CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35865/03
by Mohammed Ali Hassan AL-MOAYAD
against Germany

The European Court of Human Rights (Fifth Section), sitting on 20 February 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 14 November 2003,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mohammed Ali Hassan Al-Moayad, is a Yemeni national who was born in 1948 and was resident in Yemen. He was an adviser to the Yemeni Minister for Religious Foundations with the rank of secretary of state and the imam of the Al-Ihsan Mosque in Sanaa (Yemen).

2. He is currently detained in the United States of America. Before the Court he was represented by Mr Alfred Dickersbach, a former judge of the Federal Administrative Court and lawyer practising in Berlin. The respondent Government were represented by their

Agent, Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialdirigentin*.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's arrest and detention pending extradition

4. A Yemeni citizen on an undercover mission for the US investigation and prosecution authorities in Yemen convinced the applicant that he could put him in touch with a person abroad who was willing to make a major financial donation (the purpose of which is a matter of dispute). Thereupon, the applicant decided to travel to Germany.

5. On 6 November 2002 the US authorities requested legal assistance (*Rechtshilfe*) from the German authorities in the criminal investigations into the applicant's activities. On 18 December 2002 the Frankfurt am Main Regional Court authorised the interception and recording of conversations in the hotel rooms in Frankfurt in which the applicant was expected to stay.

6. The applicant travelled to Germany in January 2003 with his secretary. On 10 January 2003 they were arrested in Frankfurt by German police officers under an arrest warrant that had been issued on 5 January 2003 by the US Federal Court for the Eastern District of New York supported by a motion dated 8 January 2003 of the US Ministry of Justice for the applicant to be taken into custody pending extradition. The US prosecution authorities charged the applicant with providing money, weapons and communications equipment to terrorist groups, in particular Al-Qaeda and Hamas, and with recruiting new members for these groups between October 1997 and the date of his arrest.

7. On 11 January 2003 the Frankfurt am Main District Court ordered the applicant's provisional detention after hearing his representations. Pursuant to an order of the Frankfurt am Main Court of Appeal dated 14 January 2003, the applicant was remanded in provisional custody pending extradition.

8. On 24 January 2003 the Embassy of the United States of America transmitted a formal request to the German Federal Government for the applicant's extradition for criminal prosecution. The request was based on the extradition treaty between the Federal Republic of Germany and the United States of America of 20 June 1978 read in conjunction with the supplementary treaty of 21 October 1986 (see below at paragraphs 29-34). Enclosed with the request were the arrest warrant of 5 January 2003 and a written affidavit by the Deputy US Attorney of the Eastern District of New York in which the latter expounded the state of the investigations in the United States.

9. On 13 February 2003, upon an application made by the public prosecutor's office, the Frankfurt am Main Court of Appeal ordered the applicant's remand in formal custody pending extradition (*förmliche Auslieferungshaft*). It gave the US authorities until 31 March 2003 to furnish additional particulars of the offences the applicant was charged with. Thereupon, additional extradition documents were submitted to that court, including an affidavit by an FBI investigator setting out the specific offences with which the applicant was charged under the US criminal law. It emerged from these documents that the US authorities had learned of the suspected offences from a Yemeni national who had also incited the applicant to meet another informant in Frankfurt who allegedly wanted to donate money for the "Jihad".

10. At a hearing before the Frankfurt am Main Court of Appeal on 19 February 2003 the applicant refused to consent to his extradition.

11. On 24 April 2003 the Frankfurt am Main Court of Appeal confirmed its order of formal detention pending extradition. Having received additional documents from the US authorities, it noted that the applicant was now charged with membership of two terrorist associations, Al-Qaeda and the extremist branch of the Hamas. These activities corresponded to offences under German criminal law.

12. In three notes verbales the Embassy of the Republic of Yemen informed the German Foreign Office that it considered that the applicant had been abducted from Yemen to Germany contrary to public international law and to the prohibition in the Yemeni Constitution on the extradition of its own citizens. It requested the federal government to repatriate the applicant to Yemen.

13. In a note verbal of 22 May 2003 the Embassy of the United States of America gave an assurance (*Zusicherung*) to the German authorities that the applicant would not be prosecuted by a military tribunal pursuant to the Presidential Military Order of 13 November 2001 (see below at paragraphs 37-38) or by any other extraordinary court.

2. The extradition decision of the Frankfurt am Main Court of Appeal

14. On 18 July 2003 the Frankfurt am Main Court of Appeal declared the applicant's extradition admissible and ordered his further remand in custody, invoking the risk that he might abscond if released. It found that the offences which the applicant was charged with in the United States of America were punishable and extraditable, under the law of both the United States and Germany. There were no rules of domestic or public international law that required the discontinuance of the proceedings on account of the fact that the applicant had been incited to travel to Germany by an informant. Moreover, there was nothing to warrant the conclusion that the applicant might be subjected to unfair criminal proceedings or torture in the United States. The assurance given by the United States on 22 May 2003

clearly stated that criminal proceedings for the offences listed in the extradition request would be instituted against the applicant in the ordinary criminal courts.

15. On 23 July 2003 the applicant complained to the Frankfurt am Main Court of Appeal of a violation of his right to be heard in court and applied for a new decision on the validity of the extradition request and a stay of execution. On 5 August 2003 the Court of Appeal dismissed the complaint as the reasons given by the applicant disclosed no new circumstances justifying a different decision on the validity of the extradition request.

16. On 19 August 2003 the Frankfurt am Main Court of Appeal dismissed a further application by the applicant for a fresh decision on the validity of the extradition request. It found that the evidence supporting the charges had exclusively been taken from the extradition documents submitted by the US authorities, which had been sent to the applicant's lawyers for inspection prior to the decision on the validity of the extradition request. Concerns that the applicant might be at risk of torture if extradited had been allayed by the assurance given by the US authorities, which was binding under public international law. It had to be assumed that the applicant 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 Guantánamo Bay (Cuba) and Bagram (Afghanistan) and in some third countries. It could not be concluded from existing press reports on the treatment of these prisoners that ordinary criminal proceedings in the United States would not meet the minimum standards of due process of law or would infringe the prohibition on torture. Moreover, no other circumstances were known that would give cause for further inquiry into the facts.

