions on the report of New Zealand, the Committee expresses doubts about the use of assurances and recommends that the state party "strictly" observe its international obligations: "The Committee recognizes that the security requirements relating to the events of 11 September 2001 have given rise to efforts by New Zealand to take legislative and other measures to implement Security Council resolution 1373…The Committee…expresses its concern that the impact of such measures or changes in policy on New Zealand's obligations under the Covenant may not have been fully considered. The Committee is concerned about possible negative effects of the new legislation [and] the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled."[74] The Committee concluded that New Zealand should maintain its practice of "strictly observing the principle of non-refoulement."[75]

U.N. Committee against Torture

58. The U.N. Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly prohibits the return of a person to a country where he or she would be in danger of torture.[76] In *Tapia Paez v. Sweden*, the committee stated that the test of article 3 of the Convention is absolute: "Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."[77]

59. In the November 2003 case of *Attia v. Sweden*,[78] the Committee considered, among other things, the adequacy of diplomatic assurances proffered by the Egyptian authorities. Although the Committee found no violation on the facts, the *Attia* decision essentially underscores the elements of other treaty body comment with regard to reliance on diplomatic assurances. First, the requirement of good faith behind the assurances is acknowledged, and here assumed met because of the high political level of negotiations and access by representatives of the expelling state, Sweden, to the prisoner. Second, the requirement of systematic monitoring is present, even if it was acknowledged that Sweden's monitoring did not meet accepted levels of confidentiality. Finally, that Egypt did not seek Ms. Attia's extradition nor lay criminal charges against her seems to have led the Committee against Torture to conclude she was not situated in as delicate a position as her husband, who had already been returned and was in prison in Egypt. Despite some questionable assumptions in this case, the principles that undergird its decision are common to evaluating the risks inherent in the reliability of diplomatic assurances.

b. Diplomatic Assurances and Their Use in North America: United States and Canada

United States

60. The United States is one of the few jurisdictions that provides in law for the use of diplomatic assurances in the context of its obligations under the Convention against Torture (CAT). According to 8 C.F.R. § 208.18(c), the Secretary of State may secure assurances from a government that a person subject to return would not be tortured. In consultation with the Attorney General, the Secretary will determine whether the assurances are "sufficiently reliable" to allow the return in compliance with CAT. Once assurances are approved, any claims a person has under the CAT will not be given further consideration.[79]

61. According to a February 1999 commentary by the U.S. Department of Justice, the nature, reliability, and verification of assurances would require "careful evaluation" before an alien's removal.[80] The determination to use diplomatic assurances is decided on a case-by-case basis, and may relate to torture or aspects of the requesting State's criminal justice system that protect against mistreatment, for example access to counsel.[81] The Secretary considers 'the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the requesting State that would provide context for the assurances provided."[82] The State Department may also consider the diplomatic relations between the United States and the requesting country.[83]

62. When constructing the diplomatic assurances, the State Department may require a monitoring or review mechanism to ensure compliance with the assurances. For instance, the State Department can ask human rights groups to monitor the condition of those extradited under a diplomatic arrangement.[84] The decision to implement a monitoring or review mechanism is also determined on a case-by-case basis. The factors considered include "the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive's condition, the ability of such groups or persons to provide effective monitoring, and similar considerations."[85]

63. The circumstances surrounding the recent case of Maher Arar raises serious concerns about U.S. practice with respect to reliance on diplomatic assurances as a safeguard against CAT violations. In September 2002, the U.S. government apprehended Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he has lived for many years. After holding him for ten days, U.S. immigration authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada.

64. Prior to his transfer, the U.S. government obtained assurances from the Syrian government that Arar would not be subjected to torture. Arar was released without charge from Syrian custody ten months later and alleged that he was in fact tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.[86] The U.S. government has not explained why it sent him to Syria rather than to Canada, where he resides; why it believed Syrian assurances to be credible in light of the government's well-documented record of torture, including designation as a country that practices systematic torture by the U.S. Department of State's 2003 Country Reports on Human Rights Practices;[87] and why, in this case, no post-return monitoring plan was required as a condition of return.[88]

65. The Arar case raises the concern that diplomatic assurances may be used as a means to return persons suspected of having information about terrorism-related activities to jurisdictions where torture is routinely used specifically to extract such information.[89] This concern is bolstered by the comments of former U.S. intelligence officials and sources within the U.S. administration who have stated publicly that they believe some transferred suspects are being tortured.[90]

Canada

66. The absence of provision for a person subject to extradition to challenge diplomatic assurances prior to return has been addressed by Canada in a January 2002 decision. In *Suresh v. Canada*,[91] the Canadian Supreme Court expressed reservations about the reliability of diplomatic assurances as an adequate safeguard to the prohibitions against torture and *refoulement*, particularly in cases where a person is threatened with return to a country where torture is systematic. The court held that Manickavasagam Suresh, a Sri Lankan national subject to deportation on national security grounds, made a *prima facie* case in his first deportation hearing showing a substantial risk of torture if returned to Sri Lanka. Suresh was granted a new deportation hearing after the court concluded that his original hearing did not provide procedural safeguards, including the opportunity to challenge the validity of diplomatic assurances, required to protect his right not to be expelled to a risk of torture.[92]

67. With respect to the use of diplomatic assurances, the court stated that "Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee [sic] must be given an opportunity to present evidence and make submissions as to the value of such assurances."[93] Moreover, the court distinguishes the use of assurances in cases of a risk of torture from those given where the person extradited may face the death penalty, articulating the operational problems inherent in reliance on such assurances:

It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[94]

