Order of the Second Senate of 24 June 2003

- 2 BvR 685/03 -

in the proceedings on the constitutional complaint

of Mr. G., a citizen of Vanuatu, ...

and his motion for a temporary injunction

RULING:

The constitutional complaint is not admitted for decision.

This disposes of the motion for a temporary injunction.

GROUNDS:

The constitutional complaint, in connection with which a motion for a temporary injunction had been made, concerns orders of the Munich Higher Regional Court *(Oberlandesgericht)* in which the court declared admissible the complainant's extradition to India for criminal prosecution. 1

I.

1. a) The complainant is a citizen of Vanuatu, previously of India. He was arrested at Munich Airport on 15 December 2002. 2

The arrest was based on a warrant of arrest issued by the First Special Court in Alipore/Calcutta on 3 May 2002. In the warrant of arrest, the complainant was alleged to have fraudulently obtained a total of 108,400,000 Indian rupees (approximately € 2,143,000) from the Allahabad Bank in 1994 and 1995. On the basis of an international wanted notice, the Munich Higher Regional Court ordered the complainant's provisional arrest in its warrant of arrest of 18 December 2002. 3

In a note of 31 January 2003 with which the indictment and the warrant of arrest were enclosed, the Indian Minister of State for External Affairs requested the complainant's extradition for criminal prosecution on the charges of criminal conspiracy and fraud. 4

b) In its order of 14 February 2003, the Munich Higher Regional Court ordered further remand in custody and deferred the decision about the admissibility of the extradition because the complainant: (1) had not agreed to a simplified extradition procedure; (2) had not yet been given access to the files concerning his extradition; and (3) had not yet been granted a hearing in court. On 21 February 2003, the complainant was given access to the files. On 24 February 2003, he was notified of the decision of the Munich Higher Regional Court of 14 February 2003. 5

c) In its order of 7 March 2003, the Higher Regional Court again ordered further remand in custody and declared the extradition admissible. 6

2. In a written application of 13 March 2003, the complainant submitted a remonstrance to the Munich Higher Regional Court. In the remonstrance, he applied for the extradition to be declared inadmissible and for the warrant of arrest to be suspended. 7

The complainant alleged that he had not been given sufficient opportunity for explanation because the court had given an unappealable judgment about the admissibility of his extradition already two weeks after he had been given access to the extensive files concerning the extradition. The complainant put forward that the extradition was inadmissible in more than one aspect; he argued in particular that it infringed § 73 of the Law on International Judicial Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*), not only because life in prison, the impending punishment for the offences against property with which he was charged, was an unbearably severe punishment, but also because apart from this, he was in danger of being tortured and ill-treated during the preliminary investigation and, should he be sentenced, during imprisonment. 8

3. Also on 13 March 2003, the complainant made a motion for a temporary injunction before the Federal Constitutional Court which after its being granted, was supposed to prevent extradition that was impending at any time. 9

In its order of 7 April 2003 - 2 BvQ 14/03 -, the First Chamber of the Second Senate of the Federal Constitutional Court denied the motion. The Chamber held that the constitutional complaint in the main action would have been inadmissible at the time when the motion was made because the principle of subsidiarity had not been complied with. 10

The Chamber held that the possibility of subsequently obtaining, by way of an application pursuant to § 77 of the Law on International Judicial Assistance in Criminal Matters in conjunction with § 33a of the German Code of Criminal Procedure *(Strafprozessordnung)*, a hearing in court concerning the aspects that in the complainant's opinion had been disregarded, was still open to the complainant. In the order, the complainant was also informed of the possibility of obtaining a stay of the extradition from the Munich Higher Regional Court by way of applying, *mutatis mutandis*, § 33.4 of the Law on International Judicial Assistance in Criminal Matters. 11

4. In its order of 4 April 2003, of which the complainant was notified on 8 April 2003, the Munich Higher Regional Court held that it did not follow the objections raised, and ordered further remand in custody. The grounds for the order included that there was no infringement of the public policy reservation in § 73 of the Law on International Judicial Assistance in Criminal Matters. The Higher Regional Court further argued that the wrongful character of the offences with which the complainant was charged was so strong that the statutory range of punishment that Indian criminal law provides for such offences was not so disproportionate that it had to be regarded as absolutely unreasonable. 12

The court further held that the complainant was also not in danger of being subject- 13

ed to torture or other cruel or degrading treatment. According to the federal government's assessment (Federal Foreign Office [*Auswärtiges Amt*], *Länderbericht Indien* of 8 May 2001, and letter of 25 March 2003 to the chief public prosecutor at the Munich Higher Regional Court), human rights violations by state bodies did occur in India, but they were punished to an increasing extent. Although torture was banned by law, it was a method of interrogation that was frequently used by the police. However, it was not encouraged by the state in any targeted manner; the state, on the contrary, punished torturers and had recently initiated a campaign to raise awareness among the police force. The danger to the complainant was also low because the preliminary investigation was almost concluded and because he had legal counsel in India.