3. The decision of the Federal Constitutional Court

17. On 28 August 2003 the applicant filed a constitutional complaint with the Federal Constitutional Court against the decisions of the Frankfurt am Main Court of Appeal of 18 July, 5 and 19 August 2003. He argued, in particular, that his surveillance by the FBI in Yemen and his abduction from that country to Germany had been in breach of Yemen's territorial sovereignty and therefore of public international law and that, accordingly, his detention pending extradition had no legal basis. He also claimed that he would be placed in preventive detention in the United States indefinitely without access to a court or a lawyer. He further alleged that, if he was extradited, the American authorities would expose him to interrogation methods that were contrary to Article 3 of the Convention.

18. On 5 November 2003 the Second Chamber (*Senat*) of the Federal Constitutional Court unanimously rejected the complaint as ill-founded and therefore refused to grant an interim injunction staying the applicant's extradition.

19. The Federal Constitutional Court found that the Frankfurt am Main Court of Appeal's decision had not infringed the Basic Law. The applicant's extradition was not in breach of public international law. There was no general rule of public international law, at any rate not in cases such as the present one, to prevent a person being lured by trickery from his State of origin to a State to which a request was then made for his extradition ("the requested State") in order to circumvent a ban on extradition that was valid in his State of origin. Examining the State practice on this question, the Federal Constitutional Court held as follows:

> "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 is heterogeneous as regards 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. The majority of decisions do not even regard the circumstances which preceded the arrest as an obstacle precluding criminal prosecution in the State of the forum.
>
> 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 the 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 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 (see International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dragan Nikolic, Decision of 5 June 2003 - IT-94-2-AR73, Appeals Chamber, nos. 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).
>
> The facts of the present case, however, differ from these cases in important details as the applicant's decision to leave Yemen was voluntary. According to his secretary's statement, the applicant himself suggested Frankfurt as the venue for a meeting that was supposed to serve fundraising activities on account of the favourable visa regulations for Yemeni citizens in Germany and in view of the good traffic connections. Admittedly, the applicant was 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, he was not threatened with the use of force, and the trickery did not facilitate his subsequent forceful abduction. The acts of deception were not performed by or are attributable to the German authorities. 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 applicant to travel specifically to Germany."

20. The Federal Constitutional Court examined a number of decisions of national and international courts and concluded that it could not be ascertained that a practice had been established under international law with respect to facts such as those in the present case which would have meant that the extradition was ostensibly in breach of customary international law. The fact that the Swiss Federal Court had refused the extradition of a Belgian citizen to Germany because the prosecuted person had been lured to Switzerland by the German authorities, infringing Belgian sovereignty (Swiss Federal Court, judgment of 15 July 1982, *Europäische Grundrechte Zeitung* 1983, pp. 435 *et seq.*) could not be regarded as proof of the existence of a practice creating customary international law. The Federal Constitutional Court notably found:

> "When assessing the existing judicial decisions it has to be borne in mind that doubts already exist as to the preconditions that must obtain before the luring of a suspect out of his or her State of residence by means of trickery – as opposed to the use of force – can be regarded as an act that is contrary to international law at all... To the extent that in the case of the use of trickery the suspect's decision to travel overseas is also motivated by his or her own interests and to the extent that the possibility remains for him or her to decide not to leave, the suspect will not, as a general rule, be the subject of State coercion.
>
> 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 borderline cases, for instance if someone is deluded into believing something that has the effect of irresistible coercion on the person affected. Such circumstances, however, do not exist here. Instead, the complainant travelled to the federal territory on the basis of an independent decision in order to pursue his own specific interests there.
>
> Moreover, recent State practice also takes into account the seriousness of the crime with which the person is charged, which means that, in this respect, it takes proportionality into consideration. The protection of high-ranking legal interests, which has been intensified at the international level in recent years, can lend itself to justifying the violation of a State's personal sovereignty that may result from the use of trickery (see International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dragan Nikolic, loc. cit., number 26). To the extent that the fight against the most serious crimes – such as supporting the international drugs trade or 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 under existing State practice, regarded as an obstacle precluding criminal prosecution. No different rules can apply to the existence of an obstacle precluding extradition."

21. As to the applicant's complaints about the interrogation methods in the United States the Federal Constitutional Court continued:

> "The applicant's rights under ... the Basic Law ... have not been violated. The Court of Appeal declared the extradition request valid in accordance with the constitutional requirements. This also applies to the extent that the applicant had applied for a further investigation into the facts of the case as regards the methods of interrogation used in the United States, which are allegedly contrary to the due process of law.

The Court of Appeal rejected this submission, citing a lack of indications to this effect in the United States' practice. This reasoning is constitutionally unobjectionable.

On the one hand, it is consistent with the Federal Constitutional Court's recent case-law, which provides that in mutual assistance concerning extradition, especially if rendered on the basis of international-law treaties, 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 evidence to the contrary (Decision of the Second Chamber of 24 June 2003 - 2 BvR 685/03 - Extradition to India). Such evidence did not exist at the time of the Court of Appeal's decision.

On the other hand, decisive weight 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 assumed an obligation, which is binding under international law, not to bring the applicant before an extraordinary court after his extradition, apply the procedural law laid down in the Order of 13 November 2001 or place the complainant in an internment camp. There is no indication that the United States will not comply with the assurance if the applicant is extradited.

It is also relevant that the relations of mutual judicial assistance that exist between Germany and the United States on the basis of international law treaties have been reinforced still further 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 (the Court's decision of 24 June 2003 cited above). Moreover, it can be assumed that the Federal Government itself will observe the further proceedings in the United States through its diplomatic missions."

22. The Federal Constitutional Court's decision was published and sent to the applicant by fax on 13 November 2003.

4. The applicant's extradition and subsequent developments

23. On Friday, 14 November 2003 the federal government authorised the applicant's extradition.

24. On Sunday, 16 November 2003 the applicant and his secretary were extradited to the United States of America on board a US Air Force aircraft.

25. In a note dated 17 November 2003 the Head of the Public Prosecutor's Office informed the Frankfurt am Main Public Prosecutor's Office that the federal government had authorised the extradition of the applicant and his secretary on 14 November 2003. The authorisation had been given on condition that they were not sentenced to death or committed to stand trial before a military tribunal (thus excluding their detention in Guantánamo Bay). They had been extradited on 16 November 2003. The Head of the Public Prosecutor's Office noted that the German authorities had not been notified of any decision taken by the European Court of Human Rights concerning the applicant (see paragraphs 43-48).

26. On 17 November 2003 the applicant was brought before a judge of the Brooklyn / New York District Court. He was reportedly subsequently held in a prison in Brooklyn.

