Extradition, Human Rights, and the Public Order – The "Extradition to India" - Decision of the FCC

By Rainer Nickel

A. Introduction

The status and range of human rights in international relations is a politically delicate and legally contested topic. In a recent decision the Federal Constitutional Court was forced to concretize the relation between international human rights obligations, domestic constitutional rights laid down in the *Grundgesetz* and international duties following from extradition contracts between the Federal Republic and other UN member states. More precisely, in the "Extradition to India"-case the FCC had to deal with the crucial question of human rights adjudication: can an accused be handed over to a country where the police force is accused of "using torture as a regular instrument during the interrogation of apprehended persons" and whose correctional institutions are described as "keeping prisoners and detainees in custody under conditions which resemble a cruel, inhuman and humiliating treatment or punishment"?

A divided Second Senate of the Federal Constitutional Court delivered an answer in its judgement of 24 June 2003[1]: yes, an accused can be extradited to such a country unless there is a concrete basis for suspecting that the accused in the actual case will suffer torture or inhuman treatment. A majority of six judges upheld the decision of the *Oberlandesgericht* (*Higher Regional Court*) in Frankfurt am Main declaring the extradition admissible and found that it did not violate either the *Grundgesetz* (Basic Law – GG) or *ius cogens* in international law. The two dissenters, Justices Sommer and Lübbe-Wolf, disagreed. They claim that the right to human dignity (art 1.1 *GG*) and to personal freedom (art. 2.1 *GG*) demand further inquiry into the actual circumstances and conditions awaiting the detainee before he can be handed over to the authorities of the state requesting extradition.

[1] Case no. 2 BvR 685/03. The court's decision is published on its website www.bverfg.de (under *Entscheidungen*). Quotations from and references to the decision relate to the paragraphs of the internet version.

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This case highlights the delicate position of international human rights law as balanced between apology and utopia.[2] In 1793, Jeremy Bentham stated that "there is no right which, when the abolition of it is advantageous to society, should not be abolished".[3] 210 years later, and in the light of the United Nations Universal Declaration of Human Rights of 1948 and subsequent human rights agreements, Bentham's verdict seems to be completely outdated. "Our" contemporary notion of human rights clearly follows the pattern of the first article of the French "Déclaration des Droits de l'Homme" rather than the utilitarian approach to human rights favoured by Bentham: fundamental human rights are worldwide accepted as being universal and inviolable. As everybody knows, of course this does not mean that they are actually implemented throughout the world. Since their declaration in the Universal Declaration of 1948 and the human rights treaties that followed, the weakest points in human rights protection are – still – the exact contents of the rights guaranteed and the question about the guarantor of the actual rights. While some governments claim that there is a culturally determined interpretative latitude when it comes to the concrete contents of human rights, others claim that there are exceptional rules for exceptional situations, for example in wartime and in view of terrorism.[4] A culture of relativism, and in recent times a culture of "exceptionism", seems to gradually undermine the strict validity of human rights.

Nonetheless, modern societies usually protect their citizens against human rights violations by installing constitutional safeguards or other legislative acts transforming fundamental rights into the legal web of the domestic legal order. The crucial test of the actual existence of human rights begins when the protection of *non-citizens* against possible human rights violations *outside the domestic sphere* is at stake. As Hannah Arendt has pointed out, the idea of human rights has failed in practice largely when the protection of individuals against violations of their fun-

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[2] Martti Koskenniemi, From Apology to Utopia, Helsinki: Lakimiesliiton Kustannus, 1989.

[3] Jeremy Bentham, Anarchical Fallacies, reproduced in Jeremy Waldron (ed.), Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man, London and New York: Methuen, 1987, 53.