68. The court added guidelines for the assessment of the adequacy of assurances, including an evaluation of the human rights record of the government offering the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces.[95]

69. In a subsequent case that does not explicitly refer to *Suresh*, the Court of Appeal for Ontario quashed the extradition order ("warrant of surrender") of Rodolfo Pacificador, suspected of the murder of a former provincial governor in the Philipines in 1986, and held that Philippine assurances of fair treatment were not reliable. In *Canada v. Pacificador*,[96] decided in August 2002, the Court of Appeal held that the Philippines' "criminal procedures have been interpreted and applied in this very prosecution in a manner that 'sufficiently shocks the conscience' that to surrender the appellant would violate his section 7 [Canadian Charter of Rights and Freedoms] right not to be denied life, liberty, and security of the person except in accordance with the principles of fundamental justice."[97]

70. While the decision not to surrender Pacificador is based, in the main, on fair trial concerns, including excessive delay and lengthy pre-trial detention, the presiding judge stated that "it is important to view this record as a whole,"[98] and included consideration of evidence that Pacificador's co-defendant had been tortured in detention in the Philippines.[99] Evidence of the co-accused's torture included subjection to electric shock and mock execution;[100] this evidence was not contradicted by the Canadian government.[101]

71. The Pacificador court stated "The appellant makes serious allegations of political manipulation and fabrication of evidence, as well as allegations of appalling treatment of his co-accused during the lengthy pre-trial detention. No evidence has been led to dispute those allegations. At the very least, they establish a significant risk that the appellant will not be fairly treated upon his surrender."[102] The court concluded that the Philippines' authorities "failed to explain why the appellant's treatment on surrender will differ from that of his co-accused" and thus the assurances of fair treatment "failed to provide an adequate assurance that the delay and pre-trial detention of the appellant's co-accused would not be inflicted on the appellant as well."[103]

72. With respect to the Minister of Justice's reliance on Philippine assurances of fair trial and fair treatment, the *Pacificador* court held that "when one looks at the record as a whole, the failure of the Philippines to provide acceptable explanations of what has gone on in the past or to provide adequate assurances about what might happen in the future, seriously undermines this fundamental element of the Minister's decision."[104]

c. Diplomatic Assurances and Their Use in Europe

73. The absence of any provision in regional law for the use of diplomatic assurances as a safeguard to European governments' *nonrefoulement* obligations, and the existing jurisprudence of the European Court of Human Rights with respect to their use, distinguishes the European regional system from policy and practice within the United Nations treaty monitoring system and in North American jurisdictions.

Regional Law

74. No European legal instrument expressly provides for reliance on diplomatic assurances as a safeguard against torture or ill-treatment in the context of extradition or expulsion. For example, the European Convention on Extradition provides for the use of assurances, but only with respect to the death penalty.[105] The same Convention's Second Additional Protocol provides for the use of assurances to guarantee that a person who has been sentenced or subject to a detention order *in absentia* will have the right to a retrial in conformity with fair trial standards upon return.[106]

75. In January 2004, the European Arrest Warrant came into force in eight of the fifteen European Union member states.[107] The warrant applies to surrenders among E.U. member

states only. The preamble to the E.U. framework decision adopting the warrant reaffirms the absolute nature of the prohibitions against the death penalty, torture, and returns to prohibited treatment.[108] The decision explicitly provides for the use of assurances only with respect to the opportunity of a retrial in cases of judgements or orders handed down *in absentia*, and review of life-sentences.[109]

76. Likewise, the Protocol amending the European Convention on the Suppression of Terrorism, opened for signature on May 15, 2003, includes a provision obliging Contracting States to seek assurances only if a person concerned risks being exposed to the death penalty.[110] It is significant that the explanatory notes to the revised convention [the Protocol] require the requested state to transmit its reasons for refusing extradition or return, but contain no provision for the requesting state to offer assurances in reply that a person subject to surrender will not be at risk of torture if returned.[111]

77. Moreover, the guidelines elaborated by the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on July 15, 2002, reaffirm the absolute prohibition against torture in all circumstances "irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."[112] The guidelines also reaffirm the absolute nature of the prohibition on extradition to face such treatment: "[e]xtradition may not be granted when there is serious reason to believe that: i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment."[113] No derogation is permitted from either guideline.[114] The guidelines permit states to seek assurances that a person subject to surrender will not be subject to the death penalty, but no express provision is made for states to seek diplomatic assurances that a person subject to surrender will not be at risk for torture.[115]

Jurisprudence of the European Court of Human Rights (ECHR)

78. The Court will recall that it has addressed the issue of States' parties' reliance on diplomatic assurances as a safeguard against violations of states' obligations under article 3 of the European Convention on Human Rights. In *Chahal v. United Kingdom*,[116] the Court ruled that the return to India of a Sikh activist would violate the U.K.'s obligations under article 3, despite diplomatic assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities.[117] The Court noted that:

[T]he United Nations' Special Rapporteur on Torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. . .The NHRC [Indian National Human Rights Commission] has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India. . .Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. . .Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.[118]

79. The Chahal ruling indicates that diplomatic assurances are not an adequate guarantee of safety from treatment contrary to ECHR article 3 where torture is "endemic," a "recalcitrant and enduring problem" that results, in some cases, in fatalities, and where there is no accountability for such abuse. The Court's acceptance that Indian assurances were given in good faith and that the government had embarked on reforms, but that serious abuses persisted, indicates that it took into account the credibility of the requesting government and

whether the requesting government had effective control over the forces responsible for acts of torture.