27. On 27 January 2005 the US District Court for the Eastern District of New York opened the applicant's trial on charges of providing material support to Al-Qaeda and Hamas. Both the German Consulate General in New York and the Yemeni Government sent observers to attend the District Court's hearings.

28. According to several press reports, the US District judge sentenced the applicant on 28 July 2005 to 75 years' imprisonment, the statutory maximum sentence, for conspiracy to support Al Qaeda and Hamas, for having provided material support to Hamas and for having attempted to provide material support to Al Qaeda.

B. Relevant domestic and international law and practice

1. Relevant public international and domestic law

a. Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition

29. Extradition between Germany and the USA is governed by the bilateral Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition of 20 June 1978 (which entered into force on 29 August 1980), as added to and amended by the supplementary treaty of 21 October 1986 (which entered into force on 6 December 1988).

30. Pursuant to Article 1 of the Treaty, the Contracting Parties agree to extradite to each other persons found in the territory of one of the Contracting Parties who have been charged with an offence or are wanted for the enforcement of a judicially pronounced penalty or detention order for an offence.

31. Articles 2 and 3 provides that extradition will be granted in respect of certain extraditable, non-political offences either for the prosecution of these offences or the enforcement of a penalty or detention order.

32. The Requesting State is required to inform the Requested State on demand of the result of the criminal proceedings against the extradited person and to send a copy of the final and binding decision to that State (Article 24).

33. When the offence for which extradition is requested is punishable by death under the laws of the Requesting State and the laws of the Requested State do not permit such punishment for that offence, extradition may be refused unless the Requesting State furnishes such assurances as the

Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be executed (Article 12).

34. Article 13 of the Treaty provides that an extradited person is not to be tried by an extraordinary court in the territory of the Requesting State and that extradition may not be granted for the enforcement of a penalty imposed, or detention ordered, by an extraordinary court.

b. International Assistance in Criminal Matters Act

35. Pursuant to section 15(1) of the International Assistance in Criminal Matters Act (IACMA), a person may be taken into detention pending extradition upon receipt of an extradition request if there is a risk that he or she might otherwise evade the extradition proceedings or extradition or if, on the basis of specific facts, there are strong grounds for believing that he or she would obstruct the process of establishing the truth in the proceedings in the foreign State or in the extradition proceedings. Section 15(2) of the IACMA lays down that section 15(1) shall not apply if the request for extradition appears to be invalid from the outset.

c. The Basic Law

36. Pursuant to Article 25 of the Basic Law, the general rules of international law form an integral part of federal law. They take precedence over statute law and directly create rights and duties for the inhabitants of German territory.

2. Relevant law of the United States of America

37. On 13 November 2001 the President of the United States of America signed a military order on the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (U.S. Federal Register of 16 November 2001, Vol. 66 No. 222, pp. 57831 *et seq.*).

38. The US President's Military Order applies to non-citizens of the US with respect to whom there is reason to believe that they are members of Al-Qaeda or have aided and abetted acts of international terrorism (section 2 of the Order). Any individual subject to the Order shall be detained at an appropriate location designated by the Secretary of Defence outside or within the United States (section 3 of the Order). They shall, when tried, be tried by military commission for any and all offences triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death (section 4 of the Order). Military tribunals shall have exclusive jurisdiction with respect to offences committed by such persons, who shall not be privileged to seek any remedy in any court of the United States, any court of any foreign nation, or any international tribunal (section 7 of the Order).

3. Relevant international material

a. Amnesty International Reports

39. In its Annual Report 2003 on the USA, covering events from January to December 2002, Amnesty International stated:

> **"Background**
>
> The US-led international military action in Afghanistan, launched following the 11 September 2001 attacks, continued into 2002. Thousands were detained in the context of the conflict, with frequent transfers of prisoners between the US, Afghan and Pakistan authorities. ...
>
> **Detentions outside the USA**
>
> During the year, starting in January, the USA transferred more than 600 foreign nationals to the US naval base in Guantánamo Bay, Cuba, where they were held without charge or trial or access to the courts, lawyers or relatives. Although most were arrested during the armed conflict in Afghanistan, the USA refused to grant them prisoner of war status under the Geneva Conventions or to afford them other rights under international human rights law. ...
>
> The conditions of the detainees' transfer to and detention in Guantánamo Bay gave cause for serious concern. ...
>
> A number of suspected members of *al-Qa'ida* reported to have been taken into US custody continued to be held in undisclosed locations. The US government failed to provide clarification on the whereabouts and legal status of those detained, or to provide them with their rights under international law, including the right to inform their families of their place of detention and the right of access to outside representatives. An unknown number of detainees originally in US custody were allegedly transferred to third countries, a situation which raised concern that the suspects might face torture during interrogation.
>
> Two US nationals continued to be held in incommunicado detention without charge or trial as 'enemy combatants' in military custody in the USA at the end of the year. ..."

40. In its 2004 Annual Report on the United States of America, which covered events from January to December 2003, Amnesty International noted:

> "**Background**
>
> Thousands of people were detained in the context of the US-led war against Iraq and subsequent occupation of Iraq by the Coalition Provisional Authority... Others were held in US bases in Afghanistan, Cuba and elsewhere as part of the ongoing 'war against terrorism'. ...

Detentions outside the USA

Hundreds of detainees from around 40 countries remained in legal limbo in the US naval base in Guantánamo Bay. ... None of the detainees were charged, tried, or given access to lawyers, relatives or the courts. ...

During 2003, concern continued to grow about the psychological impact on the detainees of the indefinite and isolating detention regime in Guantánamo. The International Committee of the Red Cross (ICRC), the only international non-governmental organization with access to the detainees, took the unusual step of publicly criticizing the lack of legal process and spoke of the deterioration in mental health that the organization had witnessed among large numbers of the detainees. ...

The US air base in Bagram, Afghanistan, continued to be used as a detention facility. There, too, detainees were denied any sort of legal process. The ICRC did not have access to all those held there. During the year, allegations were made that detainees had been tortured or ill-treated in Bagram. ...

There were continuing concerns about the possible transfer of prisoners to countries where it was feared they might face torture during interrogation.

