The German Federal Constitutional Court and the Extradition of Alledged Terrorists to the United States

By Matthias Hartwig[*]

A. Factual Background

In January 2003, two Yemeni citizens were arrested by German police forces at the airport of Frankfurt.[1] The arrest took place pursuant to the request of an American judge of the United States District Court for the Eastern District of New York.[2] The action was considered to be a blow against international terrorism and should have demonstrated the functioning of the German-American cooperation in the war against this scourge. However, due to general considerations as well as the concrete circumstances of the case, the extradition of the two persons took more time than would be expected from a smoothly running cooperation. All legal remedies were exhausted in the Yemenis' efforts to avoid extradition to the United States, and even now, an individual complaint has been brought before the European Court on Human Rights in Strasbourg. The two Yemeni citizens were finally extradited more than ten months after their arrest in November 2003.[3]

One of the two Yemenis is alleged to be the adviser of the Yemeni minister for religious foundations with the rank of an undersecretary of state and Imam at the Al-Ihsan-Mosque in Sanaa.[4] The other is his secretary. Both were lured to their travel to Germany after meetings with an Yemeni citizen acting as an under-cover agent of U.S. prosecutors.[5] The agent promised to put the two Yemenis in contact with a person willing to make a gift to the foundation.[6] The ends to which this money was to be put remains in dispute.[7] According to the declaration of the secretary, both men decided freely to come to Germany.[8]

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[1] BverfG, 2 BvR 1506/03 of 5.11.2003, paragraph No. (3), http://www.bverfg.de/entscheidungen/rs20031105_2bvr150603en.html [hereinafter Decision].

[2] *Id*.

[3] *Terrorverdächtige Jemeniten an USA ausgeliefert*, SUEDDEUTSCHE.DE, Nov. 17, 2003, www.sueddeutsche.de/ausland/artikel/685/21664/.

[4] Decision, *supra* note 1, para. 2.

[5] *Id*. para. 4

[6] *Id*.

[7] *Id*.

[8] *Id*.

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The arrest in Franfurt was based on an arrest warrant of the U.S. Federal Court for the Eastern District of New York issued on January 5, 2003.[9] Germany was asked to extradite the two arrested persons according to the extradition treaty between the U.S.A. and Germany of June 20, 1978.[10] An affidavit of the Assistant U.S. Attorney of the Eastern District of New York explaining the state of investigations and the arrest warrant were attached to the request. As the information provided by the U.S. authorities was deemed inadequate by the German court responsible for reviewing the extradition application, the U.S. authorities were asked to provide additional explanations.[11] This request was satisfied by an affidavit of an investigating officer of the FBI, in which the acts with which the two Yemenis were charged were detailed.[12] The *Oberlandesgericht* (Higher Regional Court) confirmed its arrest warrant upon receipt of the supplementary information, justifying its decision with the claim that the two Yemenis were charged with membership in a terrorist organization as punishable under articles 129, 129a and 129 b paragraph 1 of the German Criminal Code.[13]

The Republic of Yemen intervened in the case arguing that the two persons were abducted from the territory of Yemen in violation of international law.[14] Yemen demanded that the Federal Republic of Germany return the Yemeni citizens to Yemen.[15]

The United States gave an assurance on 22 May 2003, that the two persons would not be tried before a military court (in the sense of the Presidential Military Order of November 13, 2001[16]) or before another extraordinary court.[17] This assurance was given by the U.S. notwithstanding to the fact that, according to the US interpretation of article 13 of the German-American extradition treaty, the military commissions provided by the Presidential Military Order cannot be characterized as extraordinary courts.[18]

The two Yemenis raised a number of claims in opposition to their extradition to the United States. First, they claimed that the decision on the extradition must not be based on information furnished by the under-cover agent. They also argued that the extradition must be declared inadmissible because they claim they were abducted from Yemen in breach of international law. Third, they asserted that extradition would violate the minimum standards of

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[9] *Id*. para. 3.

[10] *Compare* v. 1980 (BGBl. II S. 646, 1300), *and* the supplementary treaty found at v. 21.10.1986 (BGBl. II S. 1086); V. 1993 (BGBl. II S. 846)

[11] Decision, *supra* note 1, para. 6.