5. a) In a written application of 10 April 2003, the complainant applied before the Munich Higher Regional Court for: (1) access to the files concerning the federal governments asylum situation report that was cited in the order of 4 April 2003; (2) the granting of a hearing in court pursuant to § 77 of the Law on International Judicial Assistance in Criminal Matters in conjunction with § 33a of the Code of Criminal Procedure; and (3) the stay of extradition by way of applying, *mutatis mutandis*, § 33.4 of the Law on International Judicial Assistance in Criminal Matters. 14

b) After having been given access to the files, the complainant applied, in his written application of 23 April 2003, for the extradition to be declared inadmissible. The complainant put forward that in India, he was in danger of being subjected to torture and cruel, inhuman or degrading punishment and that for this reason, the planned extradition infringed § 73 of the Law on International Judicial Assistance in Criminal Matters. In India, the minimum term of imprisonment for the offences with which the complainant was charged was 25 years. This punishment was 2.5 times as high as the maximum sentence for such offence in Germany, which was ten years. Therefore, the punishment with which he was threatened was unbearably severe. 15

c) In its verbal note of 23 April 2003, the Federal Foreign Office informed the Indian embassy that the federal government had complied with the request for the complainant's extradition "in accordance with the principles laid down in the German-Indian Extradition Treaty of 27 June 2001". 16

d) In its order of 25 April 2003, the Munich Higher Regional Court granted a stay of the extradition until a decision concerning the complainant's remonstrance was issued. The Indian embassy was notified of the Higher Regional Court's decision by the Federal Foreign Office. 17

e) In its order of 30 April 2003, the Munich Higher Regional Court again declared the complainant's extradition admissible and overturned its decision concerning the stay of the extradition. 18

In the grounds of the order, the Higher Regional Court particularly focused on the argument that the extradition did not infringe any principles of the German legal order (§ 73 of the Law on International Judicial Assistance in Criminal Matters). With refer- 19

ence to its order of 4 April 2003 and to the federal government's asylum situation report, the court's essential reasoning was that in India, torture was admittedly used, particularly by police authorities, as a method of interrogation and a means of extortion but that such action was not tolerated but combated by the Indian state. India had, for example, acceded to the United Nations Convention against Torture and had, on the domestic level, started a campaign to achieve a change of attitude in this respect. Moreover, Germany had concluded an extradition treaty with India in 2001 with knowledge of the circumstances addressed in the asylum situation report, which indicated that in India, the human rights violations that were mentioned in the asylum situation report were not normal practice but an exception.

The court further held that re was no well-founded evidence to indicate that the complainant would be subjected to inhuman treatment. Any remaining risk that possibly existed had not concretised into a specific and direct danger. The investigations against the complainant had been terminated, the proceedings against the codefendants had been handed down without any cases of torture, e.g. of the numerous codefendants, having become known in this context. Finally, the complainant had legal counsel in India. The same considerations applied to the conditions of imprisonment. 20

The impending sanctions in India were a "very harsh punishment", but could not be qualified as an "unbearably severe punishment" under the terms of the Federal Constitutional Court's case law. The court additionally pointed out that the complainant would also in Germany be threatened with a maximum aggregate term of imprisonment of 15 years for the offences with which he was charged. 21

II.

The complainant lodged a constitutional complaint on 5 May 2003 and at the same time made another motion for a temporary injunction. He alleges a violation of his fundamental rights enshrined in Article 1.1, Article 2.2 sentence 2 and Article 3.1 of the Basic Law by the challenged decisions of the Munich Higher Regional Court and further argued that they infringed the principle of proportionality. In detail, he alleges the following: 22

1. Torture and ill-treatment of persons who are suspected of an offence are widespread in India, according to amnesty international's 1998 Annual Report on India and to the organisation's country summary for India of February 2003, they are even daily practice. Also according to the Federal Foreign Office's asylum situation report of 8 May 2001, this is a method of interrogation that is frequently used by the police in India. 23

The complainant further alleges that the reasoning of the Munich Higher Regional Court that torture is of an exceptional nature in India and that merely a "residual risk" exists in this respect, can only be regarded as objectively arbitrary. The statements of amnesty international and of the federal government are rejected under the hypothet- 24

ical consideration that Germany would otherwise not have concluded an extradition treaty with India. As there is specific evidence to the contrary, i.e. evidence that the above-mentioned desirable situation does not exist, it cannot be inferred that the factual situation is equal to the desirable situation.