Military commissions

On 3 July, the Pentagon announced that President Bush had selected six foreign detainees to be subject to the provisions of the Military Order he signed in November 2001. The Order provides for non-US nationals suspected of involvement in 'international terrorism' to be held indefinitely without trial or to be tried by military commissions. ..."

b. Newspaper articles

41. In company with numerous other newspapers, *The Washington Post* reported on interrogation methods applied to terrorist suspects following the attacks of September 11, 2001. For instance, in its article 'U.S. Decries Abuse but Defends Interrogations – 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities' dated 26 December 2002, it reported on the use of methods known as "stress and duress" techniques at the U.S. airbase in Bagram (Afghanistan) and in other secret detention centres outside US territory. The techniques reportedly used comprised methods such as beating, holding suspects in painful positions and sleep deprivation. Furthermore, some suspects were handed over to foreign intelligence services known for using brutal means with a list of questions the agency wanted answered.

42. In its article 'Justice Dept. Memo Says Torture 'May Be Justified'' of 13 June 2004, *The Washington Post* reported on a memorandum written by the US Department of Justice dated 1 August 2002 on standards of conduct for interrogations of suspected Al-Qaeda members whom the CIA had apprehended outside the United States. Another memorandum dated 6 March 2003 from a Defence Department Working Group, which was to

elaborate new interrogation guidelines for detainees at Guantánamo Bay, incorporated much of the Justice Department's memorandum.

PROCEDURE BEFORE THE COURT

43. At around 4 p.m. on Friday, 14 November 2003 the applicant lodged his application with the Court by fax. Simultaneously he filed a request for interim measures pursuant to Rule 39 of the Rules of Court, requesting the Court to ask the German Government provisionally to stay the extradition proceedings.

44. According to the Government, the applicant's lawyer informed them by telephone on 14 November 2003 merely that the applicant would lodge an application with the Court in the future. This was contested by the applicant who stressed that his lawyer had informed the Federal Ministry of Justice by telephone on that day that the applicant had already lodged his application and a request for interim measures under Rule 39. His lawyer had, however, been informed by a staff member of the Ministry that the applicant's extradition proceedings would certainly continue for another "couple of days".

45. The applicant's lawyer also intended to fax a copy of the application to the Court and of the request for interim measures to the Federal Ministry of Justice on 14 November 2003. However, he used the wrong fax number.

46. The applicant's lawyer informed the Court by telephone at around 4.30 p.m. on the same day that he had informed the Federal Ministry of Justice by telephone and fax about the introduction of the application with the Court and the request for interim measures under Rule 39. He stated that he had been informed by the Ministry that the applicant's extradition proceedings would certainly take a few more days.

47. The applicant was extradited to the United States of America on Sunday, 16 November 2003 (see paragraph 24 above).

48. On 17 November 2003 the Court informed the Government that the applicant had applied for his extradition to be stayed by way of an interim measure pursuant to Rule 39 of the Rules of Court. On the same day, the applicant's lawyer faxed a copy of the applicant's submissions dated 14 November 2003 and of the request for interim measures to the Federal Ministry of Justice. He also faxed a press release to the Court in which he complained that the applicant had been extradited to the USA despite the German authorities' knowledge of his request for an interim measure suspending his extradition. He argued that by proceeding with the applicant's immediate extradition the Government had sought to avoid having to comply with the Court's recommendation for a provisional stay of the extradition.

COMPLAINTS

49. The applicant submitted that his extradition to the United States of America violated Article 3 of the Convention because, like other terrorist suspects, he would be subjected to interrogation methods amounting to torture at the hands of the US authorities.

50. Invoking Article 5 § 1 of the Convention the applicant claimed that his detention pending extradition had been unlawful, as his placement under surveillance in and abduction from Yemen had breached public international law. For the same reasons he argued that the extradition proceedings in Germany had not been fair and therefore breached Article 6 § 1 of the Convention.

51. The applicant further alleged that following his extradition to the United States of America he would be placed in detention indefinitely without access to a court or a lawyer and therefore risked suffering a flagrant denial of a fair trial, contrary to Article 6 § 1 of the Convention.

52. Finally, the applicant claimed that the German authorities had violated Article 34, second sentence, of the Convention, as they had extradited him to the United States of America despite being notified that he had lodged an application and a Rule 39 request with the Court.

THE LAW

A. The Government's objections

1. The parties' submissions

53. Relying on Article 34 of the Convention, the Government argued, firstly, that the application was inadmissible as a whole owing to the applicant's lack of interest in securing legal protection (*Rechtsschutzbedürfnis*). They stated that the Yemeni Deputy Minister of Foreign Affairs, Mr Al-Dhabbi, had told staff members of the German Embassy in Sanaa that he presumed that the applicant was no longer interested in pursuing the proceedings before the Court.

54. The applicant's lawyer stated that the applicant had confirmed via members of his family that he wished to pursue his application following his extradition.

55. Secondly, the Government claimed that the application was in any event inadmissible in so far as the applicant had initially complained that Articles 3 and 6 of the Convention would be violated if he was extradited. These parts of the application had become devoid of purpose following the

applicant's extradition and were therefore inadmissible, as the applicant had not alleged that he had in fact been a victim of a denial of justice or had been subjected to interrogation methods amounting to torture. The Government relied on Article 34 of the Convention on this point also.

56. The applicant did not expressly comment on this issue, but stood by his complaints under Articles 3 and 6 of the Convention after his extradition, arguing that Germany had in fact violated these provisions by extraditing him to the United States of America.

2. The Court's assessment

57. The Court does not consider it necessary in the present case to rule on the objections made by the Government. Assuming that the applicant wishes to pursue his application and has not lost his status of victim of Convention violations, it considers that the application is in any event inadmissible for the reasons set out below.

B. Complaint under Article 3 of the Convention

58. The applicant claimed that following his extradition he risked being subjected to interrogation methods amounting to torture at the hands of the US authorities. His extradition therefore breached Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

1. The parties' submissions

59. In the Government's submission, the applicant had failed to substantiate that he risked being subjected to treatment contrary to Article 3 of the Convention in the United States of America if extradited to that country. The Government's long standing experience concerning extraditions to the USA showed that there was no risk that the applicant would be exposed to such treatment.

60. The applicant argued that prisoners like him who were suspected of offences connected with international terrorism risked being submitted to measures amounting to inhuman and degrading treatment, if not torture. Such methods had been employed in foreign States detaining terrorist suspects on behalf of the United States or even by the US authorities themselves. At the time of the applicant's extradition proceedings it was already common knowledge from publicly available sources, notably newspaper and Amnesty International reports, that the US authorities questioned terrorist suspects by using interrogation methods that were contrary to Article 3 of the Convention. These notably comprised subjecting suspects to extreme heat or cold, depriving them of light or darkness,

making them squat in painful positions, questioning and feeding them at irregular intervals, keeping them awake for hours and holding them in isolation. In order to avert such treatment, the German Government should have obtained concrete guarantees from the United States of America that the applicant would not be subjected to interrogation methods contrary to Article 3 despite the fact that the US authorities generally considered the use of interrogation methods amounting to torture on terrorist suspects to be justified.