[12] *Id*. para. 5

[13] *Id*. para. 7

[14] *Id*. para. 8

[15] *Id*.

[16] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57,831 (November 16, 2001).

[17] Decision, *supra* note 1, para. 9.

[18] *Id*.

international law, as the U.S. authorities would apply methods of inquiry which have to be qualified as torture in the sense of article 3 of the European Convention on Human Rights.[19] Fourth, the Yemenis argued that the German Court did not verify the facts on which the suspicion asserted by the U.S. was based, as required by article 14 paragraph 3 letter a of the German-American extradition treaty;[20] no detailed description of the incriminating acts (as for time, place and manner) could be found in the request of extradition.

The Higher Regional Court rejected these arguments.[21] It held that the request of Yemen to have its citizens returned does not concern the admissibility of the extradition, even if the extradition were a breach of international law. The court explained that there is no norm in international law that requires that the forum-State stop a criminal procedure in case of an illegal abduction

Against the decision of the Higher Regional Court, the Yemenis brought a constitutional complaint before the German Constitutional Court. They claimed that the Higher Regional Court violated their right to a lawful judge according to article 101 paragraph 1 of the *Grundgesetz* (GG – Basic Law).[22] This argument was based on the Higher Regional Court's failure to submit the questions of general international law implicated by the case to the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court), as required by article 100 paragraph 2 of the Basic Law.[23] The question requiring submission to the Federal Constitutional Court, in the opinion of the Yemeni complainants, was whether there is a general principle of international law according to which nobody can be extradited who has been abducted from his home country in order to bypass a prohibition to extradite citizens. Furthermore, in such a procedure the Constitutional Court would have had to decide if there is a general principle under international law which excludes extradition if it is based on information received from an under-cover agent who acted in breach of the international law. Finally, Constitutional Court review was necessary to clarify if there is a norm in international law which prohibits the possibility of an unlimited arrest, which is permitted by the Presidential Military Order of November 13, 2001.[24]

Because they believe there are such rules in international law, the two Yemenis felt that their right to life and to corporal integrity had been violated by the decision of the Higher Re-

[19] Article 3 of the European Convention on Human Rights states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[20] *See supra* note 10.

[21] Decision, *supra* note 1, para. 12.

[22] Article 101 paragraph 1 of the GG states, "Courts with extraordinary jurisdiction shall be inadmissible. Nobody may be deprived of the jurisdiction of his lawful judge."

[23] Article 100 paragraph 2 of the GG states, "Where in a court proceeding a doubt arises whether a rule of international law is an integral part of the federal law and whether such rule directly establishes rights and obligations for the individual (art. 25), the court shall seek a ruling from the Federal Constitutional Court."

[24] Section 2(b) of the Military Order requires that all persons who are a risk for the United States as determined by section 2(a) of the Military Order shall be detained; a maximum detention is not established.

gional Court.[25] They also claimed that their right to freedom had been violated,[26] by Higher Regional Court's failure to verify the facts on which the extradition request was based. Finally, the Yemenis argued that the constitutional guarantee of personal freedom, requires an inquiry into the possibility that an extradition may lead to the result that the extradited persons will be subject to torture and other illegal methods of investigation.[27]

B. The Decisions of the Constitutional Court

The Constitutional Court declared the constitutional complaints unfounded. The Court emphasized that an ordinary court has an obligation to submit a question to the Constitutional Court pursuant to article 100 paragraph 2 of the Basic Law if there are objective doubts about the existence or non-existence of a general rule of international law applicable as part of the federal law.[28] Furthermore, referral is necessary only if such a rule is relevant in a case pending before the court.[29] The breach of this obligation constitutes a violation of the guarantee of the lawful judge.[30] The obligation imposed on ordinary courts by article 100 paragraph 2 of the Basic Law serves international law; it minimizes the risk that an ordinary court will misinterpret or erronously applies international law and consequently fail to appropriately recognize the international responsíbility of Germany.[31] At the same time the Constitutional Court's exclusive authority to eliminate doubts about the existence of a rule of international law aims at an unified understanding of international law within the municipal order.[32]

In the given case the Constitutional Court declared that the Higher Regional Court had the obligation to seek a ruling from the Constitutional Court, for there are objective doubts if there is a general rule under international law prohibiting the extradition of a person who was lured by a trickery to leave his country.[33] The Higher Regional Court was not authorized to overcome these doubts by its own decision. The question of the existence or non-existence of an international rule with this content was relevant for the outcome of the Higher Regional Court's decision. After all, the primacy of such a general rule over ordinary law,[34] would have required the Higher Regional Court to apply the international rule prohibiting the extradition.