[4] The examples are well known, and the list is long: Governments in China and Indonesia claim their own interpretations of human rights, while Russia, for example, is frequently accused of using "terrorism" as an excuse for acts of extreme brutality against people in Chechnya. The treatment of the Guantanamo prisoners or the intentional killings of suspected Hamas terrorists by Israeli military forces in the West Bank and Gaza strip could also be mentioned here. For a critique of the definition of the Guantanamo detainees as "unlawful combatants", see Luisa Vierucci, What judicial treatment for the Guantanamo detainees?, *German Law Journal* Vol. 3 No. 9 - 1 September 2002. For a further analysis on the contemporary role of the US in the international legal order, see Martin F. Byers/Georg Nolte (eds.), *US Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2003. See, the review of this volume by Miia Halme in: 4 *German Law Journal* No. 12 (1 December 2003) – this issue.

damental rights was most needed.[5] Her concluding remarks referred to stateless persons whose fundamental rights thus were outside the orbit of defence by a nation state. Today's refugees, or persons affected by an extradition procedure, however, are in a comparable situation: if they face inhuman treatment in their country of origin or in the country demanding their extradition, then the protection of their human rights solely rest in the hands of the country they fled to.

B. The case: Extradition to India

I. The Case before the FCC

The accused, a former Indian and now Vanuatuan citizen, was arrested on 15 December 2002 at Munich airport. The arrest was based on an arrest warrant of the First Special Court in Alipore/ Calcutta from May 2002. In this arrest warrant the accused is charged of having obtained, by fraudulent means, in the years 1994 and 1995 an amount of 10,840,000 Indian Rupees (approx. 2,143,000 Euros) from the Allahabad Bank. Based on an international search the *Oberlandesgericht München* issued an arrest warrant and ordered that the accused be kept in preliminary extradition custody. In an official note dated 31 January 2003, the Indian Foreign Office requested the extradition of the accused for the purpose of criminal proceedings on the grounds of criminal conspiracy and fraud.[6]

With a court order of 7 March 2003 the *Oberlandesgericht München* declared the extradition admissible. The accused entered a formal objection claiming that the decision of the court violated his constitutional right to due process of law. Additionally, he claimed that the extradition was inadmissible because it violated the ordre public-reservation of paragraph 73 IRG (*Gesetz über den internationalen Rechtsverkehr in Strafsachen*/ statute on international legal co-operation in criminal matters).[7] He argued that the possible punishment – lifelong imprisonment for a property offence - was excessively long and that he was at risk from torture and maltreatment both during the criminal proceedings and in prison following possible conviction. The accused quoted a report of the German Foreign Office from May 2001 and another report from 25 March 2003 which mentioned frequent incidents of torture during police interrogations in India, and inhuman conditions in prisons there.[8]

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[5] Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft,* Munich: Hanser 1986 (The Origins of Totalitarianism, New York: Harcourt Brace Jovanovich 1951), 455.

[6] BVerfG (n.1), 2-4.

[7] Paragraph 73 IRG states: „Co-operation in legal matters is unlawful if it were in contradiction to fundamental principles of the German legal order."

[8] BVerfG (n. 1), 5-8.

In two subsequent decisions of 4 April and 30 April 2003 the *Oberlandesgericht* rejected the claims the accused had raised. In its first decision the court stated that the accused was charged with serious criminal offences which justify severe punishment, and that the possible sentence of lifelong imprisonment according to the Indian penal code was not disproportionate to the extent that it could be viewed as clearly excessive. The court also rejected the claims with respect to torture and inhuman prison conditions. While admitting that "according to the reports of the foreign office there are human rights violations committed by state organs" and that "although torture is forbidden by law, it represents a method of interrogation often used by police organs", the court argued that torture was "not intentionally promoted by the state". The Indian authorities "punish torturers, and the Indian state has in recent times started a campaign aimed at 'raising the awareness' ['*Bewußtseinserhöhung*'] among security forces".[9]

In its second decision the court repeated its finding that the extradition of the accused would not violate fundamental principles of the German legal order. In addition to its former arguments the court also stressed that India had ratified the United Nations Convention Against Torture (CAT), and that Germany had entered a bilateral extradition treaty with India in the year 2001 in full awareness of the reports of the German Foreign Office, indicating that the human rights violations mentioned in the reports did not represent normality, but had exceptional character. The court held that there were no actual and concrete indications for the assumption that the accused would be subject to inhuman treatment in India. Any remaining risk could not be condensed to an actual and immediate danger.[10]

Between the two court decisions, on 23 April 2003, the German Foreign Office communicated to the Indian embassy in Germany that the federal government had approved the extradition of the accused to India "according to the principles of the German-Indian treaty on extradition from 27 June 2001".[11]

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[9] BVerfG (n. 1), 12-13.

[10] BVerfG (n. 1), 19-20.