61. The applicant submitted that the use of interrogation methods amounting to torture in questioning terrorist suspects had been confirmed, *inter alia*, by statements emanating from the US Ministries of Defence and of Justice concerning interrogation techniques in the global war on terrorism.

2. The Court's assessment

a. The relevant principles

62. It is the settled case-law of the Court that the decision by a Contracting State to extradite a fugitive – and, *a fortiori*, the actual extradition itself – may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (see, *inter alia*, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, § 91; *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70; and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

63. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (see, among others, *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment,

the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition; the Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see, *mutatis mutandis*, *Cruz Varas*, cited above, pp. 29-30, §§ 75-76; *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 36, § 107; *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004; and *Mamatkulov*, cited above, § 69).

64. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (see, *mutatis mutandis*, *Vilvarajah*, cited above, p. 36, § 108; *Jabari v. Turkey*, no. 40035/98, § 39, ECHR 2000-VIII).

b. Application of the above principles to the present case

65. In determining whether at the time of the applicant's extradition there existed a real risk that he would be subjected to treatment proscribed by Article 3 when interrogated by the US authorities, the Court observes that the applicant notably relied on Amnesty International and press reports concerning the ill-treatment of prisoners associated with international terrorism. The Court finds that, in principle, the applicant falls within the group of suspects who reportedly risked being subjected to ill-treatment when interrogated. The US prosecution authorities charged him 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. Furthermore, in Frankfurt the applicant met an informant working for the US authorities who, according to these authorities, pretended that he wished to make a donation for the "Jihad".

66. The Court would state at the outset that it is gravely concerned by the worrying reports that have been received about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism. It notes, however, that these reports concern prisoners detained by the US authorities outside the national territory, notably in Guantánamo Bay (Cuba), Bagram (Afghanistan) and some other third countries. It further observes that the German authorities and courts were satisfied by the assurance given to them by the US authorities on 22 May 2003 that the applicant would not be detained in any of these places. In particular, the Federal Constitutional Court stated that

the United States had precluded the possible application of the Presidential Military Order of 13 November 2001 by their assurance, which meant that they had entered into a binding obligation not to detain the complainant in an internment camp. Likewise, the German Federal Government had authorised the applicant's extradition under the condition that he would not be detained in Guantánamo Bay.

67. In order to determine whether the German authorities can be considered to have obtained sufficient guarantees to avert the danger of the applicant's being subjected to interrogation methods proscribed by Article 3 the Court must assess how far the said assurance can be considered effectively to have averted this danger (see, *mutatis mutandis*, *Soering*, cited above, pp. 38-39, §§ 97-99; *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII; and *Einhorn v. France* (dec.), no. 71555/01, § 26, ECHR 2001-XI). The Court observes that in the note verbal issued by the US Embassy on 22 May 2003, the US authorities merely assured that the applicant would not be prosecuted by a military tribunal pursuant to the Presidential Military Order of 13 November 2001 or by any other extraordinary court. However, the German authorities and courts expressly stated in the extradition proceedings and in their conditions for allowing the applicant's extradition that they understood the US authorities' assurance to comprise an undertaking not to detain the applicant in a facility outside the USA. This assessment has indeed been confirmed following the applicant's extradition, as there is no indication that he has been detained in a prison outside the USA prior to or during his trial in the US District Court for the Eastern District of New York.

68. In assessing the effectiveness of the assurance given by the requesting State to avert the risk of the applicant being ill-treated, the Court also attaches importance to the fact – which is uncontested by the applicant – that to date it has not been Germany's experience that assurances given to them in the course of proceedings concerning extraditions to the USA are not respected in practice or that the suspect is subsequently ill-treated in US custody. Moreover, the applicant's personal circumstances were carefully considered by the German authorities and courts in the light of a substantial body of material concerning the current situation in the USA (compare, *mutatis mutandis*, *Cruz Varas*, cited above, p. 31, § 81; and *Vilvarajah*, cited above, p. 37, § 114).

69. In these circumstances, the Court accepts that the German authorities have obtained an assurance, which is binding under public international law, that the applicant will not be transferred to one of the detention facilities outside the United States of America in respect of which interrogation methods at variance with the standards of Article 3 have been reported. It notes in this connection that, as the Federal Constitutional Court had assumed they would (see paragraph 21 *in fine*), the German authorities sent

a representative to observe the proceedings against the applicant in the US (see paragraph 28).

70. The Court further finds that, in the absence of reports denouncing the ill-treatment of terrorist suspects such as the applicant detained in regular detention facilities within the USA, the applicant has failed to substantiate that he faced a real risk of being subjected to treatment contrary to Article 3 during interrogation in custody in an ordinary US prison.

71. In the light of the foregoing, the Court considers that in the circumstances of the present case the assurance obtained by the German Government was such as to avert the risk of the applicant's being subjected to interrogation methods contrary to Article 3 following his extradition.

72. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to its Article 35 § 4.

C. Complaint under Article 5 of the Convention

73. In the applicant's submission, his detention pending extradition was unlawful, as his placement under surveillance in and abduction from Yemen had breached public international law. He invoked Article 5 § 1 (f) of the Convention, which, in so far as relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

1. The parties' submissions

74. In the Government's view, the applicant's detention had not violated Article 5 § 1 of the Convention. Action had been taken against him with a view to his extradition within the meaning of Article 5 § 1 (f), as proceedings concerning his extradition to the United States of America had been pending against him throughout his detention in Germany.

75. The Government further submitted that the applicant had been deprived of his liberty in accordance with a procedure prescribed by law. The applicant's continued detention and his extradition complied with the provisions of the Extradition Treaty between Germany and the United States of America of 20 June 1978 and the International Assistance in Criminal Matters Act (IACMA). In particular, the request for the applicant's extradition had not appeared invalid on its face within the meaning of

section 15 § 2 IACMA so that his detention pending extradition was lawful. The Government referred to the reasoning in the decisions of the Frankfurt am Main Court of Appeal and the Federal Constitutional Court in this respect.