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[25] *See* Art. 2 Para. 2 GG

[26] *See* Art. 2 Para. 1 GG

[27] *See* Art. 2 Para. 1 and 2 GG

[28] *See* BVerfGE 23, 288 (319); BVerfGE 75, 1 (11); BVerfGE 92, 277 (316); BVerfGE 96, 68 (77); M. Hartwig, *Article 100, in* GRUNDGESETZ, MITARBEITERKOMMENTAR, HEIDELBERG para. 183 (D. Umbach & T. Clemens eds., 2002).

[29] BverfGE 15, 25 (30); BverfGE 94, 315 (328); BverfGE 100, 209 (211).

[30] The guarantee of the legal judge is laid down in article 101 paragraph 1 GG; *see also* BVerfGE 18, 441 (447); BVerfGE 23, 288 (319); M. Hartwig, *Article 100, in* GRUNDGESETZ, MITARBEITERKOMMENTAR, HEIDELBERG para. 209 (D. Umbach & T. Clemens eds., 2002).

[31] Decision, *supra* note 1, para. 38.

[32] *Id*.

[33] *Id*. para. 34.

[34] Article 25 of the GG states, "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory."

However, the Constitutional Court did not reach the conclusion that the decisions of the Higher Regional Court were based on a violation of the right to a judge predetermined by law. The Court held that, had it been confronted with the international law questions implicated by this case and arguably subject to referral from the Higher Regional Court, it would have come to the same result as the Higher Regional Court, i.e. that there is no general rule under international law prohibiting extradition in the case that a person is lured out of his homecountry. By this hypothetical "consideration" of the issue, the Constitutional Court excluded the possibility that the violation of the right to a lawful judge had any impact on the outcome of the decision.[35]

The Constitutional Court further held that the Higher Regional Court did not violate fundamental rights when it granted the request for extradition without verifying the factual basis for the extradition request.[36] The Court explained that this is mainly a question of the application of ordinary law which is not subject to referral to and review by Constitutional Court. The Court explained that the constitutional claims did not demonstrate that in the present case the erroneous application of ordinary law constitutes a violation of constitutional law.[37]

The Constitutional Court did not characterize the use of information gained from an undercover agent as a violation of the constitutionally guaranteed right to a fair trial; it is not only doubtful if the acts of an informant of the U.S.A. in Yemen have to be judged under the Basic Law, but even the German legal order allows the use of such under cover agents.[38]

Finally, the Constitutional Court did not endorse the complainants' allegations that the treatment of arrested persons in the U.S.A. would make extradition a violation of the fundamental rights of the Basic Law.[39] The Court held that there were no facts in the present case which could prove that the United States would not observe the priciples of due process of law and of the protection of human rights. This, the Court noted, is all the more valid because Germany signed a further Agreement with the U.S.A. on Mutual Assistance in Criminal Matters in 2003,[40] confirming the assumption that there is actually no risk of human rights violations in criminal proceedings in the U.S.A.[41] These considerations aside, for the Constitutional Court the assurance by the U.S.A. that the Presidential Military Order of 13 November 2001 would not be applied in this case was decisive. This guarantee, the Court concluded, precluded the possibility that an extraordinary court as well as internment in Guantánamo would result from the extradition.[42]

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[35] Decision, *supra* note 1, para. 48. This line of argument is based on permanent case law; *see, e.g.*, BVerfGE 64, 1 (21); BVerfGE 96, 68 (98).

[36] Decision, *supra* note 1, para. 64.

[37] *Id*. para. 66

[38] *Id*. para. 73

[39] *Id*. para. 74

[40] The agreement has not yet been published, but was mentioned in Decision, *supra* note 1, para. 77.

[41] Decision, *supra* note 1, para. 75.