According to the complainant, it is objectively impossible to adduce specific circumstances that concern the person sought, beyond the substantiated allegation of a detainee's high risk of being tortured in India. When referring to a "specific, imminent danger", the Munich Higher Regional Court applies a completely exaggerated standard. Due to the impending danger of torture, the challenged orders violate Article 1.1 of the Basic Law and infringe the prohibition of arbitrariness laid down in Article 3.1 of the Basic Law. 25

2. According to amnesty international's 1998 Annual Report on India, many prisoners and detainees are held in conditions amounting to cruel, inhuman or degrading treatment. Many prisons are severely overcrowded. There is a lack of medical facilities, and sanitation is poor. Also according to the Federal Foreign Office's situation report of 8 May 2001, the conditions of imprisonment, especially in the large prisons, are "desolate". The prisoners suffer from overcrowding that exceeds actual prison capacity five times. Most of the prisoners who are accommodated in Category C, out of three accommodation categories, must content themselves with unacceptable conditions. In this category it is possible that up to 50 prisoners have to share one large cell, that there are no beds, and that there are no blankets in winter. Because the complainant is threatened with a prison sentence of many years under such conditions if he is sentenced, an extradition to India carries the risk of cruel, inhuman or degrading punishment. The complainant further argues that if the Higher Regional Court's only objection to the cited reports is that there are no findings that make a specific danger to the complainant appear imminent, this is incomprehensible. No evidence can be inferred from the reports that a specific risk of being imprisoned under such conditions in India exists only for specific persons or only under specific circumstances. Also in this respect, the Higher Regional Court's orders violate Article 1.1 and Article 3.1 of the Basic Law. 26

3. The maximum punishment with which the complainant is threatened for the offence against property is life in prison, which in India means a minimum term of imprisonment of 25 years, which makes it 2.5 times as high as the imprisonment with which he would be threatened in Germany for a comparable offence. This is an unbearably severe punishment. Extradition would therefore infringe the principle of proportionality and the complainant's fundamental rights under Article 1.1 and Article 2.2 sentence 2 of the Basic Law. 27

III.

The constitutional complaint is not admitted for decision because the requirements for admission outlined by § 93a.2 of the Federal Constitutional Court Act *(Bundesverfassungsgerichtsgesetz)* have not been met. The constitutional complaint has no fun- 28

damental constitutional significance because the issues that it addresses have already been dealt with in constitutional case-law (cf. Decisions of the Federal Constitutional Court [*Entscheidungen des Bundesverfassungsgerichts,* BVerfGE] 63, p. 332 [at pp. 337-338]; 75, p. 1 [at pp. 18 *et seq.*]). The admission of the constitutional complaint for decision is also not indicated in order to enforce the rights whose violation is alleged; it has no sufficient prospects of success (cf. BVerfGE 90, p. 22 [at pp. 25-26]).

1. According to the Federal Constitutional Court's consistent case-law, German courts are to examine in extradition proceedings whether the extradition and the acts on which it is based are compatible: (1) with the minimum standard under international law that is binding on the Federal Republic of Germany pursuant to Article 25 of the Basic Law; and (2) with the inalienable constitutional principles of its public policy (cf. BVerfGE 63, p. 332 [at pp. 337-338]; 75, p. 1 [at p. 19]). 29

The Federal Constitutional Court has specified the limits that are thereby set to extradition with regard to the organisation of the criminal proceedings and execution proceedings that expect the person sought in the requesting state. Pursuant to the Federal Constitutional Court, the central core of the principle of proportionality, which is to be derived from the principle of the state under the rule of law, constitutes one of the inalienable constitutional principles. The Federal Republic of Germany's competent bodies are therefore prevented from extraditing a person sought if the punishment with which he or she is threatened in the requesting state appears unbearably severe, i.e. unreasonable under every conceivable aspect. Another inalienable principle of the German constitutional order is that a punishment that is impending or has been imposed may not be cruel, inhuman or degrading. The Federal Republic of Germany's competent bodies are therefore prevented from cooperating in the extradition of a person sought if such person has to reckon with, or will have to serve, such punishment. 30