80. The Court will recall that in the subsequent case of *Shamayev and 12 Others v. Georgia and Russia*,[119] it scrutinized assurances from the Russian government. Georgian authorities detained thirteen Chechens in August 2002 who had illegally crossed the border from Chechnya. The Russian authorities requested the men's extradition, claiming they were suspected of involvement in militant activities. Despite a Rule 39 indication to the effect that the applicants should not be extradited, five of the Chechens were extradited from Georgia to Russia on October 4.[120] On November 26, the Court decided not to extend the period of application of the interim measures following undertakings given by the Russian authorities that included guarantees of unhindered access for the applicants to appropriate medical treatment, to legal advice, and to the European Court itself. The Russian government also made assurances that the applicants would not be subject to the death penalty and that their health and safety would be protected.[121]

81. The subsequent course of events is instructive with respect to the difficulties inherent in relying upon diplomatic assurances. In September 2003, the Court declared the individual applications of the Chechens admissible, and organized Article 38 fact-finding missions to both Georgia and Russia, notifying both governments of the pending visits.[122] The Russian government, however, notified the Court on October 20, 2003, that the Stavropol Regional Court, within whose jurisdiction the five extradited applicants were detained, refused to grant the European Court delegation access to the applicants at that stage in the domestic proceedings.[123] The European Court replied by reminding the Russian government that:

[T]he local court was contacted purely out of courtesy. The issue of access to the applicants is a matter of international law—in particular the European Convention on Human Rights, which, under Russian law, takes precedence over domestic law—and, therefore, falls to be decided solely by the European Court of Human Rights. The Court drew attention to Article 38 § 1 of the Convention, which provides that the State concerned is to furnish all necessary facilities for the effective conduct of any investigation undertaken by the Court. Moreover, Article 34 of the Convention requires the High Contracting Parties not to hinder in any way the effective exercise of the right of individual application.[124]

82. The Russian authorities' failure to comply with assurances it made to the Court itself is a striking illustration of the fact that mere accession to regional or international human rights instruments is no guarantee that a state will comply with the obligations enshrined in those instruments, or even with express assurances given to the European Court of Human Rights in the course of pending proceedings. Moreover, it raises again the question of whether assurances should ever be accepted as an adequate safeguard against potential Article 3 violations when proffered by a state where torture and ill-treatment are designated as endemic or systematic by credible sources, yet are routinely denied or left unaddressed by the state in question.[125]

Examples of State Practice in the Council of Europe Region

83. There is no comprehensive study of the use of diplomatic assurances as a safeguard against extradition or return to torture or ill-treatment in the member states of the Council of Europe. A sampling of case law in the region, however, indicates that the judiciary often serves as a check on the use of diplomatic assurances as a safeguard against torture, and has held that such assurances are inadequate when proffered by a state with a well-documented record of torture and ill-treatment.

United Kingdom

84. The credibility of diplomatic assurances proffered by the Russian authorities also came under scrutiny in the U.K. courts in 2003. In *Russia v. Zakaev*, the Bow Street Magistrate's Court considered Russia's extradition request for the surrender of Akhmed Zakaev, an envoy for the Chechen government in exile, for alleged crimes committed in Chechnya in 1995 and 1996.[126] The Deputy Minister responsible for the Russian prison system gave testimony in court that Zakaev would come to no harm whilst in detention in Russia.[127] The extradition request was considered within the context of the Extradition Act 1989 (c. 33), the U.K. legislation incorporating the European Convention on Extradition.[128] The Act requires that a person not be surrendered if he might ". . .be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."[129] The Court thus undertook "an assessment of what might happen if [Zakaev] were returned" and to what extent those happenings could be attributed to his race, religion, nationality or political opinions.[130]

85. The U.K. Court accepted that the trial process in Russia might be fair, but focused on "the conditions in which Mr. Zakaev would be likely to be detained and to consider whether they would have any prejudicial effect on his trial," in particular whether he would be at risk of torture if surrendered.[131] The Court considered material from the European Committee for the Prevention of Torture and the U.N. Committee against Torture expressing concerns regarding continuing torture and ill-treatment by Russian law enforcement officers operating in Chechnya. Witness testimony, however, regarding the practice of torture in Russia against Chechens appears to have been the decisive factor in the Court's determination that if returned, Zakaev would indeed be at risk for torture and ill-treatment.

86. In addition to testimony from former Russian officials about the specific vulnerability of Chechens in the Russian criminal justice system, including the increased risk to a near certainty that they will be tortured or ill-treated, the U.K. Court heard evidence from a credible witness who said he made a statement, extracted under torture, to Russian authorities implicating Zakaev in the crimes. The Court gave particular weight to this evidence stating that it was "clear, unequivocal and unshaken by cross-examination,"[132] and came to the "inevitable conclusion" that if the Russian authorities resorted to torturing a witness, "there is a substantial risk that Mr. Zakaev would himself be subject to torture;"[133] and that such treatment would be meted out as a consquence of Mr. Zakaev's nationality and political beliefs. With respect to Russian assurances that Mr. Zakaev would not be tortured, the U.K. Court concluded:

I am sure that he [Deputy Minister for Russian prisons] gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate. I consider that such a guarantee would be almost impossible in any country with a significant prison population. I was also concerned as to the type of institution to which the defendant would be sent. Although the Minister indicated that he would be detained in a Ministry of Justice institution, another witness eventually confirmed that the decision could be taken by the Prosecutor who could choose to place Mr. Zakaev in an institution run by the FSB [federal forces operating in Chechnya?][134]

87. In refusing to accept Russian assurances, the *Zakaev* Court appears to rely on the fact that torture in Russia is widespread; that Chechens, in particular, are more likely than not to be tortured; that the Russian government cannot have effective control over the vast prison system in such a manner as to guarantee that Zakaev will not be tortured; and that Russian guarantees of placement in a specific detention facility cannot be relied upon. Extradition was refused.