[42] *Id*. para. 76

C. Evaluation of the Decision

The decision does not mark a new approach to the problems at stake; it does not invent new solutions to old questions. However, in continuing the traditional line of case-law it contributes to the clarification of some points. The decision also sheds a light on the state of affairs in the field of legal cooperation between Germany and the U.S.A. in these times dominated by the "war against terrorism."

I. The Constitutional Court as National Defender of International Law

With reference to case-law the Constitutional Court decided that article 100 paragraph 2 of the Basic Law attributes to the Court the function of defending international law in the internal legal order.[43] With respect to the general principles of international law, in the sense of article 25 of the Basic Law, in cases of doubt, the Constitutional Court has exclusive authority to determine if there is a norm of international law to be applied in a given case.[44] Once the existence of an international rule, in the sense of article 25 of the Basic Law, is ascertained, the consequences of its application within the legal order are very far-reaching. The national authorities are not only prevented from applying national law in a manner that violates the general rules of international law.[45] They are also obliged to refrain from anything that lends effectiveness to acts of non-German organs of state authority that are performed in violation of general rules of international law in the territorial scope of the Basic Law.[46] Finally – in a most remarkable way – German authorities "are prevented from participating, in a decisive manner, in acts of non-German organs of state authority that are performed in violation of general rules of international law."[47] In this way, the German legal order contributes to the enforcement of international law not only within Germany but also on an international level, by prohibiting any international cooperation which could lead to a violation of international law. This defence of the international law does not only concern the conduct of German authorities, but by way of repercussion, other states are forced to bring their conduct in line with international law, as ascertained by the Constitutional Court. Only renunciation of its cooperation with Germany would permit another state to evade this exercise of authority by the Constituitonal Court. Certainly, the constitutional requirement of the respect for international law could hamper effective international cooperation.

Generally, the German authorities and judges try to harmonize the requirements of the Basic Law and the necessity of international cooperation. The German concept of certain values as laid down in the Basic Law should not establish an obstacle to international relations with other States. Therefore, the provisions of the Basic Law should be construed in a way that they would not exclude international cooperation, which is a constitutional principle derived from article 24 of the Basic Law.[48] However, these concessions to the international coopera-

[43] BVerfGE 58, 1 (34); BVerfGE 59, 63 (89).

[44] M. Hartwig, *Article 100, in* GRUNDGESETZ, MITARBEITERKOMMENTAR, HEIDELBERG para. 179 (D. Umbach & T. Clemens eds., 2002).

[45] BVerfGE 23, 288 (316); BVerfGE 36, 342 (365).

[46] Decision, *supra* note 1, para. 45.

[47] *Id.*; *see also* BVerfGE 75, 1 (18).

[48] *See* BVerfGE 58, 1 (41).

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tion are not unlimited. When acting on an international level Germany is not exempt from respecting the rules of its legal order,[49] including among them the principles of international law as incorporated by the Basic Law. Indeed, it would be paradoxical if the price of international cooperation were the sacrifice of international law, which should be the basis of all international relations. And as for international law, which is so often derided for lacking a mechanism of enforcement,[50] it is certainly an advantage if there is an international legal personality that takes charge of enforcing the international legal order as its own business, at least to the degree that international law forms part of its porper legal order.

II. Remarks on the Principle Male Captus, Bene Detentus

The material question of international law dealt with by the Constitutional Court in this somewhat bizantyne procedural manner – within an individual constitutional complaint on the violation of the right to the lawful judge – was decided on the basis of an analysis of the given State practice. The Constitutional Court, in a traditional approach, took into consideration the State practice, especially decisions by municipal courts. At the same time, the Court underlined the importance of acts of the decisions of international courts, although they are only qualified as auxiliary means for the determination of international law under article 38 of the Statute of the ICJ.[51] The Constitutional Court justified this by pointing out that international organizations and international courts have become important actors of international law in recent years.[52]

The Constitutional Court found out that there is contradictory case law concerning this problem; the majority of national and international courts, however, allow extradition in cases in which a person was lured to leave his country by trickery.[53] With respect to these contradictions, the Court could make out neither a permanent practice nor a uniform legal opinion that extradition is excluded by international law in these given circumstances. This result is not at all revolutionary, not even surprising, but merely in line with the present state of international law on the question.[54]

However, the statements of the Constitutional Court are very prudent and it tried to avoid any generalization by narrowly delimiting the subject of its legal verification. In this sense it

[49] It is in this line of reasoning that the Constitutional Court requires the application of the German constitutional law even in cases where German Courts have to apply foreign law, see, for example, BVerfGE 31, 56 (74) – or that even acts of an international organization which have to be applied by German organs are subject to a constitutional control, see, for example, BVerfGE 89, 155 (174).

