Order of the Second Senate of 5 November 2003

- 2 BvR 1506/03 -

in the proceedings on the constitutional complaint of Mr. Al-M., a Yemeni citizen,

... and his motion for a temporary injunction

R U L I N G :

The constitutional complaint is rejected as unfounded.

This disposes of the motion for a temporary injunction.

G R O U N D S :

A.

By way of his constitutional complaint, the complainant challenges orders of the Frankfurt am Main Higher Regional Court *(Oberlandesgericht)* that declared the complainant's extradition to the United States of America for criminal prosecution admissible and rejected the remonstrances that the complainant made against the orders as unfounded. *1*

I.

1. According to his own statement, the complainant is an adviser of the Yemeni Minister for Religious Foundations in the rank of an undersecretary of state and imam of the Al-Ihsan Mosque in Sanaa/Yemen. *2*

He was arrested in Frankfurt am Main on 10 January 2003, together with his secretary. The arrest was based on an arrest warrant of 5 January 2003 issued by the United States District Court for the Eastern District of New York. The United States prosecution authorities charge the complainant with having provided money, weapons and communications equipment to terrorist groups, in particular Al-Qaeda and Hamas, and with having recruited new members for these groups, between October 1997 and his arrest. *3*

Instrumental in making the complainant travel to Germany were conversations that a Yemeni citizen maintained with the complainant in Yemen in an undercover mission of the United States investigation and prosecution authorities. The confidential informant convinced the complainant that he could bring him into contact with another person abroad who was willing to make a major financial contribution. In this context, it is controversial for what purposes the money was supposed to be donated. According to the statement made by the complainant's secretary in his interrogation by the German investigation authorities in which he was heard as a person charged with a criminal offence, the decision to travel to Germany was based on the complainant's voluntary decision. *4*

2. On the basis of the order of the Frankfurt am Main Higher Regional Court of 14 January 2003, the complainant was placed under provisional arrest pending extradition. On 24 January 2003, the Embassy of the United States sent a request for the complainant's extradition for criminal prosecution to the federal government. The request for extradition was based on the extradition treaty between the Federal Republic of Germany and the United States of America of 20 June 1978 (Federal Law Gazette, *Bundesgesetzblatt*, 1980 II pp. 646 and 1300) in conjunction with the supplementary treaty of 21 October 1986 (Federal Law Gazette 1988 II p. 1086; 1993 II, p. 846). The arrest warrant of 5 January 2003 and a written affidavit by the Assistant U.S. Attorney of the Eastern District of New York in which she expounded the state of the investigations in the United States were enclosed with the request for extradition. *5*

3. Upon an application made by the public prosecutor's office, the Higher Regional Court ordered, in its order of 13 February 2003, that the provisional arrest be continued as formal arrest pending extradition, and at the same time gave the U.S. authorities the opportunity, pursuant to § 30.1 of the Law on International Judicial Assistance in Criminal Matters *(Gesetz über die internationale Rechtshilfe in Strafsachen)* of 23 December 1982 (Federal Law Gazette I p. 2071), last amended by the Act of 21 June 2002 (Federal Law Gazette I p. 2144), to complement the extradition documents until 31 March 2003 with a view to the offences with which the complainant was charged. Thereupon, additional extradition documents were submitted to the Higher Regional Court. They included the affidavit by an FBI investigator that expounded the specific acts with which the complainant is charged under criminal law. *6*

In its order of 24 April 2003, the Higher Regional Court confirmed its order of formal arrest pending extradition. The court held that after the complementary documents from the United States had been received, the complainant was now charged with membership in a terrorist association. From the perspective of German criminal law, the activities with which the complainant was charged justified to charge the complainant with offences pursuant to § 129, § 129a and § 129b.1 of the German Criminal Code *(Strafgesetzbuch)*. *7*

4. In several diplomatic notes, the last one of which is dated 27 March 2003, the Embassy of the Republic of Yemen expounded to the Federal Foreign Office *(Auswärtiges Amt)* its opinion that the complainant had been abducted from Yemen to Germany contrary to international law, and circumventing the Yemeni constitution's ban on the extradition of Yemen's own citizens. The federal government was requested to repatriate the complainant to Yemen. *8*

5. In a verbal note of 22 May 2003, the United States Embassy assured that the complainant would not be prosecuted by a military tribunal pursuant to the Presidential Military Order of 13 November 2001 (U.S. Federal Register of 16 November 2001, Vol. 66 No. 222, pp. 57831 *et seq.*) or by any other extraordinary court. The assurance was given preserving the United States' legal opinion that the military commissions provided in the Presidential Military Order are no extraordinary courts within the meaning of Article 13 of the extradition treaty between Germany and the United States of America. *9*

6. a) In the further course of the extradition proceedings, the complainant sought to achieve, by means of an application, that all facts stated in the request for extradition that were attributable to statements of the confidential informant not be used in the decision about the admissibility of the request for extradition, and that the extradition itself be declared inadmissible. The complainant put forward that he had been abducted from Yemen to Germany contrary to international law in order to circumvent Yemeni law on extradition. He further alleged that an extradition to the United States infringed the minimum standards that international law requires for a state governed by the rule of law. According to the complainant, United States authorities use, in the case of persons who are charged with an offence and who are suspected of terrorism, methods of interrogation that fall under the ban on torture pursuant to Article 3 of the European Convention on Human Rights and Article 1 of the United Nations Convention against Torture. *10*