[11] BVerfG (n. 1), 16. – The German extradition procedure consist of two parts: First, an upper state court (*Oberlandesgericht*) has to declare the extradition admissible, and in a second step the German Foreign Office approves the extradition in a diplomatic note ("*Verbalnote*") addressed to the country asking for the extradition of the accused. The Foreign Office may deny the extradition of an accused, e.g. for political reasons, even if the *Oberlandesgericht* declares the extradition admissible. It cannot, however, override a negative decision of the *Oberlandesgericht*.

On 5 May 2003 the accused lodged a constitutional complaint and requested a temporary injunction stopping the execution of the extradition. In his constitutional complaint against the decisions of the *Oberlandesgericht* the accused argued that the findings of the court were arbitrary and unconstitutional, thus violating Articles 1.1, 2.2, and 3.1 of the Grundgesetz. The complaint is based on two main points: firstly, the accused challenges the findings of the *Oberlandesgericht* concerning the risks of torture and maltreatment of criminal suspects. Citing the 1998 annual report of Amnesty International as well its February 2003 short country report on India, where torture and maltreatment are described as "widespread" or even "daily occurrences" in India, the accused claims that it was impossible for him to deliver more precise information about the risks he is facing as an individual. Secondly, the accused pointed to prison conditions: according to the 1998 Amnesty annual report, Indian prisoners and detainees are kept in custody under conditions which constitute cruel, inhuman and degrading treatment or punishment. The German Foreign Office's country report on India from 2001 also describes the prison conditions, especially in larger prisons, as "desolate". As these reports do not contain any indications that an actual danger of being imprisoned under the described desolate conditions is imminent only for certain groups of persons or under certain circumstances, the accused concludes that it was not reasonable for the *Oberlandesgericht* to find otherwise, nor why it stated that there were no actual indications of imminent danger that the accused will be imprisoned under those conditions.[12] Finally, the accused claims that a possible lifetime imprisonment for property offences under desolate prison conditions represents an excessive and thus unconstitutional punishment.

II. The decision

In its decision of 24 June 2003 the Second Senate of the FCC, with a majority of six judges, declared the constitutional complaint of the accused inadmissible and rejected his request for a temporary injunction.

1. The Majority Opinion

The court's majority began from the point that, according to the jurisdiction of the FCC, German courts examine whether an extradition is in accordance with the minimum standards of international law and the indispensable fundamental constitutional principles of the public order of the Federal Republic pursuant to article 25 *GG*.[13] The principle of proportionality counts as such a principle. Thus, German

[12] BVerfG (n. 1), 22-26.

[13] Article 25 GG reads: "The fundamental principles of the international legal order are part of the Federal legal order."

authorities are not allowed to extradite an accused if he is facing an extraordinarily severe punishment in the country seeking his extradition, or if the punishment is cruel, inhuman, or humiliating. The court's majority also stressed that the Federal Republic is part of the international legal community, and that the *Grundgesetz* demands respect for the legal orders of other countries, even if they are not in accordance with the internal views in Germany. In a central part of its argument, the majority opinion underlines the function of this "open" structure of the Grundgesetz: "If the international co-operation in extradition matters rests in mutual interest, and if the discretion of the Federal government in foreign policy matters has to be preserved, then the courts must regard as an insuperable obstacle towards an extradition only the violation of indispensable principles of the German constitutional order."

In the following part of the judgement the court discusses the claim of the accused that he is facing the risk of torture and maltreatment. The fact that torture and inhuman treatment constitute violations of the minimum standards of international law and the indispensable fundamental constitutional principles of the public order of the Federal Republic seems to be so obvious that the FCC does not even discuss it. Instead of considering the nature of the minimum standards and fundamental principles courts have to take into consideration, the majority opinion concentrates on the question of whether the *Oberlandesgericht* assessed the risks the accused is facing in an appropriate manner. In this respect, the majority opinion stresses that the interpretation and application of laws below the constitutional level (for example, paragraph 73 IRG) is the task of the lower courts. Thus, the FCC states that decisions of the *Oberlandesgericht* have to be measured on the criterion of whether the application of the laws or the procedure thereof are based on extraneous and therefore arbitrary considerations.[14]

The majority opinion holds that this is not the case here. It states that the reasoning of the *Oberlandesgericht* remained within the limits of its judicial discretion. "Surprisingly, although the majority opinion concluded merely a few sentences before that it does not control the application of "regular law", the ensuing parts of the judgement contain a detailed discussion of what the *Oberlandesgericht* said or allegedly meant to say[15] when it stated that the accused does not personally face an actual risk of being tortured. In this context the majority opinion also refers to the wording of Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which reads as follows:

[14] BVerfG (n. 1) 33-34.