Something different, however, applies if the punishment that is to be executed can merely be regarded as very harsh, and if it could not be regarded as reasonable if it were submitted to strict review under German constitutional law. This is because the Basic Law assumes that the state of which it is the Constitution is integrated into the system of international law of the international community of states (cf. Preamble, Article 1.2, Article 9.2, Articles 23 to 26 of the Basic Law). The Basic Law therefore also orders foreign legal systems and legal views to be respected in principle (cf. BVerfGE 75, p. 1 [at pp. 16-17]) even if they are not identical with German domestic views in every detail. If the relations of mutual assistance concerning extradition that exist between states in their mutual interest are supposed be maintained, and the federal government's freedom of action in the area of foreign policy is supposed to remain unaffected, the only insurmountable obstacle to extradition on which the courts may base their decision is the violation of the inalienable principles of German constitutional order. 31

2. Against this constitutional standard of review, no infringement of the Constitution by the challenged decisions can be inferred from the constitutional complaint. 32

a) To the extent that the complainant alleges, with reference to reports by amnesty international and the Federal Foreign Office, that as a person who is suspected of an offence, he is in danger of being tortured and ill-treated in India, he basically challenges the court's appraisal of the factual situation, which in his view is incorrect. 33

It is 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 p. 196 f]; 57, p. 250 [at p. 272]; 74, p. 102 [at p. 127] consistent case-law). 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]). These boundaries have not been overstepped in the present case. 34

aa) (1) As concerns the alleged danger of inhuman treatment in the case of extradition, the Munich Higher Regional Court, in its order of 30 April 2003, explicitly focuses on the argument that there must be substantiated evidence concerning the danger of inhuman treatment. This standard of review corresponds to the Federal Constitutional Court's case-law, which is cited by the Higher Regional Court (cf. Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 31 May 1994 - 2 BvR 1193/93 -, *Neue Juristische Wochenschrift* 1994, p. 2883 = *Neue Zeitschrift für Strafrecht* 1994, p. 492), and to the case-law of the European Court of Human Rights (cf. European Court of Human Rights, Judgment of 7 July 1989, Series A No. 161, p. 35 No. 91 = *Neue Juristische Wochenschrift* 1990, pp. 2183, 2185 - Soering; Reports of Judgments and Decisions 1996-V, 1853, Nos. 73-74 – Chahal), which, with an identical meaning as regards the content of the terms, refers to "substantial grounds" *(begründete Tatsachen)* of a "real risk" *(tatsächliches Risiko)* of torture. The Higher Regional Court has therefore, contrary to the complainant's allegations, not applied an exaggerated standard. In particular, it cannot be inferred solely from the wording of the order of 30 April 2003, pursuant to which there was no evidence of a "specific danger [...] that is imminent", that the Higher Regional Court now wanted to apply a different standard. 35

(2) It can be supposed that a danger within the meaning described above exists if valid reasons have been advanced to substantiate that in the specific case in question there is a "considerable probability" (cf. Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 22 June 1992 - 2 BvR 1901/91 -, printed in:
Eser/Lagodny/Willkitzki, *Internationale Rechtshilfe in Strafsachen, Rechtsprechungssammlung,* 2nd edition 1993, No. U 202) that the person sought will be- 36

come a victim of torture or other cruel, inhuman or degrading treatment in the requesting state.

As a general rule, concrete evidence need not be furnished in the specific case of the person sought only where there is a consistent pattern or gross, flagrant or mass violations of human rights in the requesting state (in this context, cf. the wording of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 - UN Convention against Torture, BGBl [Federal Law Gazette] 1990 II p. 246 [at p. 248]). Extradition to states that have a consistent pattern of comprehensive and systematic violations of human rights will, as a general rule, establish the probability of a violation of the fundamental principles of German constitutional order. 37

b) It is not apparent that the findings in the challenged decisions that deny such danger of torture for the complainant are arbitrary. 38

For such an assumption, the complainant's reference to the reports by amnesty international and the Federal Foreign Office, according to which torture and ill-treatment of persons who are suspected of an offence are widespread in India, and torture is "a method of interrogation that is frequently used by the police" and a means of extortion, is not sufficient. 39