The complainant argued that contrary to Article 14.3 letter a number 2 of the extradition treaty between Germany and the United States of America, the Higher Regional Court had not examined the evidence for the charge. This also infringed § 10.2 of the Law on International Judicial Assistance in Criminal Matters. The complainant also argued that he could not be extradited because the offences with which he was charged had not been committed in the area of applicability of the Basic Law, as is required by the relevant provisions in German criminal law. Moreover, the extradition documents did not contain the sufficient justification of an offence that specified the time, place and manner of its commission. The complainant concluded that the ordering of surveillance measures in Frankfurt am Main by German investigating authorities in the framework of legal assistance had been illegal so that the information thus obtained could not be used. *11*

b) In its order of 18 July 2003, the Frankfurt am Main Higher Regional Court declared the complainant's extradition admissible and ordered his further remand in custody. The court held that the offences with which the complainant was charged in the United States arrest warrant in conjunction with the investigators' affidavits that had been submitted were punishable, and extraditable, pursuant to the law of both states. No reasons existed that were contrary to extradition. 12

The court further held that the request for repatriation that had been made by the Republic of Yemen in a diplomatic note to the federal government did not affect the admissibility of extradition. Because possible claims for reparation under international law exclusively existed between the two states. Even if the use of a Yemeni citizen in Yemen as a covert investigator of the United States were to be regarded as a violation of Yemen's sovereignty that was contrary to international law, this would not be contrary to the complainant's criminal prosecution. No general rule of international law existed that would oblige the state of the forum to withdraw the charge if a person had been induced to commit the offence, and to enter the state of the forum, by an agent provocateur, by means of trickery, and violating the territorial sovereignty of a foreign state. Such a rule would require the existence of a state practice to this effect. In state practice, however, different opinions concerning the legal consequences of an abduction that is contrary to international law could be found. This appraisal was confirmed by the existing literature on international law. 13

The court further stated that the use of confidential informants had not infringed the principle of a state governed by the rule of law and also not Article 1.1 of the Basic Law. The use of such methods of investigation was necessary and required for the prosecution of particularly dangerous offences that were difficult to resolve. An obstacle precluding proceedings could only be assumed in extreme and exceptional cases if it became evident that considering all circumstances, requirements that are indispensable in a state governed by the rule of law had not been complied with. The present case was no such exceptional case. 14

The court continued that it was also not required for the German side to examine the evidence for the charge. In the context of mutual assistance with the United States concerning extradition, such examination was, in principle, not performed. Circumstances that made such examination appear required pursuant to § 10.2 of the Law on International Judicial Assistance in Criminal Matters were not apparent. This also concerned the violation of the Republic of Yemen's sovereignty by the United States that the complainant had challenged. Pursuant to the law of both states, the confidential informant's deposition was no illegal evidence. 15

The requirement of reciprocal punishability had also been complied with because when the facts of the case that had been communicated by the United States authorities had undergone analogous conversion, as was required pursuant to § 3 of the Law on International Judicial Assistance in Criminal Matters, it had been justified to classify the complainant's activities, according to German law, as membership in the terrorist organisations Hamas and Al-Qaeda pursuant to § 129a.1 of the German Criminal Code. When performing the examination of the facts pursuant to § 3 of the Law on International Judicial Assistance in Criminal Matters, the facts of the case had to be treated in the same way as if the offence had been committed in the state of which extradition had been requested. According to this standard, the offences with which the complainant was charged would be punishable in Germany pursuant to § 129, § 129a and § 129b of the Criminal Code. For the extradition proceedings, it was irrelevant that § 129b of the German Criminal Code had entered into force only in August 2002. Because the relevant point in time for the examination of punishability pursuant to German law was the reception of the request for extradition in Germany or the decision about such request. The ban on *ex post facto* laws pursuant to Article 103.2 of the Basic Law was not contrary to this because such ban only applied to substantive criminal law. Punishability pursuant to United States law resulted from Title 18 of the United States Code, Sec. 2339b. 16

7. In a written application of 23 July 2003, the complainant challenged before the Higher Regional Court the violation of the right to a hearing in court in several aspects and applied, pursuant to § 33.1 and § 33.4 of the Law on International Judicial Assistance in Criminal Matters, for a new decision to be adopted about the admissibility of the extradition and for the stay of the extradition. In its order of 5 August 2003, the Higher Regional Court denied the application. The court held that the reasons given in the application did not contain any new circumstances that justified a different decision as regards admissibility. 17

8. a) When the Federal Constitutional Court, in its order of the First Chamber of the Second Senate of 11 August 2003 (2 BvR 1223/03), did not admit the complainant's first constitutional complaint for decision on procedural grounds, the complainant complemented his application of 23 July to the Frankfurt am Main Higher Regional Court, which at that point in time had already been denied by the court, by further applications; in particular, he submitted press articles about the methods of torture that were allegedly applied in the United States. 18

b) In its order of 19 August 2003, the Frankfurt am Main Higher Regional Court analogously denied also the further applications made by the complainant pursuant to § 33a of the German Code of Criminal Procedure *(Strafprozessordnung)* and § 33.4 of the Law on International Judicial Assistance in Criminal Matters. The court held that the evidence for the charge had exclusively been taken from the extradition documents that had been submitted by the United States authorities, which had been sent to the complainant's attorneys for inspection before the decision about the admissibility of the extradition. 19

In the court's opinion, the reference to differing dates in the United States officials' investigation reports does not reveal any fundamental contradiction to the extradition documents. The court held that in these extradition proceedings no review of the lawfulness of the acts of German judicial assistance was required. Moreover, the order of 18 July 2003 had stated that the use of confidential informants was not to be regarded as an obstacle precluding extradition proceedings. Moreover, no special circumstances within the meaning of § 10.2 of the Law on International Judicial Assistance in Criminal Matters existed that required an examination of the evidence for the charge. The court further argued that the examination of reciprocal punishability was exclusively based on an analogous conversion of the facts of the case that had been disclosed by the United States authorities in the extradition documents. 20

The court stated that the reservations concerning the possible danger of torture for the complainant had been removed by the assurance given by the United States, which was binding under international law. It had to be assumed that the complainant would be brought before an ordinary criminal court in the United States. Worrying reports about inhuman treatment of prisoners suspected of terrorism concerned almost without exception prisoners in Guantanamo (Cuba) and Bagram (Afghanistan) and in some third countries. It could not be concluded from existing press reports about the treatment of persons suspected of terrorism that ordinary criminal proceedings in the United States of America did not meet the minimum standards of due process of law or even infringed the ban on torture. Moreover, no other circumstances were known that would give cause to further inquiry into the facts. 21

II.