76. The applicant claimed that his detention pending extradition was not lawful within the meaning of Article 5 § 1 (f) because it contravened public international law. The extradition request had been based on surveillance measures which violated public international law as they had been carried out by a secret agent working for the US authorities on Yemeni territory in disregard of its territorial sovereignty. Moreover, the luring of the applicant onto the territory of the requested State where the request for his extradition was made had been aimed at circumventing the prohibition under Yemeni law of extraditing the country's own nationals. That act, performed in Yemen, violated Yemen's territorial sovereignty and was therefore contrary to public international law. Pursuant to Article 25 of the Basic Law which provides that the rules of customary international law form part of the federal law (see paragraph 36 above) the applicant's extradition also contravened domestic law.

77. The applicant argued that his extradition and therefore also his detention pending extradition by the German authorities was itself contrary to customary public international law applicable in Germany, as it perpetuated the said violations of public international law by the US authorities. In particular, the German authorities had cooperated with the US authorities in securing the applicant's arrest in Germany. To support his view, he relied on the judgment of the Swiss Federal Court of 15 July 1982, which is referred to at paragraph 20 above.

2. The Court's assessment

a. The relevant principles

78. The Court reiterates that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law" within the meaning of Article 5 § 1, the Convention refers back essentially to national law, including rules of public international law applicable in the State concerned (see, *mutatis mutandis*, *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, § 68; *Öcalan v. Turkey* [GC], no. 46221/99, §§ 83, 90, ECHR 2005-IV; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 87, 29 June 2006). The Convention lays down the obligation to conform to the substantive and procedural rules of national law. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1864, § 118;

Čonka v. Belgium, no. 51564/99, § 39, ECHR 2002-I; and *Öcalan*, cited above, § 83).

79. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Bozano v. France*, judgment of 18 December 1986, Series A no. 111, p. 25, § 58; and *Öcalan*, cited above, § 84).

80. As regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned for the purpose of bringing fugitive offenders to justice are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see *Illich Ramirez Sánchez v. France*, no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 162; and *Öcalan*, cited above, §§ 86-87).

81. However, given that "lawfulness" also implies absence of any arbitrariness, extra-territorial measures of a respondent State resulting in the applicant's detention which entailed clear violations of international law, for instance in the case of forcing an applicant against his will to enter the respondent State in a manner that is inconsistent with the sovereignty of his host State, raise an issue under Article 5 § 1 of the Convention (see, *mutatis mutandis*, *Bozano v. France*, cited above, pp. 25-27, §§ 59-60; *Stocké v. Germany*, judgment of 19 March 1991, Series A no. 199, pp. 18-19, §§ 51, 54; *Čonka*, cited above, §§ 41-42; and *Öcalan*, cited above, §§ 90).

b. Application of the above principles to the present case

82. The Court notes at the outset that it was not in dispute between the parties that the applicant was detained "with a view to extradition" to the United States of America within the meaning of Article 5 § 1 (f) of the Convention. It shares this view.

83. In determining whether the applicant's detention was "lawful" and complied with "a procedure prescribed by law" the Court observes that the German courts considered the applicant's detention pending extradition to comply with the substantive and procedural provisions of the bilateral Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition, read in conjunction with the International Assistance in Criminal Matters Act (IACMA). This was not contested by the applicant, who argued that his extradition, and consequently also his

detention pending extradition, was unlawful because his placement under surveillance in and abduction from Yemen was contrary to the rules of customary public international law applicable in Germany, which took precedence over the said treaty and statutory provisions.

84. In this respect, the Court notes that the Federal Constitutional Court, in a thoroughly reasoned decision, disagreed with the applicant. According to that court, there was no general rule of public international law, at any rate not in cases like the present one, to prevent the extradition of a person who had been lured, by trickery, from his State of origin to the requested State in order to circumvent a ban on extradition that was valid in the State of origin. The fact that, without any participation by the German authorities, the applicant had previously been kept under surveillance by informants working for the US authorities in Yemen did not affect this finding.

85. Having reviewed the national courts' finding that domestic law, including the rules of public international law applicable in the respondent State, authorised the applicant's detention pending extradition, the Court discerns no issues that raise doubts about the compatibility of the applicant's detention with German law.

86. With "lawfulness" under Article 5 implying also the absence of arbitrariness, the Court moreover attaches weight to the circumstances which led to the applicant's arrest and detention (compare, *mutatis mutandis*, *Čonka*, cited above, § 59).

87. It observes in the first place that it was not the respondent State itself – or persons for whose actions it must be deemed responsible – which had taken extraterritorial measures on Yemen's territory aimed at inciting the applicant to leave that country. In this respect, the present case is therefore to be distinguished from the facts of the cases cited above (at paragraph 81).

88. Moreover, the present case does not concern the use of force. The applicant was tricked by the US authorities into travelling to Germany. As was convincingly stated in the Federal Constitutional Court's judgment (see paragraph 19 above), if a State apprehends a suspect by committing serious human rights violations and if the State whose territorial sovereignty is violated protests, State practice indicates that there is an obstacle to extradition and, consequently, to detention pending extradition. In such cases, the detention also raises an issue under Article 5 § 1 of the Convention. However, the use of force on the territory of a third-party State in violation of its territorial sovereignty in order to remove a suspect from his or her State of origin to the respondent State was not alleged in the present case. The cooperation between German and US authorities on German territory pursuant to the rules governing mutual legal assistance in arresting and detaining the applicant do not in itself give rise to any problem under Article 5 (see paragraph 80 above).

89. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to its Article 35 § 4.

D. Complaints under Article 6 § 1 of the Convention

90. The applicant submitted that he had not had a fair trial in the German courts, notably because his placement under surveillance in and abduction from Yemen had breached public international law and his extradition was therefore also unlawful. He further argued that following his extradition he was likely to be placed in detention indefinitely without access to a court or a lawyer and therefore risked suffering a flagrant denial of fair trial in the United States of America. He relied on Article 6 § 1 of the Convention, the relevant part of which reads:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

1. The extradition proceedings in Germany

91. In the Government's submission, the applicant's complaint about the fairness of the extradition proceedings as such did not fall within the ambit of Article 6 § 1 of the Convention. They argued that the extradition proceedings against the applicant did not concern the determination of his civil rights or of a criminal charge against him.