(1) In its order of 30 April 2003, the Higher Regional Court did not doubt that in India, torture is sometimes used as a method of interrogation or as a means of extortion. As the basis of its appraisal that nevertheless, the complainant is not in specific danger of being subjected to torture, the court put forward that violations of human rights by state bodies did occur in India but that they were increasingly punished as offences. This corresponds to the Federal Foreign Office's appraisal in its situation report on India. Moreover, the court pointed out that in India, torture was banned by law and that it was not promoted by the state in a targeted manner, but that, on the contrary, the Indian state punished torturers and had recently initiated a campaign to raise awareness among its police force. Also this reasoning is based on the Federal Foreign Office's situation report. 40

Already these aspects make the Higher Regional Court's appraisal that for the sole reason that in India, torture is a method of interrogation that is frequently used by the police or a means of extortion, there is no considerable probability for the complainant to be in specific danger of being subjected to torture appear understandable; all in all, India is, according to the court's reasoning, no state in which a consistent pattern of gross, flagrant or mass violations of human rights exists. 41

(2) (a) This appraisal by the Higher Regional Court is also based on the court's consideration that the extradition treaty between Germany and India that was concluded on 27 June 2001 is to be taken into account. The court held that admittedly, the treaty had not yet been ratified, but that with regard to the circumstances under which the treaty had been concluded, there were many indications that the methods mentioned 42

in the Federal Foreign Office's asylum situation report were certainly not normal practice but of an exceptional nature, because otherwise, such treaty would not have been concluded. The complainant cannot successfully advance as an objection that this is an arbitrary, "hypothetical" consideration because due to the evidence to the contrary, it cannot be inferred that the factual situation is equal to the desirable situation.

(b) The fact that the treaty has been concluded confirms that the asylum situation report, whose statements are heterogeneous and focus on the situation of persons who are persecuted on political grounds, can be understood in such a way that in the prison regime in particular, no practice that is systematically contrary to human rights exists because otherwise, an extradition treaty for which the Federal Foreign Office has assumed chief responsibility would not have been concluded in the first place, at any rate not in 2001. Moreover, the very fact that such treaty has been concluded diminishes a possible danger to the complainant because legal obligations for the Republic of India arise from the treaty as concerns the compliance with minimum human rights standards in the concrete case of extradition. From the fact of the conclusion of the treaty alone follows an obligation under international law not to defeat the object and purpose of a treaty prior to its entry into force, which obliges the contracting parties to refrain from acts which would be contrary to the object and purpose of the treaty (see Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, Federal Law Gazette 1985 II p. 926; Verdross/Simma, *Universelles Völkerrecht*, 3rd edition 1984, §§ 705, 719, with further references). Inhuman treatment of persons that are extradited to India before the treaty's entry into force would contradict the treaty because by such practice, the creation of a stable bilateral relation in judicial assistance and extradition matters, which the conclusion of the treaty is supposed to achieve, would be prevented. Article 5 of the extradition treaty contains a public policy reservation, which would allow the denial of a request for extradition in the case of § 73 of the Law on International Judicial Assistance in Criminal Matters (cf. federal government memorandum concerning the treaty, on Article 5, BRDrucks [Records of the *Bundesrat*] 241/03, p. 17). From the functional point of view, the extradition treaty's legal obligations thus take the place of the assurance that is given if no treaty exists. Such assurance of the compliance with the minimum human rights standards in criminal proceedings or of humane conditions of imprisonment cannot, as a general rule, be requested if a treaty exists because this would assume that the other party is in breach of contract; this especially applies at the moment when the treaty is put into force. 43

These considerations permit a conclusion concerning the complainant's factual situation in India. In the present case, the federal government permitted the complainant's extradition by way of a verbal note of 23 April 2003 "in accordance with the principles laid down in the German-Indian Extradition Treaty". From this it follows that the German-Indian agreement on extradition has become the material basis of the complainant's extradition, although it had not formally entered into force, pursuant to 44

the obligation under international law not to defeat the object and purpose of a treaty prior to its entry into force and pursuant to the wording of the granting of extradition. In this context, it must also be taken into account that India has already terminated the ratification process thereby again declaring its willingness to comply with the obligations under international law that have been established by the agreement.