By way of his constitutional complaint, the complainant challenges a violation of Article 101.1 sentence 2 in conjunction with Article 100.2, Article 2.2 in conjunction with Article 25, Article 2.1, Article 2.1 in conjunction with Article 1.1 and Article 19.4, Article 103.1 and 103.2 of the Basic Law and of his right to a fair trial. 22

1. The complainant states that the constitutional right to one's lawful judge pursuant to Article 101.1 sentence 2 of the Basic Law has been violated because the Higher Regional Court did not submit to the Federal Constitutional Court, on the basis of Article 100.2 of the Basic Law, the question whether a general rule of international law pursuant to which no one may be extradited who has been abducted from his or her state of origin to the requested state in order to circumvent the ban on extradition that is valid in the state of origin is an integral part of federal law. In particular, there had been cause for submitting this question because the Swiss Federal Court *(Schweizerisches Bundesgericht*) had confirmed the existence of such rule in its judgment of 15 July 1982. Such abduction constituted an obstacle precluding extradition. 23

The complainant further states that his right under Article 101.1 sentence 2 in conjunction with Article 100.2 of the Basic Law has also been violated because the Higher Regional Court also did not submit to the Federal Constitutional Court the question whether a general rule of international law pursuant to which no one may be extradited for charges brought by the requesting state if such charges are based on alleged evidence that has been obtained by undercover agent activity by the requesting state in the complainant's state of origin that is contrary to international law and that violates the sovereignty of the complainant's state of origin is an integral part of federal law. 24

The complainant finally states that the Higher Regional Court also did not submit to the Federal Constitutional Court the question whether a general rule of international law pursuant to which the minimum guarantees of due process in a state governed by the rule of law encompass that preventive detention for an indefinite period of time is precluded although the assurance given by the United States does not guarantee such preclusion and the Presidential Military Order of 13 November 2001 provides the detention, for an unlimited period of time, of foreign citizens who are suspected of terrorism before their trial before a military tribunal is an integral part of federal law. 25

2. The complainant concludes that because the above-mentioned rules of international law exist and because the Higher Regional Court based its decision on information obtained in an inadmissible manner, his right to freedom from lawless coercion and his right to physical integrity pursuant to Article 2.2 in conjunction with Article 25 of the Basic Law have been violated. 26

3. According to the complainant, the right to freedom from lawless coercion has been violated by the Higher Regional Court's refusal to examine the evidence for the charge pursuant to § 10.2 of the Law on International Judicial Assistance in Criminal Matters although there are indications that the request for extradition abused legal rights. 27

4. The complainant puts forward that his fundamental right to a fair trial has been violated because the Higher Regional Court took charges brought in the request for extradition into account that were based on alleged surveillance results that had been obtained in Germany on the basis of a separate request for mutual assistance without the court having examined beforehand the corresponding requirements of admissibility. 28

5. The complainant alleges a violation of his fundamental right under Article 2.1 in conjunction with Article 1.1 of the Basic Law and Article 19.4 of the Basic Law because the Higher Regional Court has not complied with its constitutional obligation to investigate the facts of the case as regards the question whether the complainant will be subjected to methods of interrogation that are contrary to the principle of a state governed by the rule of law in the case of a possible extradition to the United States. 29

6. The complainant states that the right to respect the ban on *ex post facto* laws, which is equivalent to a fundamental right, has been violated because the charges brought in the extradition proceedings refer to offences that were not punishable pursuant to German law at the time when the offences were committed. Finally, the complainant alleges a violation of his right to a hearing in court pursuant to Article 103.1 of the Basic Law. 30

B.

The admissible constitutional complaint is unfounded. 31

I.

The complainant's allegation of a violation of his right under Article 101.1 sentence 2 of the Basic Law, which is equivalent to a fundamental right, because the Higher Regional Court, contrary to Article 100.2 of the Basic Law, did not obtain a Federal Constitutional Court decision concerning the existence or non- existence of a general rule of international law, in the final analysis, does not result in the challenged decisions being overturned because they are not based on an infringement of Article 101.1 sentence 2 in conjunction with Article 100.2 of the Basic Law. 32

Admittedly, the Higher Regional Court, contrary to Article 100.2 of the Basic Law, did not refer doubts, which objectively existed, concerning the existence and the content of a general rule of international law to the Federal Constitutional Court for clarification (1.) although the validity of the decision depended on the clarification of such doubts (2.). In proceedings involving the verification of a general rule of international law pursuant to Article 100.2 of the Basic Law the Federal Constitutional Court would, however, have come to the conclusion that considering the facts in the case at issue, there is no obstacle precluding extradition in a requested state if the prosecuted person has been lured, by means of trickery, from his or her state of origin by the requesting state in order to circumvent the ban on extradition that is valid in the state of origin (3.); the challenged decisions are therefore not based on a violation of the obligation to refer the case to the Federal Constitutional Court. 33