Germany

88. A German court also recently rejected as insufficient diplomatic assurances offered by a government that used evidence procured by the torture of codefendants or witnesses in related criminal proceedings. In a 2003 decision, a German Court ruled that a request from the Turkish government for the extradition of Metin Kaplan, a religious extremist sought on terrorism-related charges, was politically motivated.[135] The court determined that the evidence on which the extradition warrant was based was procured by the torture in detention of a group of Kaplan's followers, in violation of Article 15 of the United Nations Convention against Torture.[136] The court held that diplomatic assurances from the Turkish government that Kaplan's treatment and prosecution would conform with Turkey's human rights obligations would not provide the Kaplan with "sufficient protection" against such violations.[137] Expressing concern about information extracted by torture and the independence of the Turkish State Security Court, the Kaplan court stated that:

…Such formal guarantees in an extradition proceeding can only provide sufficient protection in favor of the persecuted person if their correct implementation through the institutions of the requesting state—in this case the independent Turkish judiciary—can reliably be expected. The latter is here not the case.[138]

89. German authorities claimed that the decision not to extradite Kaplan was "regrettable" and pointed to "the repeated expressly confirmed promises of the Turkish government regarding the adherence to principles of the rule of law."[139] In a disturbing development, the government claimed that the court decision "does not stand in the way of expulsion, especially since the declarations of the Turkish government adequately guarantee that, after his expulsion to Turkey, Kaplan will not be subjected to treatment that violates the rule of law."[140] Minister of Interior Otto Schily stated that he would request changes in the legal regulations to be able to effect an expulsion of Kaplan because "the right of a state to expel a foreigner in order to protect national security" should be the priority.[141]

90. The German government's response in the Kaplan case points to the important role the judiciary plays in interpreting a state's treaty obligations and evaluating the use of diplomatic assurances in light of those obligations. The German government's public statements raise serious concerns that the government is actively attempting to undermine the authority of its own judiciary. Subsequent news accounts revealed that Schily visited Ankara in September 2003 to secure enhanced assurances that Kaplan would get fair treatment upon return and that evidence extracted by torture would not be used in any proceedings again Kaplan.[142] The Turkish government declined to provide satisfactory assurances.[143]

Austria

91. Finally, the intervenors invite the Court to recall its own decision in the recent case of *Bilasi-Ashri v. Austria*.[144] The extraditing state, Austria, had sought assurances from Egypt that Bilasi-Ashri would be treated in conformity with ECHR articles 3 and 6 upon return. Egypt declined to give the necessary assurances and Austria refused to carry out the extradition. The Court will recall that, having made a Rule 39 indication to prevent Bilasi-Ashri's extradition, it eventually found that the applicant was not at risk of a violation of the Convention because Austria refused to extradite the applicant to Egypt as a consequence of that state's failure to provide assurances that it would comply with the conditions laid out in the extradition order. One of the most important assurances that had been sought by the Austrian government was permission upon request to visit the applicant to monitor his condition after return to Egypt.