[15] BVerfG (n. 1) 35. In the FCC's daily practice this is a popular technique to save judgements where the reasoning is obscure, opaque, or contradictory, but where the findings can be defended on other grounds, from the verdict of being arbitrary and thus unconstitutional.

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[16]

The Court concluded in view of these provisions, that extradition to countries "that show a permanent practice of gross and systematic violations of human rights" will "regularly indicate a probable violation of fundamental principles of the German constitutional order". In the absence of such conditions, "substantial grounds" for a "real risk" of being tortured have to be proven with regard to the single, concrete case of the accused.[17] In the following sections of the judgement the Court holds that the *Oberlandesgericht*, by referring to the fact that torture is forbidden in India and that India had lodged a campaign aiming at 'raising the awareness' ('*Bewußtseinserhöhung*') among security forces, rejected the existence of a "real risk" for the accused of being tortured on reasonable grounds.[18]

In a second line of reasoning, the majority opinion defends the position of the *Oberlandesgericht* by referring to the extradition treaty between India and Germany. Although this treaty has not yet been ratified by the *Bundestag*, the Justices argue that its mere existence indicates the lack of a "real risk" for the accused: "The fact of the conclusion of the treaty supports an interpretation of the report [of the Foreign Office] - with its heterogeneous statements which are concentrated on the situation of political refugees – according to which a systematic practice of human rights violations especially in the prison system does not exist, because otherwise an extradition treaty would not, at least not in the year 2001, have been signed under the supervision of the Foreign Office."[19] What the Court in these rather opaque words here seems to suggest is that the existence of the extradition treaty, although not yet fully binding, indicates the non-existence of systematic human rights violations in India.

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[16] Upon ratification of the convention, Germany has made the following reservation: "This provision prohibits the transfer of a person directly to a State where this person is exposed to a concrete danger of being subjected to torture."

[17] BVerfG (n. 1) 36-37.

[18] BVerfG (n. 1) 40-41.

[19] BVerfG (n. 1), 43.

However, the Court interestingly goes on to rule that even without ratification of the treaty on the German side, India would nonetheless violate its obligations under international law if it failed to treat the accused according to the minimum standards of international law: the Court stressed that although it is formally not binding, the extradition treaty already produces preliminary powers, materially binding the treaty parties on the treaty conditions, and that India has to comply with these conditions.[20] Additionally, the Senate's majority stresses that the fact that during the period following the signing of the extradition treaty the Foreign Office has had regard to the treaty clearly shows that, even if in India torture and maltreatment are generally widespread, the Federal Government holds with regard to the persons extradited to India with reference to the German-Indian extradition treaty that in their cases the minimum standards of human rights have been met.[21]

With similar arguments the Court also rejects the claim of the accused that he will face cruel, inhuman, and humiliating treatment if imprisoned. With regard to the prison conditions, the Court holds that the same principles apply as with regard to torture during interrogations: notwithstanding the prison conditions for a major part of the detainees, "no hints" can be identified that "especially with regard to the persons extradited by Germany to India the minimum standards of human rights were not met".[22] Finally, the FCC holds that the possible punishment the accused faces does not touch the core of the principle of rule of law ["*Rechtsstaatsprinzip*"]. It argues that, even if in the concrete case of the accused lifetime imprisonment may represent a hardship, the core of the principle is touched only if the punishment in question is purely and simply disproportionate. By referring to the serious crimes with which the accused is charged, the Court finds that "the sanction the Indian democratic lawmaker has determined" is not "intolerably hard".[23]

2. The dissenting vote

The two dissenting Justices share the premises of the view of the majority. They also start off from the point that the decision as to whether an accused can be extradited or not has to be measured according to Article 25 *GG* and the fundamental principles of the constitutional order of the *Grundgesetz*. Justices Sommer and Lübbe-Wolff, however, come to a different conclusion than their colleagues. They claim that the decisions of the *Oberlandesgericht* violated Articles 1.1 (the protection

[20] BVerfG (n. 1), 43-45.