1. In the litigation in the extradition proceedings, it was doubtful whether a rule of international law is an integral part of federal law. There were doubts concerning the question what the consequences for extradition proceedings will be in the requested state if the requesting state has lured the subject of a third state authority, possibly contrary to international law, to the requested state. The Higher Regional Court addressed such doubts and rendered a decision itself instead of obtaining a decision by the Federal Constitutional Court. 34

a) In principle, the person affected can be deprived of his or her lawful judge also by the competent court's failure to make a referral pursuant to Article 100.2 of the Basic Law. Pursuant to Article 100.2 of the Basic Law, a competent court must obtain a decision from the Federal Constitutional Court if in the course of litigation, objective doubts exist whether a general rule of international law is an integral part of federal law (cf. BVerfGE 46, p. 342 [at pp. 362-363]). The failure to make a referral violates the right to one's lawful judge under Article 101.1 sentence 2 of the Basic Law to the extent that referral pursuant to Article 100.2 of the Basic Law would have been required (cf. BVerfGE 18, p. 441 [at pp. 447- 448]; 64, p. 1 [at pp. 12- 13]; Order of the Fourth Chamber of the Second Senate of the Federal Constitutional Court of 12 December 2000 - 2 BvR 1290/99 -, *Neue Juristische Wochenschrift* 2001 p. 1848). 35

This presupposes that the validity of the competent court's decision depends on the rule of international law and that the court meets with serious doubts whether, and with what content, it is an integral part of federal law pursuant to Article 25 sentence 1 of the Basic Law, even if the court itself has no doubts (cf. BVerfGE 15, p. 25 [at p. 30]; 23, p. 288 [at pp. 316 *et seq*.]; 96, p. 68 [at p. 77]; consistent case-law). Not the court that is originally competent for the case but only the Federal Constitutional Court is authorised to clarify existing doubts. Serious doubts always exist if the court would, in its decision, depart from the opinion of a constitutional body, from the decisions of high German, foreign or international courts, or from the doctrine of acknowledged scholars of international law (cf. BVerfGE 23, p. 288 [at p. 319]; 96, p. 68 [at p. 77]). 36

b) Pursuant to consistent case- law, a court does not already violate Article 101.1 sentence 2 of the Basic Law each time it mistakenly transgresses the limits that are set to it by the law. The bounds of unconstitutionality are only overstepped if the court's erroneous interpretation and application of ordinary law is absolutely unacceptable, and the implementation of such law therefore stands outside lawfulness (cf. BVerfGE 87, p. 282 [at pp. 284-285]; 96, p. 68 [at p. 77]). 37

Admittedly, this principle also generally applies to the obligation to make a referral pursuant to Article 100.2 of the Basic Law. If however, objectively serious doubts exist regarding the existence or the scope of a general rule of international law, a competent court that does not refer the case to the Federal Constitutional Court to clarify the question, as a general rule, infringes the right to one's lawful judge, which is equivalent to a fundamental right. It is the primary purpose of the verification proceedings to prevent and remedy, whenever possible, violations of international law that are due to the erroneous application or to the disregard of rules of international law by German courts, and which can create a responsibility under international law on the part of Germany (cf. BVerfGE 58, p. 1 [at p. 34]; 59, p. 63 [at p. 89]). Moreover, the proceedings are also supposed to ensure the uniformity and reliability of the rules of international law across states (cf. BVerfGE 96, p. 68 [at pp. 77-78]), and in this respect, they are an element of the Basic Law's openness to international law. Thus, the Federal Constitutional Court indirectly dedicates itself to the cause of enforcing international law and thereby reduces the risk of non-compliance with international law. In these proceedings, the competent court has therefore no discretion in the appraisal of objectively serious doubts as regards acceptability. This means that there is not much room for infringements of the obligation to make a referral that are due to mistakes, and which do not violate Article 101.1 sentence 2 of the Basic Law (cf. BVerfGE 61, p. 1 [at p. 21]). *38*

c) The subject of the doubt are the appraisal under international law of the circumstances under which the complainant reached Germany, and their possible legal consequences for the extradition proceedings. *39*

aa) In the grounds of its order of 18 July 2003, the Higher Regional Court expounded that even if a violation of Yemen's sovereignty had occurred by the use of a Yemeni citizen, by direction of the FBI, in Yemen, this circumstance would not be contrary to the prosecuted person's criminal prosecution and extradition on the grounds of the offences with which he was charged. The court held that no general rule of international law existed that would oblige the state of the forum to withdraw the charge if a person had been induced to commit the offence, and to enter the state of the forum, by a so-called agent provocateur, by means of trickery, and violating the territorial sovereignty of a foreign state. The court concluded that therefore, this also applied, *mutatis mutandis*, to the extradition proceedings. *40*

The court further held that the conditions for the development of a general rule of international law did not exist. Because even as regards an abduction that was contrary to international law, and that involved the use of force, which constituted a stronger encroachment upon the territorial sovereignty of the state of residence than the use of trickery to lure someone out of such state, different opinions existed in state practice and in international legal literature about the question whether in the case of the violated state's protest, an apprehension that had been contrary to international law impeded criminal proceedings in the state of the forum on grounds of international law. The court then dealt with the case-law that had been cited by the complainant, in particular that of the Swiss Federal Court, and came to the conclusion that no corresponding general rule of international law existed. *41*

bb) The Higher Regional Court was not authorised to itself remove the doubts about the consequences that "luring someone out of a country in a manner that is contrary to international law" has under customary international law. In this context, it must be particularly taken into account that the relevant state practice and the doctrines that the Higher Regional Court has taken into consideration, in their overriding majority refer to situations that involve only two states. In the present case, however, legal relations exist between the Republic of Yemen, as the complainant's state of origin, the United States of America, as the requesting state of the forum, and the Federal Republic of Germany as the requested state of residence. Accordingly, the legal consequences of the alleged violation of international law do not directly refer to criminal proceedings in the state of the forum (cf. Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 3 June 1986 - 2 BvR 837/85 -, *Neue Juristische Wochenschrift* 1986 p. 3021; Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 19 October 1994 - 2 BvR 435/87 -, *Neue Zeitschrift für Strafrecht* 1995 p. 95), but to extradition proceedings in the requested state of residence. *42*