If India did not comply with the material regulations of the agreement, this would constitute an infringement of its obligations under international law. The request for extradition is therefore complied with under the condition that India will treat the complainant in accordance with the minimum standards under international law after his surrender. 45

Moreover, in the present case, the Higher Regional Court's appraisal is also endorsed by the Federal Foreign Office's communication of 25 March 2003 to the public prosecutor's office at the Munich Higher Regional Court. According to this communication, the basis on which mutual assistance concerning extradition has taken place already before the treaty's entry into force has been that minimum human rights standards are complied with in Indian criminal proceedings and in the Indian prison regime; in the individual cases, reference had been made to the German-Indian extradition treaty, which had been signed on 27 June 2001 and which will probably enter into force in the course of this year. This can only mean that, even if generally torture and ill-treatment are widespread in India, the minimum human rights standards have, according to the federal government's appraisal, been complied with in Indian criminal proceedings and in the Indian prison regime at any rate as concerns persons who have been extradited with reference to the German-Indian extradition treaty. 46

Moreover, it can be assumed that the federal government itself will observe the further proceedings in India through its diplomatic missions. 47

(3) The complainant has also not advanced any reasons that would, especially in his case, make inhuman treatment upon his return to India a considerable probability. The Higher Regional Court points out, in an understandable manner, that the complainant's codefendants are not known to have been tortured in the past. The complainant, who is represented by an Indian counsel, has not submitted anything that could question this finding. 48

c) With regard to inhuman conditions of imprisonment, the statements concerning the danger of treatment that is contrary to human rights because it constitutes torture largely apply (cf. III.2.a and b). In this context, the complainant basically challenges the court's dealing with the factual conditions in the Indian prison regime, which in his view is insufficient. 49

aa) This challenge is only examined by the Federal Constitutional Court against the standard of the prohibition of arbitrariness laid down in Article 3.1 of the Basic Law to ascertain whether the application of the law or the procedure that is employed for such application can under no conceivable aspect be considered legally justifiable, 50

which would lead to the obvious conclusion that the decision is based on irrelevant, and therefore arbitrary, considerations (cf. III.2.a above).

bb) The reasons of the constitutional complaint do not plausibly demonstrate this. The complainant's reference to the reports by amnesty international and to the Federal Foreign Office's asylum situation report is not sufficient in this respect. 51

With regard to this allegation, the Higher Regional Court admittedly in the grounds of its order of 30 April 2003, only stated briefly, after its statements concerning the alleged danger of torture, that the same applied to the conditions of imprisonment; the court further held that there were no findings that substantiated the existence of a concrete risk to the complainant. 52

By doing so, the court - *inter alia*, at any rate - made reference to its essential reasoning as regards the danger of torture, in which the conclusion of the German-Indian extradition treaty had to be taken into consideration. For the above-mentioned reasons, nothing else can apply to the conditions of imprisonment during the criminal proceedings and during the execution of the sentence than does for the danger of torture alleged by the complainant: Irrespective of the conditions of imprisonment that apply to the majority of prisoners, there is no evidence that particularly as regards the persons extradited by the Federal Republic of Germany to India, the minimum human rights standards are not respected there. 53

cc) The complainant has not substantiated that in his case there are peculiarities that give cause to suspect a different treatment during imprisonment, even though such treatment is otherwise widespread. 54

d) Finally, it is also not apparent that the Munich Higher Regional Court has affected the central core of the requirements that arise from the principle of a state under the rule of law by declaring the complainant's extradition admissible in spite of his being threatened there with a maximum sentence of life in prison. 55

aa) The complainant is charged with having committed offences against property of considerable magnitude by way of a criminal conspiracy. The offences caused losses of approximately € 2,140,000.00 so that all in all, they are of a strongly wrongful character. It is therefore not unbearably hard under the terms of the Federal Constitutional Court's case-law (cf. above under III.1 and BVerfGE 75, p. 1 [at pp. 16 *et seq.*], Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 4. March 1994 - 2 BvR 2037/93 -, *Neue Juristische Wochenschrift* 1994, p. 2884), if Indian democratic legislature has fixed the range of punishment for such offences in such a way that it includes life in prison. 56

In this context, it must also be taken into account that states in general, and in particular as regards offences against property, may have different views of the punishability of criminal behaviour. The Federal Constitutional Court can therefore only examine whether a punishment with which the person sought is threatened in the requesting state is "absolutely unreasonable" even if in the individual case the specific punish- 57

ment that is impending on the person sought constitutes a hardship for the complainant.

bb) In its order of 30 April 2003, the court finally pointed out that also pursuant to the legal situation in Germany, for the offences with which the complainant was charged, considering that in the specific case, the offences were perpetrated jointly, a maximum aggregate term of imprisonment of 15 years could be imposed. 58

3. The non-admission of the constitutional complaint disposes of the motion for a temporary injunction. 59

IV.