[50] M. Bothe, *International Obligations, Means to Secure Performance*, *in* II Encyclopedia of Public International Law 1280 (R. Bernhardt ed., 1995).

[51] 15 U.N.C.I.O. Docs. 355.

[52] Decision, *supra* note 1, para. 53.

[53] *In re* Schmidt, 3 W.L.R. 228 (H.L. 1994); 721 F.2d 967 (4th Cir. 1983); *Re* Harnett and the Queen, 14 Canadian Criminal Cases 6 (Ontario High Court of Justice 1973).

[54] M. HERDEGEN, DIE VÖLKERRECHTSWIDRIGE ENTFÜHRUNG EINES BESCHULDIGTEN ALS STRAFVERFOLGUNGSHINDERNIS, EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 1 (1986); S. WILSKE, DIE VÖLKERRECHTLICHE ENTFÜHRUNG UND IHRE RECHTSFOLGEN, 103 (Berlin, 2000) (stating, however, that international law allows a trial only against a person who was lured to the forum State, not against a person who was abducted by force).

expressly emphasized that its decision did not touch upon the question whether extradition is prohibited if the subject of extradition had been abducted by violence.[55] The Court made a point of noting that the present case exclusively concerned the luring of a person away from his country by trickery, but the leaving the home country under these circumstances can still be viewed as voluntary.

III. The Role of the American Assurance

A very remarkable aspect of the decision is the importance attached to the assurance of the United States of May 22, 2003 that the Yemenis would not be put before a military court pursuant to the Presidential Military Order of November 13, 2001. This assurance gains a central point in the Court's reasoning, as it is considered to be an effective guarantee against any infringement of the rights of the two persons during the criminal process in the U.S.A. In this sense, the effectiveness of the protection of the fundamental rights as laid down in the Basic Law depends on the reliability of a foreign government's assurance. This might be subject to criticism, but it is not the first time that the Court has referred to guarantees of foreign governments. Even in an asylum case it once decided that the assurances given by the government of Sudan would be sufficient to guarantee that there will be no violation of human rights that might otherwise have justified the granting of asylum pursuant to article 16a of the Basic Law.[56]

International cooperation in legal affairs would come to an end if controversies regularly led to the exclusive reliance on the guarantees by one's own legal order and if there were no trust in the assurances of the other State. The Constitutional Court, with reference to former case law,[57] pointed out that in cases in which extradition is requested on the basis of an international treaty "the requesting state is, in principle, to be shown trust as concerns its compliance with the principles of due process of law and of the protection of human rights,"[58] In the present case such a presumption of "State innocence" must be defended all the more, as Germany and the U.S.A. intensified their cooperation in the field of criminal prosecution by signing an agreement on October 14, 2003.[59]

Nonetheless, there was reason to analyse the content of the assurance very carfully in order to provide that the Yemenis would not be subject to anti-terrorist measures incompatible with human rights, such that extradition would be excluded under the German Basic Law.

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[55] Decision, *supra* note 1, para. 54. However, it should be mentioned that even in cases in which a person was lured by an under cover agent to leave a country, that country might be entitled to restitution for violation of international law. BverfG, 2 BvR 1451/85 of 3.6.1986 (unpublished). Therefore, the *Bundesgerichtshof* (Federal Court of Justice) suspended a trial in order make the restitution, as required by the respective state, the Netherlands. The Federal Court of Justice emphazised that the restitution does not hinder Germany's right to punish the person. BGH, MONATSSCHRIFT DES DEUTSCHEN RECHTS 427 (1987). If a trial is possible depends on the procedural question if it is admissible if the accused is absent.

[56] BVerfGE 93, 248 (256); Justice Sommer is very sceptical in his dissenting opinion with respect to the recognition of the assurance given by the Sudanese government.

[57] BverfG, 2 BvR 685/03 of 24.6.2003.

[58] Decision, *supra* note 1, para. 75.