2. There is only an obligation to make a referral pursuant to Article 100.2 of the Basic Law if the validity of the court's decision depends on the doubts. This precondition has also been met. *43*

Should the complainant's extradition on the grounds of the circumstances that have led to his arrest in Germany infringe a general rule of international law, Article 25 of the Basic Law would prescribe compliance with customary international law, with the consequence that Germany would have to permit the complainant's departure from the territory of the Federal Republic of Germany to the extent that no criminal prosecution by German authorities on account of a possible infringement of German criminal- law provisions was considered. *44*

Pursuant to Article 25 of the Basic Law, the general rules of international law must be respected in the organisation of the national legal system by the legislature and in the interpretation and application of provisions under national law by the administrative authorities and the courts (cf. BVerfGE 23, p. 288 [at p. 300]; 31, p. 145 [at p. 177]; Order of the Federal Constitutional Court [preliminary examination committee] of 11 October 1985 - 2 BvR 336/85 -, *Europäische Grundrechte- Zeitschrift* 1985 p. 654 - Pakelli). From this it follows in particular that Article 25 of the Basic Law prevents the administrative authorities and the courts of the Federal Republic of Germany from interpreting and applying national law in a manner that violates the general rules of international law. 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, and they 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 (cf. BVerfGE 75, p. 1 [at pp. 18-19]). *45*

On the German side, an obstacle precluding extradition could possibly result from this if the action of the Yemeni confidential informant on behalf of the United States investigation authorities were to be regarded as being contrary to international law. The territorial sovereignty of a state, which is an expression of its sovereignty, prohibits, in principle, sovereign acts by other states or by organs of state authority, on the territory of the state affected. In this context, private individuals' acts can be attributed to a state if, for instance, such acts are controlled by this state. *46*

Tortious action on the part of the United States would establish their responsibility under international law *vis-à-vis* Yemen. In such a case, there would be the risk that by extraditing the complainant, Germany would support a United States' action that is possibly contrary to international law, which would make Germany itself responsible under international law *vis- à- vis* Yemen. That such state responsibility can, under specific preconditions, be established by the support of third parties' action that is contrary to international law is shown by Article 16 of the International Law Commission's Draft Convention on State Responsibility, which codifies customary international law in this field (on this, cf. Crawford, The International Law Commission's Articles on State Responsibility, 2002, Article 16, pp. 148 *et seq.*). *47*

3. The challenged decisions, however, are not based on an infringement of Article 101.1 sentence 2 in conjunction with Article 100.2 of the Basic Law. Because in verification proceedings, the Federal Constitutional Court would have come to the conclusion that a general rule of international law does not exist, at any rate in cases like the one at hand, pursuant to which no one may be extradited who has been lured, by means of trickery, from his or her state of origin to the requesting state in order to circumvent the ban on extradition that is valid in the state of origin. *48*

Because the Federal Constitutional Court's ruling Senate itself is the lawful judge from whose jurisdiction the complainant had been removed - it would have been competent pursuant to Article 100.2 of the Basic Law, § 13 number 12 and § 14.2 of the Federal Constitutional Court Act *(Bundesverfassungsgerichtsgesetz)* -, it can be stated that the challenged decisions ought not to have been different if Article 101.1 sentence 2 of the Basic Law would have been respected (cf. BVerfGE 61, p. 1 [at pp. 21-22]; 96, p. 68 [at p. 86]). *49*

a) The general rules of international law are primarily customary international law that is of universal validity and that is complemented by accepted general principles of law (cf. BVerfGE 15, p. 25 [at pp. 32 et seq.]; 16, p. 27 [at p. 33]; 23, p. 288 [at p. 317]). In the words of the Permanent International Court of Justice, customary international law is the "usage generally accepted as expressing principles of law" (PCIJ Series A 10 [1927], p. 18 -Lotus Case; for a detailed account on the evolution of customary international law, see Dahm/Delbrück/Wolfrum, *Völkerrecht*, volume I/1, 2nd edition, 1989, pp. 56 *et seq*., with further references). Thus, its evolution depends on two preconditions: firstly, on conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of states and other subjects of international law with law-making authority; secondly on the opinion that is behind this practice "to act in the framework of what is required and permitted or necessary under international law" (*opinio iuris sive necessitatis*, cf. BVerfGE 66, p. 39 [at pp. 64-65]; 96, p. 68 [at pp. 86-87]). 50

The Federal Constitutional Court ascertains the existence and scope of general rules within the meaning of Article 25 of the Basic Law by consulting the relevant state practice (cf. BVerfGE 94, p. 315 [at p. 332]). For this purpose, the Court focuses on the conduct of the organs of state authority that are competent for legal relations under international law; as a general rule, this will be the government or the head of state. Apart from this, state practice can also result from the acts of other organs of state authority such as acts of the legislature or of the courts to the extent that their conduct is directly relevant under international law (cf. BVerfGE 46, p. 342 [at pp. 362-363] headnote 6). 51