92. The applicant submitted that the extradition proceedings in the German courts had not been fair. The courts had not given due weight to the fact that his extradition was unlawful because his placement under surveillance in and abduction from Yemen had breached public international law. Moreover, he argued that the Court of Appeal had failed to verify whether the informants working for the US authorities on German territory had been validly authorised to do so in compliance with the provisions governing the grant of legal assistance.

93. The Court reiterates that extradition proceedings do not concern a dispute ("*contestation"*) over an applicant's civil rights and obligations (see, *inter alia*, *RAF v. Spain* (partial dec.), no. 53652/00, ECHR 2000-XI; and *A.B. v. Poland* (dec.), no. 33878/96, 18 October 2001). It further recalls that the words "determination ... of a criminal charge" in Article 6 § 1 of the Convention relate to the full process of examining an individual's guilt or innocence in respect of a criminal offence, and not merely, as is the case in extradition proceedings, to the process of determining whether or not a person may be extradited to a foreign country (see, among others, *RAF*, cited above; *Eid v. Italy* (dec.), no. 53490/99, 22 January 2002; and *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 82).

94. Therefore, Article 6 is not applicable to the present case in so far as the applicant complained about the fairness of the extradition proceedings before the German courts. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to its Article 35 § 4.

2. The trial in the United States of America

a. The parties' submissions

95. In the Government's view, the applicant could not be understood as having complained under Article 6 § 1 that if extradited he would suffer a flagrant denial of a fair trial in the criminal proceedings against him in the United States of America.

96. In any event, the Government's long standing experience concerning extraditions to the United States of America proved that the applicant did not risk being subjected to a trial in that country in which his rights were flagrantly breached. Criminal proceedings in the USA complied with the rule of law. As the extradition was carried out on the basis of a pre-existing extradition treaty between Germany and the United States, there was a presumption that the requesting State would respect the rule of law and human rights. Furthermore, the assurance given by the United States of America on 22 May 2003 precluded the applicant's committal for trial before a military or other extraordinary court pursuant to the Presidential Military Order of 13 November 2001. Consequently, there was a guarantee that the applicant would be committed to stand trial before the ordinary US criminal courts.

97. The applicant submitted notably in his application to the Court dated 14 November 2003 that if extradited he risked suffering a flagrant denial of justice in the USA, contrary to Article 6 of the Convention. As a non-US citizen suspected of terrorism he was likely to be placed in detention indefinitely pursuant to the Presidential Military Order of 13 November 2001.

98. The assurance given by the US authorities, in the applicant's view, did not exclude his internment for an indefinite duration pursuant to section 3 of the said Order in a military camp within or outside the United States of America without being committed for trial.

b. The Court's assessment

99. Having regard to the applicant's submissions, notably in his application to the Court dated 14 November 2003, the Court, unlike the Government, has no doubt that the applicant has complained under Article 6

of the Convention that he risked being denied a fair trial in the USA following his extradition.

100. The Court reiterates that it cannot be ruled out that an issue might exceptionally arise under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country (see *Soering*, cited above, p. 45, § 113; *Einhorn*, cited above, § 32; and *Mamatkulov and Askarov*, cited above, § 88). It considers that, like the risk of treatment proscribed by Article 2 and / or Article 3, the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the person concerned (see *Mamatkulov and Askarov*, cited above, § 90; and *Olaechea Cahuas v. Spain*, no. 24668/03, § 61, ECHR 2006-...).

101. In the Court's view, the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society (see, among many others, *Soering*, cited above, p. 45, § 113). Even the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the very essence of a fair trial as guaranteed by Article 6 (see, *mutatis mutandis*, *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 57-58, ECHR 2000-XII; and *Papon v. France*, no. 54210/00, § 98, ECHR 2002-VII). A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release (see, *a fortiori* and among many other authorities, *Papon*, cited above, § 90). Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial within the meaning of Article 6 §§ 1 and 3 (c). The Court refers to its well-established case-law in these fields (see, *a fortiori* and among many other authorities, *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, pp. 53-56, §§ 59-70; and *Öcalan*, cited above, §§ 131-137, 148).

102. The extradition of the applicant to the United States would therefore raise an issue under Article 6 of the Convention if there were substantial grounds for believing that following his extradition he would be held incommunicado without having access to a lawyer and without having access to and being tried in the ordinary US criminal courts. Referring to its findings with respect to Article 3, the Court finds that, in principle, the applicant fell within the category of terrorist suspects who came within the ambit of the Presidential Military Order of 13 November 2001 and who therefore risked being subjected to the impugned treatment. It notes,

however, that the German authorities and courts relied on the assurance given to them by the US authorities that the applicant would not be prosecuted by a military tribunal pursuant to the Presidential Military Order of 13 November 2001 or by any other extraordinary court. Unlike the applicant, they inferred from this undertaking that criminal proceedings before the ordinary criminal courts would be instituted against the applicant for the offences listed in the extradition request.

103. In order to determine whether the German authorities can be considered to have obtained sufficient guarantees to avert the danger of the applicant's suffering a flagrant denial of a fair trial in breach of Article 6, the Court refers to its above finding under Article 3 that the German Government was entitled to infer from the assurance given that the applicant would not be transferred to one of the detention facilities outside the United States of America – that is, the facilities in which terrorist suspects were held without being granted access to a lawyer or to the ordinary criminal courts (see paragraphs 66-69 above). Moreover, the Court observes that the applicant's extradition to the USA was granted on the basis of the bilateral Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition of 20 June 1978. As is apparent from the wording of Articles 1 to 3 and 24 of that Treaty (see paragraphs 30-32 above), extraditions granted on the basis of the Treaty either serve to allow the requesting State to prosecute an extraditable offence or to enforce a penalty imposed following conviction of such an offence. In these circumstances, the German authorities could reasonably infer from the assurance given to them in the course of the extradition proceedings that the applicant would in fact be committed to stand trial for the offences in respect of which his extradition had been granted and that he would therefore not be detained for an indefinite duration without being able to defend himself in court.

104. The Court further attaches importance to the thorough examination of the circumstances of the present case carried out by the German authorities and courts and to their long standing experience of extraditions to the USA, and in particular to the fact that the assurances given to them up to that point had been respected in practice. It refers to its reasoning under Article 3 in this respect.

105. As the Court has confirmed on several occasions and the applicant has not disputed, the proceedings before the ordinary US criminal courts to which the applicant was to be committed following his extradition respect the rule of law (see, for instance, *Soering*, cited above, p. 44, § 111; *Einhorn*, cited above, § 33).