[21] BVerfG (n. 1), 46.

[22] BVerfG (n. 1), 53.

[23] BVerfG (n. 1), 56-57.

of human dignity) in connection with 2.1 (the right to personal freedom) and 19.4 (the right to an effective judicial remedy, or due process of law) of the *Grundgesetz*.[24] First, the Justices claim that, with regard to the extradition procedure, from the minimum standards of international law and the fundamental principles of the constitutional order also follow certain requirements for the judicial fact-finding process. By referring extensively to the case law of the FCC in extradition cases, the dissenters claim that the scale of judicial obligation to detail the facts of the case may depend upon whether the individual circumstances demand further inquiry, but that the constitutional requirements are definitely not met if the fact-finding measures of the court are inappropriate to secure the right of the person affected to a due process of law ["effektiven gerichtlichen Schutz"], thus undermining the material rights of the person affected by procedural means.[25]

In the case of the accused, the dissenters argue, the *Oberlandesgericht* violated its duties with respect to the fact-finding process because it did not take the claim of inhuman prison conditions seriously.[26] In view of the report of the German Foreign Office and the statements on the prison conditions therein, the Justices claim that the evaluation of the facts in the court's decisions "is not intelligible", and that the *Oberlandesgericht* has violated its fact-finding duties following from the constitution. By extensively referring to the Foreign Office's report on India, and by quoting facts that were not mentioned in the ruling of the Court's majority (sic!), the dissenters argue that there is an actual risk that the accused will be imprisoned under inhuman conditions, especially if he falls under "category C" of the Indian prison system. They claim that a long-time imprisonment as a "category C"-prisoner would not only indicate a violation of fundamental principles of the German constitutional order and the constitutional rights of the accused (Articles 1.1 and 2.1 of the *GG*), but it would also violate Article 3 of the European Convention on Human Rights, citing the famous Soering-decision of the ECHR.[27] Thus, the dissenters conclude, it was the duty of the *Oberlandesgericht* to further examine whether the accused would be imprisoned as a "category C" prisoner, and "it was neither hindered to do so for

[24] Dissenting opinion, BVerfG (n. 1), 61-62.

[25] Dissenting opinion, BVerfG (n. 1), 62.

[26] Dissenting opinion, BVerfG (n. 1), 63-67.

[27] Soering v UK (1989), case no. 1/1989/161/217, decision of the ECHR from 26 June 1989, Neue Juristische Wochenschrift 1990, p. 2183. In paragraph 87 of the decision the ECHR holds that the provisions of the Convention and especially its article 3 must "be interpreted and applied so as to make its safeguards practical and effective". In paragraph 100-111 the Court argues that degrading or inhuman prison conditions can represent a violation of article 3 of the Convention. – Judgements of the ECHR are available on its website: http://www.echr.coe.int.

reasons of international law, nor was it allowed to abstain from it for diplomatic considerations".[28]

In a second line of reasoning, the dissenters criticize the way in which the *Oberlandesgericht* and the Senate's majority opinion refer to the extradition treaty between Germany and India. By stressing that the (critical) report of the Foreign Office on the "desolate" prison conditions in India was published only weeks before the treaty was signed, Justices Sommer and Lübbe-Wolff argue that it is hard to understand how this treaty may indicate acceptable prison conditions. In addition, they state that under the constitutional order, this indicative effect is not irrefutable: "*Der Rechtsstaat kennt keine von Rechts wegen jeder Widerlegung entzogenen Annahmen über die Wirklichkeit*" [In a state ruled by law there cannot be any completely irrefutable statements on reality.].[29] In conclusion, it was the constitutional duty of the *Oberlandesgericht* to further explore the prison conditions the accused faced if extradited to India.

B. Extradition and the procedural dimension of fundamental rights

The decision of the FCC deserves criticism in a number of respects. The form of judgement is not appropriate – the case deserved a decision of admissibility – nor does the majority opinion convince in any respect. Moreover, both the majority and the dissenters omit to mention an important aspect of international law.