Even if the principle continues to be valid that judicial decisions, as well as teachings in the field of international law, may only be consulted as subsidiary means for the determination of rules of customary international law (cf. BVerfGE 96, p. 68 [at p. 87], see also Article 38.1 letter d of the Statute of the International Court of Justice), more recent developments on the international level, which are characterised by increasing differentiation and an increasing number of acknowledged subjects of international law, must be taken into consideration when ascertaining state practice. The acts of bodies of international organisations, and in particular of international courts, therefore deserve special attention. 52

b) The examination of state practice shows that the general rule of international law that is alleged by the complainant does not exist. The courts' case-law regarding the question whether the fact that a prosecuted person has been lured out of his or her state of origin becomes an obstacle precluding extradition in the requested state of residence, is heterogeneous. The majority of decisions even does not regard the circumstances that preceded the arrest as an obstacle precluding criminal prosecution in the state of the forum. 53

aa) In this context, it need not be decided whether a national obstacle precluding criminal proceedings or extradition results from customary international law if the prosecuted person has been taken from his or her state of origin to the state of the forum or to the requested state by use of force. Admittedly, more recent state practice, in particular as a consequence of dealing with the U.S. Supreme Court decision in the Alvarez-Machain case (United States Reports, Vol. 504 [1991/92], pp. 655 *et seq.*) indicates that the principle *male captus, bene detentus* is rejected at any rate if the state of the forum got hold of the prosecuted person by committing serious human rights violations, and if the state whose territorial sovereignty was violated protested against such procedure (cf. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dragan Nikolic, Decision of 5 June 2003 - IT-94-2-AR73, Appeals Chamber, numbers 24 *et seq*. with reference to the decision of the U.S. Federal Court of Appeal, United States v. Toscanino, 500 Federal Reporter, Second Series 267 [1974]; see also Wilske, *Die völkerrechtliche Entführung und ihre Rechtsfolgen*, 2000, pp. 272 *et seq*., at p. 336, with further references). 54

The facts of the present case, however, differ from these cases in important details. *55*
Because the complainant's decision to leave Yemen was based on the complainant's voluntary decision. According to the statement of his secretary, the complainant himself suggested Frankfurt am Main as the venue of a meeting that was supposed to serve fundraising on account of the favourable visa regulations for Yemeni citizens in Germany and of the good traffic connections. Admittedly, the complainant has been deceived by trickery so that the motives for which he travelled to Germany were based on deception. However, he was not subjected to direct force aimed at bending his will, and he was also not threatened with the use of force, and the trickery did not facilitate a subsequent forceful abduction. The acts of deception were not performed by German authorities, and they are also not attributable to them. Finally, there are no indications that would permit the assumption that the German authorities cooperated with the United States criminal prosecution and investigation authorities in a collusive manner in order to induce the complainant to travel exactly to Germany.

bb) It cannot be ascertained that a practice under international law has evolved for *56*
these facts of the case that would make the extradition appear to be an infringement of customary international law.

(1) In an number of decisions, national and international courts have already refused, in *57*
principle, to acknowledge the fact that a person has been lured out of a state as being a reason for an obstacle precluding extradition or even criminal prosecution. In the Schmidt case, the House of Lords refused to acknowledge the violation of international law even though a German citizen who was resident in Ireland had been lured to Great Britain by means of telephone calls with British police officers in order to extradite him to Germany for drug-related offences (House of Lords, *In re Schmidt*, [1994] 3 Weekly Law Reports 228). In the *United States v Wilson* case, the U.S. Federal Court of Appeal upheld the indictment of the prosecuted person, who had been persuaded by an agent to leave his refuge in Libya on the grounds that he had merely become the victim of "a non-violent trick" (U.S. Federal Court of Appeal, 721 Federal Reporter, Second Series 967 [1983]). The Canadian Ontario High Court of Justice ruled in the Hartnett proceedings that the arrest of two United States citizens for fraud-related offences, who had been invited to Canada under the pretext of being examined as witnesses there, did not justify the assumption of an obstacle precluding proceedings (Ontario High Court of Justice, Re Hartnett and the Queen, decision of 20 September 1973, 14 Canadian Criminal Cases 6).

After a comprehensive examination of state practice in a case in which the person *58*
charged with a crime had been persuaded by the public prosecutor under a pretext to travel from Serbia and Montenegro to the region of Eastern Slavonia, which is under United Nations supervision, the International Criminal Tribunal for the Former Yugoslavia came to the conclusion that the criminal prosecution of a person who had been persuaded by deception to enter an area that was accessible to seizures by foreign organs of criminal prosecution can, in state practice, at any rate only be regarded as a violation of international law or of individual fundamental rights if an effective extradition treaty was circumvented or if the prosecuted person was subjected to the use of force in an unjustifiable manner (International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dokmanovic* [Motion for Release], Trial Chamber, decision of 22 October 1997 - IT-95-13a-PT -, International Law Reports Vol. 111 [1998], p. 459 [at p. 490]; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest of 5 June 2003, IT-94-2-AR73, numbers 20 *et seq*.).

(2) As opposed to this, judicial decisions can also be cited that, admittedly, are based *59*
on a different legal opinion. In a decision that has already been mentioned, on which the complainant decisively relies in his submission, the Swiss Federal Court denied the extradition of a Belgian citizen to Germany because the prosecuted person had been lured to Switzerland by German authorities, infringing Belgian sovereignty (Swiss Federal Court, Judgment of 15 July 1982, *Europäische Grundrechtszeitung* 1983 pp. 435 *et seq.*). Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law.

(3) When assessing the existing judicial decisions it cannot be left out of consideration that it is even doubtful under which preconditions the luring of a prosecuted person out of his or her state of residence by means of trickery - unlike the use of force - can be regarded as an act that is contrary to international law at all (cf. Wilske, *loc. cit.*, pp. 101 *et seq.,* with further references). To the extent that in the case of the use of trickery, the prosecuted person's intended border crossing is also motivated by his or her own interests, and to the extent that the possibility exists that the prosecuted person decides against departure, the prosecuted person, as a general rule, is not object of state coercion. *60*

Admittedly, the boundary between luring someone out of a state by means of trickery and breaking someone's will by the use of force can be fluid in a borderline area, for instance if someone is deluded into believing something that has the effect of an irresistible coercion on the person affected. Such circumstances, however, do not exist here. Instead, the complainant travelled to the federal territory on account of an autonomous decision in order to pursue specific own interests there. *61*

Moreover, recent state practice also takes the seriousness of the crime with which the person is charged into account, which means that in this respect, it takes proportionality into consideration. The protection of high- ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state's personal sovereignty that possibly goes along with the use of trickery (cf. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragan Nikolic*, *loc. cit.*, number 26). To the extent that the fight of most serious crimes such as the support of international drugs trade and of terrorism is concerned, luring someone out of a state's territorial sovereignty by means of trickery is not, at any rate to the extent that would be required to demonstrate state practice, regarded as an obstacle precluding criminal prosecution. Nothing different can apply as regards the existence of an obstacle precluding extradition. *62*

II.