[59] Not yet published, it is mentioned in Decision, *supra* note, para 77.

The passages of the decisions concerning the Court's reliance on the American assurance are somewhat inconsistent. Whereas, in its recitation of the facts of the case, the Constitutional Court wrote that the assurance of the United States guarantees that the persons will not be tried before a military court pusuant the Presidential Military Order of November 13, 2001,[60] in its reasoning on the merits of the case, the Constitutional Court extended the interpretation of the assurance by suggesting that it also excluded the detention of the Yemenis in the Guantánamo camps established for enemy combattants.[61] But even if the assurance has this broader meaning it would not cover situations which concern persons who can be qualified as material witnesses, who likewise have a precarious position under current American jurisprudence, as may seen in the many cases of persons who were arrested with a warrant qualifying them as material witnesses.[62] In the event that Yemenis might be acquitted of the criminal charges that supported the extradition request, the American assurance upon which the Court relied does not exclude the possibility that they might be requalified as material witnesses and therefore detained for an unlimited period of time. This would bring them into a position clearly out of line with fundamental principles as laid down in the German Basic Law.

Apart from all other reflections on the crucial role that the assurance plays in the Court's reasoning, there is an unmistakeable tone of concern in the Court's decision about the compatibility of the way in which the U.S. administration is dealing with persons suspected of terrorist activities. There have been discrepancies in criminal cases between Germany and the United States, most of them concerning the death penalty.[63] In recent times, questions about the violation of the consular convention were at stake.[64] The present case reaches much further. It does not concern only an internationally disputed type of punishment or the respect of a provision of an international treaty, but it concerns the whole special procedure of

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[60] *See supra* note 10.

[61] Decision, *supra* note 1, para. 76.

[62] A material witness can be kept in detention for an unlimited period of time, if he is considered to be a witness in a grand jury case and if there is a risk of danger or flight. A person can be declared a material witness only, if a court issues a warrant; the material witness enjoys legal protection. After September 11, 2001 many persons were detained because they allegedly were material witnesses. In the recent Padilla case, the court decided that Padilla, being an American citizen who was arrested on American soil, cannot be detained as an enemy combatant, but that it is possible to detain him as a material witness. Padilla v. Rumsfeld, 352 F.3d 695, 699 (2nd Cir. 2003) *available at* http://news.findlaw.com/cnn/docs/padilla/padillarums121803opn.pdf.

That would mean that he can be detained until the end of the proceedings in which he might be a witness. Taking into account that investigation on the terrorist crimes against the U.S.A. are going on and that by now only one person has been accused on the events of September 11, 2003 – Moussaoui, and his proceedings were ended in first instance by U.S. District Judge Brinkema pursuant to the unwillingness of American authorities to put evidences at the judge's disposal which she considered necessary – it is not unlikely that the detention as a material witness may last many years. For further informations on the status of a material witness, see http://www.rcfp.org/secretjustice/terrorism/materialwitness.html.

[63] Under article 102 of the GG, the death penalty is inadmissible; this means in a recent interpretation that an extradition to a State where the extradited person risks the death penalty is inadmissible. In this sense, article 8 of the German Law on International Cooperation in Legal Affairs does not allow an extradition if there is no guarantee that the death penalty will not be applied.

[64] *See* LaGrand Case (Germany v. U.S.), 2001 I.C.J. No. 104 (June 27).

treatment of suspected terrorists. And it is quite clear that German authorities would have run into trouble with the requirements of the Basic Law if they had extradited the two persons without any guarantee that these new forms of criminal procedure, being pursued in the United States, would not be applied. The German Constitutional Court does not attempt an analysis of the U.S. law. But the central role which the assurance plays in the Court's reasoning must lead to the conclusion that the measures provided by the Presidential Military Order of November 13, 2001 are not covered by common values.