The FCC disposes of the case by declaring it "inadmissible". In accordance with Article 93a.2 of the Statute on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*, *BVerfGG*), the FCC can declare a constitutional complaint inadmissible if the constitutional questions raised are already clarified in the case law of the Court, or if the complaint has no chance of succeeding. Both the majority and the dissenters seem to hold that the fundamental constitutional questions concerning the standards and principles on which an extradition has to be measured have sufficiently been clarified in past judgements of the FCC. The actual differences within the Court, however, show that this is not the case. At the core of the argument here lies the essential question of the standard of fact-finding necessary to protect the rights of the accused in the extradition procedure, and not the factual question about how the facts, e.g. the prison conditions and the respective reports from the Foreign Office or Amnesty International, are to be correctly interpreted.

In the opinion delivered by the majority of the Second Senate, the aspect as to the precise nature of the "fundamental principles of the constitutional order" remains

[28] Dissenting opinion, BVerfG (n. 1), 68.

[29] Dissenting opinion, BVerfG (n. 1), 70.

astonishingly vague. Only the dissenting opinion specifies what effect these principles have, or should have, on the way courts are required to handle factual uncertainties and the consequences such uncertainties awaiting the accused in the country demanding his extradition should have upon the lawfulness of the extradition. As the dissenting opinion defends its position with reference to former judgements of the Senate, it appears rather unusual that the Court's majority ignores this aspect and does not even mention a possible change in the Senate's reasoning in this matter.

Moreover, the majority missed another chance to clarify its position with regard to "decisions under condition of uncertainty". Three years previously, the Court had the first opportunity to reflect upon the standards of fact-finding in extradition cases. In the "Extradition to the Russian Federation" case[30], a Russian citizen, against whom a Russian arrest warrant was issued and extradition proceedings begun, claimed that prison conditions in the Russian Federation were inhumane and were approaching the level of torture. The accused referred to various newspaper articles and other sources describing very bad conditions in Russian prisons. In its decisions on the lawfulness of the extradition, the *Kammergericht* Berlin cited the diplomatic note (*Verbalnote*) of the German Foreign Office to the Russian authorities, which stated that "the German side expects that the accused will be held in a prison that meets the standards of the European Convention on Human Rights". On the grounds of this note the *Kammergericht* found that there were no reasons to believe that the German ordre public (Art. 73 IRG) would be violated. It rejected further inquiries into the prison conditions in Russia, and declared the extradition lawful.

The accused lodged a constitutional complaint and requested a temporary injunction. The first chamber of the Second Senate issued a temporary injunction and stopped the extradition procedure. In its decision the Court stated that it was dubious whether the *Kammergericht* had met the standards of a thorough investigation into the background facts of the case. Additionally, the Court emphasized that further scrutiny was required as to whether it was possible for the *Kammergericht* to refer solely to the diplomatic note of the Foreign Office when stating that the standards of the European Convention on Human Rights would be met.[31] As the case was later settled out of Court, however, the FCC did not have a chance to further concretise the level of constitutional scrutiny applicable in such cases.

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[30] Case no. 2 BvR 1430/00, decision from 24 August 2000 (temporary injunction), reprinted in NJW 2001, 3110. The decision can also be found on the website of the Court (www.bverfg.de). Referrals and quotations relate to the paragraphs of the internet version.

[31] BVerfG (footnote above), 11.

The fact that the Second Senate, in the "Extradition to India" case again missed the chance to clarify what exactly the minimum standards are might have its cause in a tactical manoeuvre; the more precise legal standards are defined in a decision of the Senate, the less discretion the FCC has in individual cases. For lawyers, their clients, and the *Oberlandesgerichte*, though, this situation means continuing uncertainty.