The challenged decisions do not infringe Article 2.1 and 2.2 sentence 2 in conjunction with Article 25 of the Basic Law because the general rule of international law that is alleged by the complainant, i.e. the existence of an obstacle precluding extradition in the case of an "abduction" by means of trickery, does not exist according to the statements made above, and because the Higher Regional Court's decision is not based on the infringement of Article 101.1 sentence 2 of the Basic Law that has been ascertained. *63*

III.

1. The complainant's challenge that his right to freedom from lawless coercion pursuant to Article 2.1 of the Basic Law is violated by the fact that the Higher Regional Court did not examine the evidence for the charge pursuant to § 10.2 of the Law on International Judicial Assistance in Criminal Matters and also not pursuant to Article 14.3 letter a of the extradition treaty between Germany and the United States of America even though there were indications that the request for extradition abused legal rights is also not accepted. *64*

By way of these submissions, the complainant challenges the court's erroneous application of ordinary law. In principle, it is, however, for the competent courts to interpret the law and to apply it to the individual case (cf. BVerfGE 18, p. 85 [at p. 93]; 30, p. 173 [at pp. 196- 197]; 57, p. 250 [at p. 272]; 74, p. 102 [at p. 127]; consistent case-law). In this respect, the Federal Constitutional Court also in extradition proceedings only examines whether the application of the law or the procedure that is employed for such application can under no conceivable aspect be considered legally justifiable, which would lead to the obvious conclusion that the decision is based on irrelevant, and therefore arbitrary, considerations (cf. Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 11 December 2000 - 2 BvR 2184/00 -; cf. also BVerfGE 80, p. 48 [at p. 51]; Order of the Second Senate of the Federal Constitutional Court of 24 June 2003 - 2 BvR 685/03 -). These boundaries have not been overstepped in the present case. *65*

In the case of an extradition that is regulated by treaties under international law, the evidence for the charges is, in principle, not examined in the extradition proceedings. Exceptions from this principle are only justified in very special cases (cf. BVerfGE 60, p. 348 [at pp. 355, 356]; 63, p. 197 [at p. 206], Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 9 November 2000 - 2 BvR 1560/00 , *Neue Zeitschrift für Strafrecht* 2001 p. 203). The Federal Court of Justice *(Bundesgerichtshof*) has concretised the requirements concerning the evidence for the charge under § 10.2 of the Law on International Judicial Assistance in Criminal Matters in such a way that the examination of the evidence for the charge is admissible and required if the request for extradition appears to be abusive or if the person affected is under the risk of proceedings in the requesting state that are contrary to due process of law (Decisions of the Federal Court of Justice in Criminal Matters 32, p. 314). The complainant, however, has not demonstrated the existence of such, or other, special circumstances. *66*

The Higher Regional Court's appraisal that the preconditions under § 10.2 of the Law on International Judicial Assistance in Criminal Matters for an examination of the evidence of the charges had not been met with a view to the charge of the membership in terrorist associations on which the request for extradition was based is constitutionally unobjectionable. In the grounds of its decisions, the Higher Regional Court has plausibly demonstrated that Article 14.3 letter a) of the extradition treaty between Germany and the United States does not force the German side to examine whether there is sufficient evidence for the charge or for the extraditee's guilt. *67*

IV.

The challenge of a violation of the right to a fair trial and due process of law is also unsuccessful. *68*

1. From the principle of the state governed by the rule of law in conjunction with the general liberty right under Article 2.1 of the Basic Law follows a claim to a fair trial and due process of law (cf. BVerfGE 38, p. 105 [at p. 111]). All restrictions that are not covered by the more specific procedural fundamental rights guarantees are to be measured against this general procedural fundamental right (cf. BVerfGE 57, 250 [at pp. 274-275]). *69*

2. In its order of 18 July 2003, the Higher Regional Court did not rate the use of a confidential informant in the preliminary investigation against the complainant as an infringement of the principle of the state governed by the rule of law and of Article 1.1 of the Basic Law. The court held that for the prosecution of particularly dangerous offences that are difficult to resolve such as, for instance, those pursuant to § 129, § 129a and § 129b of the German Criminal Code, the use of covert investigators was necessary and required. The court further held that in order to fight serious crimes of globally acting terrorist organisations, the community of states under international law had to be in a position to react also with extraordinary, cross-border investigation measures. The court stated that an obstacle precluding proceedings could only be assumed in extremely exceptional cases; such case did not exist here. The Higher Regional Court concluded that moreover, it did not have to examine the lawfulness of the subsequent procedure of mutual judicial assistance in the extradition proceedings. *70*

3. Notwithstanding a decision about the question whether the use of a Yemeni confidential informant by United States criminal prosecution and investigation authorities in Yemen can, in principle, be measured against German fundamental rights, this reasoning is constitutionally unobjectionable. *71*

The use of confidential informants can be necessary in individual cases because only in this way internal, i.e. not publicly available information about the structure of terrorist organisations, their leaders, their real, i.e. not only their publicly declared, aims, and the planning and carrying out of specific measures can be obtained. In particular, information about internal statements and oral discussions within the organisation can be obtained by means of secret informants. *72*

Also against the standards of German law, the use of confidential informants in order to prevent or to resolve criminal offences with a terrorist background does not meet with reservations with a view to the proportionality of the means employed (as concerns the prosecution of particularly serious crimes, which are difficult to resolve, in particular in the drugs trade, cf. BVerfGE 57, p. 250 [at p. 284]; Decisions of the Federal Court of Justice in Criminal Matters 32, p. 115 [at pp. 121-122]; 40, p. 211 [at pp. 215 *et seq.*]; 41, pp. 42 *et seq.*). 73

V.