[1]See Alleweldt, Ralf, "Protection against Expulsion under Article 3 of the European Convention on Human Rights," 4 European Journal of International Law (1993), pp.360-376. Alleweldt discusses what constitutes "substantial grounds" for believing that a real risk of torture or ill-treatment exists. Such grounds may include, *inter alia*, evidence of real risk of subsequent ill-treatment, evidence of previous ill-treatment, and the general situation in the requesting state. Ibid., p. 368.
[2]The government blamed those killings on "Islamic extremists," without defining that term, and began to round up people who attended unregistered mosques, men with beards, the followers of independent-minded imams, and others who displayed independence from the state in their practice of religion or who were perceived by state authorities to be "too pious."
[3]At the time, Human Rights Watch was the only international human rights organization with a permanent presence in Uzbekistan, and the only such organization legally registered in the country.
[4]Human Rights Watch interview, name withheld at interviewee's request, July 19, 1999.
[5]Application No. 39084/97, December 11, 2003, at paras. 108-121. This was the first time the Court had occasion to rule on whether or not the forced shaving off of a prisoner's hair constituted degrading treatment contrary to Article 3 of the Convention. Ibid., para. 109.
[6]See Human Rights Watch, *Republic of Uzbekistan: Crackdown in the Farghona Valley: Arbitrary Arrests and Religious Discrimination*, May 1998, pp. 18-20; Human Rights Watch, *"And It Was Hell All Over Again...": Torture in Uzbekistan*, December 2000, pp. 7-22.
[7]Human Rights Watch interview, March 1998. The eyewitness confirmed seeing signs of beatings. Human Rights Watch, *Republic of Uzbekistan: Crackdown in the Farghona Valley: Arbitrary Arrests and Religious Discrimination*, May 1998, p. 20.
[8]Ibid.
[9]Human Rights Watch interview with Sharifa Isakhojaeva, Tashkent, June 1, 2000.
[10]The trial was covered extensively by the international media: "Uzbeks, Russia to Fight 'Militant Islam' Together," Reuters, June 4, 1998. "Poverty Pushes Uzbeks to Islam Despite Crackdown," Reuters, June 5, 1998. "Defendant Admits Murders by Uzbek Islamists," Reuters, June 15, 1998. "Uzbek Faces Death Sentence over String of Murders," Reuters, June 24, 1998 ("Israil Parpibayev, one of the accused in the current trial, said he had been tortured and forced to give false evidence during the investigation."). "Gang Leader Gets Penalty in Moslem Sect 'Show Trial,'" Agence France-Presse, July 6, 1998. "Uzbeks Bent on Fighting Islamic Sects," Agence France-Presse, June 12, 1998.
[11]Human Rights Watch unofficial transcript, Supreme Court, Tashkent, June 1998. Human Rights Watch recorded this testimony in an unofficial transcript. Official transcripts are not provided by courts in Uzbekistan.
[12]Human Rights Watch unofficial transcript, Supreme Court, Tashkent, June 15, 1998.
[13]Ibid.
[14]Ibid.
[15]Uigun and Oibek Ruzmetov were tried with six other men, all accused of "Islamic extremism" and plotting to explode a dam outside Tashkent, as an act of terrorism. At trial Uigun Ruzmetov testified that he signed a prepared confession because police had threatened to arrest his wife and parents if he did not. One of the Ruzmetovs' co-defendants, Utkur Yusupov, testified that police threatened to rape his wife in front of him if he did not sign the prepared confession. The court accepted the allegedly coerced confessions as evidence and sentenced to death the Ruzmetov brothers and three of their co-defendants. Human Rights Watch interview with a journalist who attended the trial, Tashkent, name withheld, July 22, 1999. The men were reportedly executed in October 1999. Human Rights Watch interview with Darmon Sultanova, Tashkent, October 21, 1999. In Uzbekistan, the death penalty is carried out by firing squad. Bodies are not returned to the families.
[16]Human Rights Watch interview with Darmon Sultanova, Tashkent, October 21, 1999.
[17]Human Rights Watch interview with Darmon Sultanova, Tashkent, November 2, 1999; and Meeting with Darmon Sultanova, then-U.S. Ambassador at Large for Religious Freedom Robert Sieple, and Human Rights Watch, Tashkent, May 23, 2000.
[18]Human Rights Watch interview with Darmon Sultanova, Tashkent, November 2, 1999.
[19]Human Rights Watch interview with a journalist who attended the trial, name withheld, Tashkent, July 22, 1999.
[20]Human Rights Watch interview with Darmon Sultanova, Tashkent, November 2, 1999; and Letter to President Islam Karimov and others, from Darmon Sultanova, November 19, 1999.
[21]Human Rights Watch interview with Darmon Sultanova, Tashkent, November 2, 1999. Torture and mistreatment of Sultanova and other members of the Ruzmetov family are detailed also in a 2003 report by the U.N. Special Rapporteur on Torture, 2003. See Report of the Special Rapporteur on Torture, Theo van Boven, to the Commission on Human Rights, Mission to Uzbekistan,

E/CN.4/2003/68/add.2, February 3, 2003, pp. 31-32. One of the most dramatic cases of 1998 was documented best by the U.S. Embassy in Tashkent. Forty-one-year-old Imam Kobil Murodov was arrested during 1998 sweeps. The U.S. Department of State reported that in early October 1998, Murodov was taken into custody on charges of illegal possession of narcotics and teaching religion without permission. He died on October 30 in pre-trial detention at Tashkent prison. According to the U.S. government report, "Murodov's body showed severe bruising, his teeth were knocked out, and his collarbone and several ribs were broken." The official explanation for his death was either that he fell in his cell or was beaten by fellow inmates. U.S. Department of State, *1998 Country Reports on Human Rights Practices*, Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

[22]Open letter of Mamura Khojimukhamedova, on file with Human Rights Watch, May 18, 2000.

[23]Human Rights Watch interview with Mamura Khajimukhamedova, Tashkent, October 21, 1999.

[24]Human Rights Watch interview with the lawyer, Irina Mikulina, Tashkent, May 30, 1999. See, Human Rights Watch, *"And It Was Hell All Over Again...": Torture in Uzbekistan*, December 2000, p. 19.

[25]Court hearings were closed to everyone, including family members. Khajimukhamedov's lawyer was not allowed to represent him at trial, only a state-appointed lawyer selected by the procurator was present at the hearings. The verdict was upheld by the Supreme Court in September 1999. He was executed in December 1999.

[26]Although the trial was closed to the public, including local and international observers, one defendant managed to deliver to Human Rights Watch a copy of Makhmudov's statement to the court.

[27]Letter from Mamadali Makhmudov, dated April 29, 2003, translated into English, on file with Human Rights Watch.

[28]Human Rights Watch, *Uzbek Torture Victims Sentenced to Prison Terms: Describe Brutal Torture Methods*, August 18, 1999.

[29]Letter from Mahsoud Bekjanov to Human Rights Watch, January 2003, on file with Human Rights Watch.

[30]Letter from Mamadali Makhmudov, April 4, 2003, on file with Human Rights Watch.

[31]Judgment of the Prague City Court, Judge Veronika Bohácková presiding, December 14, 2001, on file with Human Rights Watch.

[32]Human Rights Watch interview, name withheld, Jizzakh, July 2, 1999; and Letter to Jizzakh Procurator Ottabaev, from Juvashev's lawyer, M. Togaev, April 17, 1999, unofficial translation. M. Togaev was Juvashev's first lawyer, who was fired by Juvashev's family and replaced after he reportedly refused to pursue a case against the officers who allegedly tortured his client. Written complaint to Judge Bahriddin Norkhudjaev of the Jizzakh Province Court, from Nakhmiddin Juvashev, June 25, 1999.

[33]Written complaint to Judge Bahriddin Norkhujaev of the Jizzakh Province Court, from Nakhmiddin Juvashev, June 25, 1999; and Human Rights Watch interview, name withheld, Jizzakh, July 2, 1999.