The decision has been adopted by six votes in favour and two against. 60

Hassemer	Sommer	Jentsch
Broß	Osterloh	Di Fabio
Mellinghoff		Lübbe-Wolff

Dissenting Opinion

of Judges Sommer and Lübbe-Wolff
concerning the Order of the Second Senate of 24 June 2003
- 2 BvR 685/03 -

We are unable to join the Senate's majority decision. We are convinced that the challenged decision violates the complainant's fundamental rights under Article 2.1 of the Basic Law 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 conditions of imprisonment that are contrary to human dignity in the case of his extradition to India. 61

We go along with the Senate majority's reasoning that German courts are to examine in extradition proceedings whether the extradition and the acts on which it is based are compatible with the minimum standard under international law that is binding on the Federal Republic of Germany pursuant to Article 25 of the Basic Law and with other inalienable constitutional principles of its public policy (cf. BVerfGE 63, p. 332 [at p. 337]; 75, p. 1 [at pp. 19-20]; Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 9 November 2000 - 2 BvR 1560/00 -, *Neue Juristische Wochenschrift* 2001, p. 3111 [at p. 3112]). For the extradition proceedings, also requirements regarding the court's finding of facts result from this. In the specific case, the extent of the court's obligation to investigate the facts of the case depends on the extent to which the circumstances of the specific case give cause to (further) inquiry into the facts (cf. BVerfGE 59, p. 280 [at p. 282]; 63, p. 332 [at p. 337]). At any rate, the finding of facts does not comply with the constitutional requirements if its nature and extent are unsuitable to ensure effective legal protection of the rights of the person affected and thereby undermines the material rights of the person affected by the way in which the proceedings are conducted. This is the case here. 62

The challenged order of 7 March 2003, by which the Higher Regional Court declared the complainant's extradition admissible for the first time, deals with the question whether there are possible obstacles to extradition pursuant to § 73 of the Law on International Judicial Assistance in Criminal Matters only implicitly in a single sentence that does not contain any grounds ("There are no legal obstacles, in particular no limitation of prosecutions, that might stand in the way of extradition."). In his remonstrance of 13 March 2003, the complainant, *inter alia*, explicitly alleged with reference to information by amnesty international to this effect that imprisonment in India, due to extreme overcrowding of prisons, lack of medical care, and unacceptable sanitation was paramount to "cruel, inhuman or degrading punishment" (cf. Article 3 of the European Convention on Human Rights). The remonstrance was rejected by the challenged order of 4 April 2003 without a word of reference to the question of the conditions of imprisonment. 63

As regards other aspects of its reasoning, the court made reference in the order, *inter alia*, to the Federal Foreign Office's report of 8. May 2001 about the aspects of the situation in India that are relevant to asylum and deportation and to a letter by the Federal Foreign Office of 25 March 2003. After the complainant had at least subsequently (cf. BVerfGE 70, p. 180 [at p. 189]) been given the opportunity to take note of these documents by way of access to the files, in his application of 23 April 2003 that was intended to have the extradition declared inadmissible he again raised objections, *inter alia* on account of conditions of imprisonment in India that are contrary to human rights, which he now also based on the situation report. 64

Irrespective of these submissions in the application, the Higher Regional Court did also in the challenged order of 30 April 2003 not investigate the question any further whether the complainant in the case of his extradition was in danger of being imprisoned under such conditions. The order contains a number of considerations, which are cited in detail in the Senate decision, for which it does not find "substantiated evidence" of a danger of torture or other treatment concerning the complainant that is contrary to human rights. It only deals with the issue of the conditions of imprisonment in the statement that "the same" applied to "conditions of imprisonment, which are submitted again"; the court held that there were no findings that made a specific danger to the complainant appear imminent. 65

In view of the statements concerning the conditions of imprisonment that are contained in the Federal Foreign Office's situation report, such assessment of facts is not understandable, and it is incompatible with the court's constitutional obligation to investigate the facts. In the situation report, it says literally: "The conditions of imprisonment, especially in the large Indian prisons (Tihar, New Delhi; Yeravada, Pune), are desolate. The prisoners suffer from overcrowding that exceeds the actual prison capacity five times. There are three categories of accommodation, with Category A in particular providing certain privileges (single cell, transistor radio, meals are provided by the prisoner's family). The majority of prisoners (Category C), however, must content themselves with unacceptable conditions. In this category it is possible that up to 50 prisoners have to share one large cell, that there are no beds and that there are no blankets in winter" (emphasis in the original). On account of these statements there was cause for ascertaining whether the complainant, in the case of his extradition to India, was threatened with being accommodated in conditions of imprisonment as they are described for Category C prisoners in the report. 66