IV. Verification of the Facts

The Constitutional Court did not qualify the rejection by the ordinary courts to verify the facts on which the extradition claim is based as a violation of a fundamental right. Although section 10 paragraph 2 of the German Law on International Judicial Assistance in Criminal Matters[65] and article 14.3a of the extradition treaty between Germany and the U.S.A. allow the verification of such facts, the Constitutional Court decided that it is a question of ordinary law – not of constitutional law - whether or not the ordinary courts make use of this possibility.[66] Even an erroneous interpretation of ordinary law only exceptionally constitutes a violation of fundamental rights. There are no indications that such an exception exists in the given case. This reasoning means that Constitutional Court trusts in the adequate foundation of the charge against the two Yemenis and in the due process of law before the U.S. courts.[67]

V. The Extradition Law and Individual Rights

Although the case concerned the extradition of individuals the Constitutional Court had no reason to answer the widely discussed question: to what extent may an individual assert provisions of extradition treaties.[68] The Court was able to avoide this question because the core of the constitutional complaint was the allegation of a violation of the principle of the lawful judge, and within this constellation there was no place to decide the question if an individual may base a claim on an extradition treaty.[69]

D. Outlook

The war against terrorism will not be a "Blitzkrieg" on the battlefield, and still less before the courts. The rule of law includes a well-elaborated system of remedies for the individual against measures taken by the State and the exhaustion of these remedies requires time. The respect for the rule of law must not be interpreted as a form of friendly fire in the war against

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[65] V. 1982 (BGBl. I S. 2071) (last amended by the Act of 21 Juni 2002, v. 21.6.2002 (BGBl. I S. 2144)).

[66] Decision, *supra* note 1, para. 65.

[67] This reflects a permanent case law; the Constitutional Court always was very reluctant in establishing constitutional requirements for controling court decisions of foreign states in extradition cases; most often it held that the ordinary courts may verify the facts, especially criminal convictions, on which a request for extradition is based; but as a rule, ordinary courts shall rely on the correctness of the decisions of foreign courts. However, there is an obligation to verify the legality of such a decision with respect to minimum standards of international law, especially in convictions in absence, BVerfGE 59, 280 (282); BVerfGE 63, 332 (337); BVerfGE 75, 1 (19).

[68] T. Stein, *Extradition Treaties*, *in* II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 335 (R. Bernhardt ed., 1995).

[69] In a former decision, the Constitutional Court had denied that an individual can refer to provisions of an extradition treaty unless rights of an individual are expressly established. BVerfGE 46, 214 (219); *see also* BVerfGE 57, 1 (25).

terrorism. The values that are defended in fighting terrorism must not turn into collateral damage. The guarantee of these values could be harmonized with effective international cooperation if States could reach a common understanding on how to conduct the fight against terrorism, particularly in order to avoid complex procedures, which must overcome discrepancies in a case by case approach.

Another remark, which goes beyond the legal frame of the Yemeni extradition case, seems to be necessary. Terrorism has become a globalized phenomenon; it is not concentrated anymore in certain places. A crime planned in one part of the world may be perpetrated in another as the events of September 11, 2001, prove. Terrorists are now characterized by their mobility. Their strength is their internationalism. Therefore, they can be fought only on an international level, through cooperation between States. However, cooperation always is a two-way-relationship, rights and obligations lie with both sides. It will not work if the information and other forms of support only go in one direction. Unfortunately, by now the United States did not give any information which could be used in the only trials which successfully were conducted or are pending on the persons suspected to be involved in the destruction of the World Trade Center. This made it very difficult to get enough evidence in order to found a judgement, which will meet the requirements of the rule of law, a principle that embraces among other things the presumption of innocence.[70] The unwillingness of a State to make evidence available cannot lead to a reduction of the requirements necessary for the full foundation of a conviction. Therefore, the lack of information may end in an unjustified acquittal.

The commented decisions may serve as an example that all international cooperation must be based on a certain trust in the reliability of the State partners, and as far as there are controversies in the topic of the cooperation they have to be solved in a way that satisfies the opposing claims and serve the common (global) interest.

[70] The first decision – in the Motadasseq case, in which the accused was convicted to imprisonment of 15 years –now is pending before the Federal Supreme Court and according to the reports about this trial the federal judges are very reluctant if the evidences at the disposal of the ordinary court could justify a conviction. In the second case – the Mzoudi-case - the court removed the arrest warrant when it got the information that un unknown witness – the court presumes that it was Binalshib who is in U.S. detention – declared that Mzoudi was not involved in the preparation of the attack on the World Trade Center. On February 5, 2004 Mzoudi was acquitted by the Higher Regional Court of Hamburg for lack of evidence according to the principle *in dubio pro reo.*