[34]Four female relatives were detained for fifteen days, three male relatives were held for thirty days in police custody, another male relative was held for two days and a fifth male relative was placed under arrest and was not released. Human Rights Watch interview, name withheld at her request, Tashkent, June 4, 1999.

[35]Human Rights Watch interview with the sister of one defendant, name withheld at her request, Tashkent, June 4, 1999.

[36]Ibid.

[37]Ibid.

[38]Human Rights Watch interview with rights defender Vasila Inoiatova, Tashkent, June 3, 1999.

[39]Human Rights Watch interview with persons close to the case, names withheld at their request, Tashkent, June 16, 1999.

[40]Human Rights Watch, "*And it Was Hell All Over Again…": Torture in Uzbekistan*, December 2000, p. 43.

[41]Jaslyk prison, located deep in the desert in the Autonomous Republic of Karakalpakstan (under the jurisdiction of the government of Uzbekistan) reportedly was designated as a facility for political and religious prisoners, including those convicted for terrorism It is reputed to have the harshest detention conditions. Until December 1999, no family members or attorneys were allowed to visit prisoners at the facility.

[42]Death certificate No. 0005094, issued February 1, 2000, on file with Human Rights Watch.

[43]Oleg Panfilov, electronic bulletin, Center for Journalism in Extreme Situations, May 23, 2000.

[44]Human Rights Watch interview with a human rights defender, name withheld, Tashkent, March 2003.

[45]Human Rights Watch interview with Abdumalik Nazarov's lawyer, Irina Mikulina, Tashkent, December 24, 1999. Abdumalik Nazarov's mother, Muharramkhon Nazarova, reported what Abdumalik told his father during a fifteen-minute visit in 2000 about his arrival at Jaslyk. She said he was transported by plane along with 250 other prisoners from Tashkent. The men were forced to sit crouched with their heads bowed. Human Rights Watch interview with Muharramkhon Nazarova, Tashkent, February 19, 2000. This account was corroborated also by a local rights defender. Human Rights Watch interview with Vasila Inoiatova, Tashkent, January 27, 2000.
[46]Human Rights Watch interview with Abdumalik Nazarov's lawyer, Irina Mikulina, Tashkent, December 24, 1999; and Human Rights Watch interview with Muharramkhon Nazarova, Tashkent, February 19, 2000.
[47]The information in this section is an eyewitness account of the trial by Human Rights Watch's researcher on Uzbekistan, who attended the trial daily.
[48]Civilians who are not professional judges, formerly known as People's Judge's under the legal system of the Soviet Union.
[49]Human Rights Watch interview with relatives of Dekanov, Tashkent, June 4, 1999.
[50]A Human Rights Watch representative viewed the contract signed by the family and a private attorney.
[51]Human Rights Watch interview with Mikhail Ardzinov, Tashkent, June 11, 1999.
[52]Human Rights Watch interview with relatives of defendant Kakhramon Niazmukhamedov, Tashkent, June 4, 1999.
[53]Some of the men were taken into custody between February and April 1999. Others were already in jail serving prior sentences at the time of the bombings.
[54]Human Rights Watch interview with members of the Niazmukhamedov family, Tashkent, June 2, 1999 and June 4, 1999.
[55]Adopted August 30, 1955, at the U.N. Congress on the Prevention of Crime and the Treatment, sections 20 (provision of food and water) and 37 (communication with family).
[56]General Assembly Resolution 43/173, annex 43 (1988), principles 15 (communication with outside world), 18.1 (communication with legal counsel), and 19 (family visits).
[57]Committee against Torture, Concluding Observations on the Second Periodic Report of Uzbekistan, CAT/C/CR/28/7, June 6, 2002, para. 5(b).
[58]Human Rights Watch interview with relatives of Mamatkulov, Tashkent, June 28, 1999.
[59]See, "Uzbekistan: Security Service Rebuts Charges it Knew of Tashkent Bombings in Advance," Bruce Panier, Radio Free Europe/Radio Liberty, November 28, 2003.
[60]Hizb ut-Tahrir means Party of Liberation. Hizb ut-Tahrir is an unregistered organization in Uzbekistan. A non-violent group which describes itself as a political party the ideology of which is Islam, its primary goal is the peaceful re-establishment of the Caliphate, a form of Islamic government, in Uzbekistan.
[61]Photograph of Usmanov's corpse on file with Human Rights Watch.
[62]See, *Leaving No Witnesses: Uzbekistan's Campaign against Rights Defenders*, Human Rights Watch, March 2000, pp. 21-24.
[63]Ibid., p. 26.
[64]See *Attia v. Sweden*, CAT/C/31/D/199/2002, November 24, 2003, para. 4.4.
[65]See International Helsinki Federation Appeal, "Violations of the Rights of Chechens in Georgia," December 23, 2002.
[66]Report of the Special Rapporteur on Torture, Theo van Boven, to the United Nations Commission on Human Rights, 58th Session, E/CN.4/2002/137, February 26, 2002, para. 15.
[67]Interim report by Theo van Boven, Special Rapporteur on Torture, to the General Assembly A/57/173, July 2, 2002. The Special Rapporteur's July 2003 report states that both the U.N Human Rights Committee and the Committee against Torture have also recently reaffirmed the absolute nature of the principle of *nonrefoulement* "and that expulsion of those suspected of terrorism to other countries must be accompanied by an effective system to closely monitor their fate upon return, with a view to ensuring that they will be treated with respect for their human dignity." Report by the Special Rapporteur on Torture, Theo van Boven, to the United Nations General Assembly, A/58/120, July 3, 2003, para. 15.
[68] A recent experience of the Special Rapporteur himself would seem to illustrate the need for assurances made in good faith and the capacity to comply with those assurances. In his February 2003 report on the question of torture in Uzbekistan, the Special Rapporteur details his "aborted visit to Jaslyk [penal] colony." Despite indicating to the Uzbek authorities, upon whose invitation van Boven was in the country, that he required six hours to evaluate conditions in Jaslyk, "often cited for its