A second, even more striking, aspect concerns the unclear positioning of the decision with regard to procedural safeguards for material rights. As the dissenting opinion rightly points out, the decision fails to defend fundamental constitutional rights such as human dignity (Art. 1.1 *GG*) and the right to personal freedom (Art. 2.1*GG*) against factual devaluation. These rights, and also the right not to be tortured or not to be treated inhumanly according to Art. 3 of the European Convention on Human Rights, have an additional *procedural* dimension. The ECHR has made this clear in its *Soering*-decision from 1989. In this decision the ECHR stressed that that the provisions of the Convention and especially its article 3 must "be interpreted and applied so as to make its safeguards practical and effective".[32] Similarly, in its famous *Mülheim-Kärlich* decision from 1979[33], the FCC found that particularly in circumstances where public authorities have to assess risks to the life and health of individuals, the fundamental rights laid down in the *Grundgesetz* possess also a procedural dimension; the public authorities have to ensure that the procedural design, i.e. the conditions under which the outcome is determined, take the rights at stake into account. This means that in the context of extradition, comparable to the situation of (political) refugees, a standard of strict *procedural* scrutiny is needed to ensure the effective execution of otherwise gradually devaluated rights.

In addition to this, one can observe that the reasoning of the majority opinion is not in accordance with a fundamental principle of international law. Traditionally, international law attributes acts of individuals who act as state organs exclusively to the state. State responsibility neither depends on nor implies the legal responsibility of individuals.[34] Therefore it is not a valid argument to state that the Indian authorities pursue and punish torturers, as the Court's majority does, and to use this fact in order to justify that India is not a state where torture is massive, if at the same time even the German Foreign Office describes acts of torture as frequent incidents. Even if the Indian state is more active in this respect nowadays, and in

[32] ECHR (footnote 27), paragraph 87.

[33] BVerfGE 53, 30.

[34] Andre Nollkaemper, Concurrence Between Individual Responsibility And State Responsibility In International Law, 52 *International and Comparative Law Quarterly* 2 (2003), 615.

doing so tries to fulfil its duties implied in the anti-torture convention, it is still responsible for the acts of its authorities. The question whether a state violates the anti-torture convention or Article 3 of the European Convention on Human Rights does not depend upon the motives of the responsible state.

The irrelevance of individual responsibility here can be illustrated by the judgement of the European Court of Human Rights in Selmouni v France. In considering the responsibility of France for an act of torture by an individual police officer, the Court noted that the issue of guilt of the French police officials for the alleged acts of torture is a matter for the jurisdiction of the French courts and that '[w]hatever the outcome of the domestic proceedings, the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under [article 3 of] the Convention.'[35] Even if a state does prosecute and punish incidents of torture, it is still responsible under international law.

The statement of the six concurring judges of the Second Senate that there are no signs of "systematic" torture suggests that a state has to support these incidents - or has to be unable or unwilling to stop them – in order to be responsible for such acts. In doing so, they miss the point. Under international law, only the sheer fact of "mass violations of human rights" (Article 3.2 of the UN Convention against Torture) counts. Even if a state is willing to fight against such mass violations, and takes steps to prevent them, it is still responsible for actual violations of human rights.

Moreover, the majority does not exactly follow the wording of Article 3.2 of the UN Convention against Torture when defining the minimum standards of international law according to Article 25 *GG*. The Court's reasoning suggests that a "consistent pattern of gross, flagrant or mass violations of human rights" is equivalent to "systematic violations". In the end, the Court suggests that only violations supported by the respective state is "torture" prohibited by Article 25 *GG*. This interpretation, however, is also not convincing. The Court does not cite any supporting source for this opinion, nor does it refer to any other judgement, decision, or commentary supporting its narrow interpretation of the definition of torture in an UN document when applying it in the German constitutional context. Additionally, negligence of the responsible state, or even its incapability to stop such mass violations of human rights does not exclude its responsibility under international law. Why should it then when it has become part of *national law*, as it is the case with Article 25 of the *Grundgesetz*?

[35] Selmouni v France, ECHR Reports V (1999) 29 EHRR 403, para 87.

Finally, it will be in fact very difficult, if not almost impossible, to find a country where torture and inhuman treatment by police authorities or prison guards is *not* a crime forbidden in the respective national legal order, at least in the form of symbolic law. Under these circumstances, vague information about "campaigns raising the consciousness of security forces" can hardly replace the degree of certainty that is necessary to promote and safeguard an effective protection of the individual against possible violations of its human rights. In its "Extradition to India" decision the FCC has lowered the standards of judicial scrutiny to a critical degree. As the dissenting Justices Sommer and Lübbe-Wolf correctly state, this bow to the smoothness and effectiveness of international legal co-operation violates fundamental principles of the German legal order – and it brings a touch of Jeremy Bentham's ghost with it.

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