The complainant's rights under Article 2.1 in conjunction with Article 1.1 of the Basic Law and Article 19.4 of the Basic Law have not been violated. The Higher Regional Court declared the extradition admissible in accordance with the constitutional preconditions. This also applies to the extent that the complainant had applied for a further investigation into the facts of the case as concerns methods of interrogation in the United States that are allegedly contrary to due process of law. The Higher Regional Court had rejected this submission with reference to a lack of indications to this effect in the United States' practice. This reasoning is constitutionally unobjectionable. 74

On the one hand, the reasoning is consistent with the Federal Constitutional Court's recent case- law, pursuant to which in mutual assistance concerning extradition, especially if it is rendered on the basis of treaties under international law, 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. This principle can claim validity as long as it is not shaken by facts to the contrary (Order of the Second Senate of the Federal Constitutional Court of 24 June 2003 - 2 BvR 685/03 -, Extradition to India). Such facts did not exist at the point in time of the Higher Regional Court's decision. 75

On the other hand, decisive consideration must be given to the fact that the United States precluded the possible application of the Presidential Military Order of 13 November 2001 by their assurance of 22 May 2003. Thus, the United States have entered into the obligation, which is binding under international law, neither to bring the complainant before an extraordinary court after his extradition nor to apply the procedural law that is provided in the Order of 13 November 2001 nor to take the complainant to an internment camp. There are no indications to suggest that the United States would, upon the complainant's extradition, not comply with the assurance given. 76

Moreover, it is to be taken into consideration that the relations of mutual judicial assistance that exist between Germany and the United States on the basis of treaties under international law have been intensified even more by the signing of the Agreement on Mutual Judicial Assistance in Criminal Matters on 14 October 2003. This circumstance confirms the assumption that, in principle, the United States will comply with their obligations *vis-à-vis* Germany (on this, cf. the Order of the Second Senate of the Federal Constitutional Court of 24 June 2003 - 2 BvR 685/03 -, III 2.b). 77

Moreover, it can be assumed that the federal government itself will observe the further proceedings in the United States through its diplomatic missions. 78

VI.

The complainant's challenge that his right to compliance with the ban on *ex post facto* laws under Article 103.2 of the Basic Law is violated because the charges brought in the extradition proceedings referred to offences that had not been punishable pursuant to German law at the point in time when they were committed is also not successful. 79

In its decisions, the Higher Regional Court rightly assumed that for the purposes of the extradition proceedings, the charges brought against the person affected by the requesting state had to be analogously converted to the German legal situation pursuant to § 3 of the Law on Mutual Assistance in Criminal Matters. When performing such conversion, it had to be asked how the offence would be assessed pursuant to the law of the requesting state. From the perspective of the German legal system, punishability can be considered for the acts pursuant to § 129, § 129a and § 129b of the German Criminal Code with which the complainant is charged. The court argued that the fact that § 129b of the German Criminal Code was incorporated in the Criminal Code only at the end of August 2002 was irrelevant because the relevant point in time for the examination of § 3 80

of the Law on Mutual Assistance in Criminal Matters was the reception of the request for extradition or the decision about such request. This reasoning of the Higher Regional Court is consistent with the constitutional preconditions.

A violation of Article 103.2 should be out of the question here because the alleged retroactivity that is challenged by the complainant does not result in retroactive punishment but only concerns reciprocal punishability as a precondition for extradition, and is therefore not covered by the purpose of protection of Article 103.2 of the Basic Law (cf. Karlsruhe Higher Regional Court, *Neue Juristische Wochenschrift* 1985 p. 2096, and Lagodny, in: Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 3rd edition, 1998, § 3 of the Law on Mutual Assistance in Criminal Matters, marginal number 21). However, a final decision of the question to what extent a person can invoke a violation of Article 103.2 of the Basic Law in extradition proceedings at all is not required because the ban on *ex post facto* laws has been complied with in the present case. The Higher Regional Court has pointed out in a justifiable manner that the charges brought also include acts that were committed after the entry into force of § 129b of the German Criminal Code. *81*

VII.

The complainant's challenge that his right to a hearing in court was violated because his attorney was not provided sufficient access to the files of the extradition proceedings is unfounded. *82*

Article 103.1 of the Basic Law ensures that a person charged with an offence in criminal proceedings is provided the opportunity to be heard about the facts on which a decision is based, in principle, before it is adopted, and to thereby influence the formation of the court's will. A judicial decision may only be based on such facts and results of evidence on which the person charged with an offence had the opportunity to comment. Article 103.1 of the Basic Law is supposed to prevent that the court uses facts that are known to the court but unknown to the person charged with an offence to his or her detriment. This guarantee can be transferred to extradition proceedings, which are no criminal proceedings. *83*

The complainant's attorney was provided access to all the Higher Regional Court's files in the extradition proceedings. Article 103.1 of the Basic Law does not provide a further-reaching claim to extending the court's files (cf. BVerfGE 63, p. 45 [at pp. 59-60]; Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 11 January 2002 - 2 BvR 1328/00 -). *84*

C.

The decision in the main action disposes of the motion for a temporary injunction. *85*

The decision has been adopted unanimously. *86*

Hassemer	Jentsch	Broß
Osterloh	Di Fabio	Mellinghoff
Lübbe-Wolff		Gerhardt