hardship conditions and inhuman practices," the itinerary and plane scheduled for the SR arranged by the Uzbek authorities left van Boven only two hours for his assessment. The Special Rapporteur thus refused to inspect the colony and instead planned to discuss deaths in custody with its director. However, the SR "noted with concern that these confidential interviews were abruptly disrupted on several occasions by the government official accompanying the SR's delegation." The SR regretted that he was unable to carry out his visit to Jaslyk "in a satisfactory and comprehensive manner." See Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 3, 2003, para. 49. He concluded by regretting that the mission's terms of reference, presumably agreed in advance, were not fully respected. Ibid., para. 60.

[69] Ibid. para. 68.

[70] Ibid., para. 69

[71] Sibylle Kapferer, *The Interface between Extradition and Asylum*, Legal and Protection Policy Research Series, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2203/05, November 2003, para. 137.

[72] Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Sweden, CCPR/C/74/SWE, April 24, 2002, para. 12. The failure of the Swedish government to effect any monitoring within the first five weeks of return is particularly disturbing. The International Committee of the Red Cross (ICRC), U.N., and other intergovernmental, nongovernmental, and humanitarian organizations, have concluded that detainees are most at risk for torture and ill-treatment within the first forty-eight hours of custody. See Human Rights Watch, "The Legal Prohibition against Torture," March 2003, at http://www.hrw.org/press/2001/11/TortureQandA.htm.

[73] The special session, held in July-August 2003, was closed. No public statements were issued by the Committee, but its annual report to the General Assembly made clear that it was not fully satisfied with the Swedish government's response and that the Committee decided to pursue certain outstanding issues with respect to the cases. See Report of the Human Rights Committee to the General Assembly, A/58/40(Vol. I), November 1, 2003.

[74] Human Rights Committee, Concluding Observations on the Fourth Periodic Report of New Zealand, CCPR/CO/75/NZL, August 7, 2002, para. 11.

[75] Ibid.

[76] CAT article 3.

[77] *Tapia Paez v. Sweden*, Communication No. 39/1996, April 28, 1997.

[78] *Attia v. Sweden*, Communication No. 199/2002, November 24, 2003.

[79] 8 C.F.R. § 208.18(c) -- Diplomatic assurances against torture obtained by the Secretary of State. (1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. (2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention against Torture…(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

[80] Regulations Concerning the Convention against Torture, 64 FR 8478, 8484 (February 19, 1999).

[81] Written Declaration by Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State, *Cornejo-Barreto v. Seifert*, United States District Court for the Central District of California Southern Division, Case No. 01-cv-662-AHS, October 2001, para. 8, at http://www.state.gov/documents/organization/16513.pdf.

[82] Ibid., para. 9.

[83] Ibid.

[84] Ibid. para. 10.

[85] Ibid.

[86] Maher Arar's complete statement to media, CanWest News Service, November 4, 2003.

[87] "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible." Dana Priest, "Man was Deported after Syrian Assurances," *Washington Post*, November 20, 2003, page A24. See also United States Department of State Country Reports on Human Rights Practices 2002: Syria, at http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm.

[88]According to press reports, Imad Moustafa, the charge d'affaires at the Syrian Embassy in Washington, denied Arar was tortured. Dana Priest, "Top Justice Aid Approved Sending Suspect to Syria," Washington Post, November 19, 2003, page A28. Priest quotes Moustafa as saying, "… Syria had no reason to imprison Arar. He said U.S. intelligence officials told their Syrian counterparts that Arar was an al-Qaeda member. Syria agreed to take him as a favor and to win goodwill of the United States, he said." Ibid.

[89]In a recent interview, Gar Pardy, one of Canada's most senior diplomats at the time, stated that "The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of the people who made this decision…I mean, there were some second thoughts." 60 Minutes II, "His Year in Hell," January 21, 2004, at http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml.

[90]See Human Rights Watch, United States: Alleged Transfer of Maher Arar to Syria, Letter to Department of Defense General Counsel Haynes Co-Signed by Amnesty International, The Center for Victims of Torture, International Human Rights Law Group, Lawyers Committee for Human Rights, Minnesota Advocates for Human Rights, Physicians for Human Rights, and RFK Memorial Center for Human Rights, November 17, 2003, at http://www.hrw.org/press/2003/11/us-ltr111703.htm

[91]*Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada),* 2002, SCC 1. File No. 27790, January 11, 2002.

[92]The court noted that, at the time the case was decided, under section 53(1)(b) of Canada's Immigration Act regarding the review of decisions based on national security grounds and return to risk of torture, "there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal—no procedures at all, in fact." Ibid., para. 117. The court determined that the U.N. Convention against Torture's explicit prohibition against deportation where there are "substantial grounds" for believing a person would be in danger of torture gave rise to a duty to provide procedural safeguards in national security cases where a person would be at risk of torture if returned: "Given Canada's commitment to the CAT, we find that … the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds." Ibid., para. 119.

[93]Ibid., para. 123.

[94]Ibid., para. 124.

[95]Ibid., para. 125.

[96]*Minister of Justice for Canada v. Rodolfo Pacificador (Canada v. Pacificador)*, Court of Appeal for Ontario, No. C32995, August 1, 2002.