To subject a person, through extradition, to such conditions of imprisonment would contradict fundamental principles of the German legal order, namely the rights under Article 2.1 in conjunction with Article 1.1 of the Basic Law of the person affected. Moreover, a prison sentence of many years under conditions as they have been described here will probably also constitute inhuman, cruel or degrading treatment or punishment (Article 3 of the European Convention on Human Rights; as concerns its applicability to conditions of imprisonment cf. European Court of Human Rights, Judgment of 7 July 1989 [Soering], *Neue Juristische Wochenschrift* 1990, p. 2183 [at 67

p. 2187]), and will as such probably also infringe the minimum standard under international law that is binding on the domestic level pursuant to Article 25 of the Basic Law (cf. European Court of Human Rights, *loc. cit.*, p. 2184; as concerns the nature of the ban on cruel, inhuman or degrading treatment as *ius cogens* cf. Schomburg/ Lagodny, *Internationale Rechtshilfe in Strafsachen*, 3rd edition 1998, marginal number 33 concerning § 73 of the Law on International Judicial Assistance in Criminal Matters; Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen*, 2001, marginal number 343; Graßhof/Backhaus, *Europäische Grundrechte-Zeitschrift* 1996, p. 445 [at p. 448]). It does not become sufficiently clear whether the situation report's statement that the "majority" of prisoners, namely the Category C prisoners, are subjected to "unacceptable" conditions of imprisonment refers to the majority of all prisoners or the majority of prisoners in the large Indian prisons. The situation report also does not indicate the conditions that determine whether a prisoner will be accommodated in Category C. Especially because these open points remain, the court could not assume without any further investigation of the facts of the case that there was no substantiated evidence that the complainant was at risk of being subjected to treatment that is contrary to human dignity. The court was neither prevented for reasons of international law from a further investigation of the facts that was required under these circumstances nor could it be prevented from such investigation by diplomatic considerations.

Contrary to the Senate majority's view, the Higher Regional Court did also not comply with its obligation to review and ascertain the facts of the case by stating that the same reasons that were advanced against the danger of torture also applied to the conditions of imprisonment. Most of these reasons bear no relation to the conditions of imprisonment. The argument, the soundness of which is stressed by the Senate majority, that the conclusion of a German-Indian extradition treaty was an indication of circumstances that normally are not contrary to an extradition, can admittedly also be applied to the conditions of imprisonment but cannot justify the court's dispensing with the clarification of the doubts that had been raised by the asylum situation report. 68

It is possible that the conclusion of an extradition treaty, and already its signing, can have an evidentiary effect that is relevant to the assessment of concrete cases of extradition. However, content and scope of such evidentiary effect may not be determined in a way that leaves other information out of consideration. In the present case, the Federal Foreign Office admittedly stated in its letter of 25 March 2003 that the "the basis" on which mutual assistance concerning extradition had taken place so far, i.e. already before the treaty's entry into force, had been "that minimum human rights standards are complied with in Indian criminal proceedings and in the Indian prison regime". However, the Federal Foreign Office's report on the situation in India, which focuses on facts that are relevant to asylum and deportation and which is dated 8 May 2001, states, *inter alia*, that torture is "a method of interrogation that is frequently used by the police" although it is banned by law. In view of this statement, which was 69

made seven weeks before the signing of the extradition treaty, and which the Higher Regional Court cited correctly in its decision of 4 April 2003, it is hard to understand, even if the Higher Regional Court denied in a justifiable manner that there is a particular risk of torture for the complainant, how the court could assume in its order of 30 April 2003 that the signing of the treaty established evidence to the effect that, as a general rule, it could be assumed that the circumstances in India were regular and not contrary to extradition. Constitutionally, the evidentiary effect that the competent court assumed cannot, at any rate, be irrefutable. In a state governed by the rule of law, there cannot be assumptions about reality that are, *de iure*, exempt from any refutation. As concerns the conditions of imprisonment, the evidentiary effect that was assumed by the Higher Regional Court in the present case was shaken by the statements in the Federal Foreign Office's situation report that were cited above. From this, the Higher Regional Court has not drawn the conclusions that are constitutionally required.

Sommer Lübbe-Wolff

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