[97]Ibid., para. 56. The Supreme Court of Canada has ruled that a Minister's surrender decision violates the Canadian Charter of Rights and Freedoms where the person subject to surrender would face a situation that is "simply unacceptable" or where the nature of the requesting country's criminal procedures or penalties "sufficiently shocks the conscience." *United States of America v. Allard and Charette*, 33 CCC (3d) 501 SCC, 1987; *R. v. Schmidt*, 333 CCC (3d) 193 SCC, 1987.

[98]Ibid., para. 53.

[99]Ibid.

[100]Ibid. para. 15.

[101]Ibid., para. 14.

[102]Ibid. para. 53.

[103]Ibid., para. 51.

[104]Ibid. para. 54. In February 2003, the Supreme Court of Canada dismissed the government's appeal in the *Pacificador* case.

[105]Article 11: Capital Punishment states that: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out." European Convention on Extradition (1957), at http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm

[106]Article 3 states that: "When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence." Second Additional Protocol to the European Convention on Extradition (1978), at http://conventions.coe.int/Treaty/en/Treaties/Html/098.htm

[107]The European Arrest Warrant (EAW) is intended eventually to replace the European Convention on Extradition and the extradition provisions of the European Convention on the Suppression of Terrorism in all the E.U. member states. On January 1, 2004, the EAW comes into force in Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden, and the U.K. See Council Framework Decision on a European Arrest Warrant, 2002/584/JHA, June 13, 2002.
[108]"No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Ibid., preamble, para 13.
[109]Ibid., Article 5.
[110]Article 4.
1 The text of Article 5 of the Convention shall become paragraph 1 of this article.
2 The text of Article 5 of the Convention shall be supplemented by the following paragraphs:
"2. Nothing in this Convention shall be interpreted as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to torture.
3. Nothing in this Convention shall be interpreted either as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to the death penalty or, where the law of the requested State does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested State is under the obligation to extradite if the requesting State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole." Protocol amending the European Convention for the Suppression of Terrorism, Strasbourg 15.V.2003, at http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm.
[111]"It is obvious that a State applying this article should provide the requesting State with reasons for its refusal to grant the extradition request. It is by virtue of the same principle that Article 18 paragraph 2 of the European Convention on Extradition provides that "reasons shall be given for any complete or partial rejection. . . " Draft Explanatory Report at http://conventions.coe.int/Treaty/EN/Reports/Html/090-rev.htm.
[112]Guideline IV.
[113]Guideline XIII.
[114]Guideline XV.
[115]Guideline XIII(2)(i) and (ii). The same formula, obliging states to seek assurances with respect to the potential application of the death penalty, but making no similar provision for extraditions where a person is at risk of torture is articulated in the Parliamentary Assembly of the Council of Europe resolution on combatting terrorism and respect for human rights, Res. 1271(2002), January 24, 2002.
[116]70/1995/576/662, November 15, 1996.
[117]Ibid., para. 37
[118]Ibid., paras. 104 and 105.
[119]Application No. 36378/02, October 4, 2002.
[120]Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 552, November 6, 2002.
[121]Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 601, November 26, 2002.
[122]Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 455. September 19, 2003. The Court can engage in its own fact-finding under Rule 42 Sec. 2 of its Rules of Procedure (measures for taking evidence).
[123]Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 528, October 24, 2003.
[124]Ibid.
[125]The European Committee for the Prevention of Torture (CPT) has repeatedly expressed concern about the torture and ill-treatment of Chechens in the Russian Federation. See, for example, CPT, "Public Statement Concerning the Chechen Republic of the Russian Federation," July 10, 2003, at http://www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm; see also, Human Rights Watch, *Welcome to Hell: Arbitrary Detention, Torture, and Extortion in Chechnya*, October 2000; *Swept Under: Torture, Forced Disappearances, and Extrajudicial Killings during Sweep Operations in Chechnya*, March 2002.
[126]*The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrate's Court, Decision of Hon. T. Workman, November 13, 2003.
[127]Ibid., page 7.

[128]The U.K. Extradition Act has since been amended. See Extradition Act 2003 at http://www.hmso.gov.uk/acts/acts2003/20030041.htm
[129]1989 Act at Article 6(1)(d).
[130]*Russia v. Zakaev*, page 7.
[131]Ibid.
[132]Ibid., page 10.
[133]Ibid. page 10.
[134]Ibid., page 7.
[135]Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-204.03III, May 27, 2003. As with the *Zakaev* case above, the German court deliberated the Kaplan case under its obligations in the context of the European Convention on Extradition Article 3(2), which states that no person shall be extradited "if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."
[136]Ibid., page 15. Article 15 of the CAT reads: "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."
[137]Ibid., page 23.
[138]Ibid., page 23.
[139]Ibid.
[140]Ibid. The government was referring to immigration-related expulsion orders issued by the city of Cologne that Kaplan was challenging at the time. The government's statement also refers to the fact that Kaplan was challenging the removal of his refugee status in court as well.
[141]Ibid.
[142]"German Minister Pursues 'Caliph of Cologne' Extradition in Turkey," Deutsch Welle, September 16, 2003, at http://www.deutschewelle.de/english/0,1003,1432_A_972238_1_A,00.html.
[143]"Germany, Turkey Fail to Agree on Extradition of Islamic Extremist," Deutsch Welle, September 17, 2003, at http://www.deutschewelle.de/english/0,1003,1432_A_973390_1_A,00.html.
[144]*Bilasi-Ashri v. Austria*, Application No. 3314/02, November 26, 2002.