106. The Court further notes in this connection that the German authorities' interpretation of the assurance given to them has been confirmed following the applicant's extradition. The applicant was brought before a judge of the Brooklyn / New York District Court immediately after

his arrival in the USA. Furthermore, as confirmed by a representative of the German Consulate observing the proceedings, the US District Court for the Eastern District of New York opened the applicant's trial (on charges of having provided material support to Al-Qaeda) on 27 January 2005.

107. Having regard to the foregoing, the Court finds that at the time of the applicant's extradition there were no substantial grounds for believing that he would subsequently suffer a flagrant denial of a fair trial by being detained without access to a lawyer and to the ordinary US criminal courts.

108. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

E. Complaint under Article 34 of the Convention

109. The applicant claimed that the German authorities had hindered the effective exercise of his right of application as guaranteed by Article 34, second sentence, of the Convention. He argued that they had extradited him to the United States of America even though the Government had been notified that he had lodged an application and a Rule 39 request with the Court.

110. Article 34 reads:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

111. Rule 39 of the Rules of Court provides:

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
>
> 2. Notice of these measures shall be given to the Committee of Ministers.
>
> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

1. The parties' submissions

112. The Government submitted that the first time the applicant had raised the complaint of a breach of his right to an effective application to the Court under Article 34 of the Convention was in his observations dated 23 June 2004, following a question to that effect put to the Government by the Court when it communicated the application. He had therefore not lodged this complaint within six months from the date on which the

extradition order was executed, so that his application was inadmissible in this respect pursuant to Article 35 § 1 of the Convention.

113. The Government stressed that, in any event, at the time of the applicant's extradition to the United States of America on 16 November 2003, they had not yet been informed that the applicant had lodged a request with the Court for a provisional stay of execution of his extradition pursuant to Rule 39. They submitted that the applicant had been extradited soon after authorisation was given on 14 November 2003 for security reasons. It was not until 17 November 2003 that they were informed by the Court's Registry that the applicant had in fact already applied for interim measures on 14 November 2003. In particular, the applicant's lawyer had not informed them of this in their telephone conversation on 14 November 2003. Consequently, the applicant's right to the effective exercise of his right of application to the Court, as guaranteed by Article 34 of the Convention, had not been violated. Mere knowledge of the fact that an applicant intended to lodge an application with the Court did not oblige the respondent State to defer his or her extradition.

114. In any event, even if the Government had been aware that the applicant had requested interim measures, they would not have been obliged to stay the applicant's extradition pending the Court's decision as, to the extent that it was binding at all, a measure recommended by the Court under Rule 39 was only binding on the Contracting States following a formal decision by the Court to apply the said Rule. The Government stressed that, in accordance with their constant practice, they would, however, have ordered a provisional stay of the applicant's extradition if the Court had asked them to await its decision on the applicant's Rule 39 request.

115. The applicant said that his lawyer had complained to the Court on 17 November 2003 that the Government had extradited him despite being aware that he had requested interim measures. He submitted that his complaint under Article 34, second sentence, of the Convention was therefore first raised in substance at that point.

116. The applicant claimed that the Government had proceeded with his extradition despite being informed by his lawyer on 14 November 2003 that he had applied to the Court for an interim stay of extradition in order to create an irreversible situation so as to avoid having to comply with any provisional stay of extradition recommended by the Court.

2. The Court's assessment

117. The Court notes at the outset that the Government considered this part of the application to be inadmissible pursuant to Article 35 of the Convention as the applicant had failed to lodge his complaint under Article 34, second sentence, of the Convention within six months from the date of his extradition. It recalls that Article 34 confers upon an applicant a right of a procedural nature distinguishable from the substantive rights set

out in Section I of the Convention and the Protocols to the Convention (see, in respect of former Article 25 § 1 of the Convention, *Cruz Varas*, cited above, pp. 35-36, § 99; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 470, 12 April 2005). The date on which the applicant lodged his complaint under Article 34, second sentence, does not, therefore, give rise to any issue of admissibility under the Convention (see *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, p. 1784, § 105; and *Shamayev*, cited above, § 507). The Government's arguments on this point must consequently be rejected.

118. As to the merits of the complaint, the Court reiterates that, by virtue of Article 34 of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application.

119. In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint. The result that the applicant wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it. Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the "effective exercise" of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject-matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State (see *Mamatkulov and Askarov*, cited above, § 108; *Shamayev*, cited above, § 473; and *Aoulmi v. France*, no. 50278/99, § 103, ECHR 2006-...).

120. Thus, indications of interim measures given by the Court permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention (see *Mamatkulov and Askarov*, cited above, § 125; *Shamayev*, cited above, § 473; and *Aoulmi*, cited above, § 108). The Court recalls in this respect that its *Soering* judgment resolved the conflict in that case between a State Party's Convention obligations and its obligations under an extradition treaty with a third-party State by giving precedence to the former (*Soering*, cited above, pp. 44-45, § 111; see also *Mamatkulov and Askarov*, cited above, § 107).

121. Accordingly, as the Court found in its judgment of 4 February 2005 in the case of *Mamatkulov and Askarov* (cited above, at §§ 125 and 128), a failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her Convention rights and, accordingly, as a violation of Article 34 of the Convention (see also *Shamayev*, cited above, § 473; *Aoulmi*, cited above, § 107; and *Olaechea Cahuas*, cited above, § 72).

122. The Court notes that in the present case it is uncontested that the applicant lodged a request on Friday, 14 November 2003 under Rule 39 of its Rules for his extradition to be stayed pending the outcome of his application to the Court. On Sunday, 16 November 2003 the German authorities extradited the applicant to the United States of America. At that time, the Court had not yet rendered a decision on the applicant's request. It had been informed by the applicant's lawyer that he had notified the Federal Ministry of Justice that the applicant had lodged a Rule 39 request with the Court. According to the applicant's lawyer, the Ministry said that the extradition would not take place within the next few days. Therefore, the Court was convinced that the Federal Ministry of Justice had knowledge of the applicant's Rule 39 request and that it was not necessary to reach a decision on the applicant's request still on 14 November 2003. To the Court's regret, these assumptions proved to be wrong. It is, however, common ground that the submissions to the Court were not communicated by fax to the Ministry as the applicant's lawyer had used a wrong fax number. Moreover, the Ministry itself was not competent for executing the extradition decision.

123. Therefore, it is clear that the respondent Government cannot be said to have failed to comply with measures formally indicated by the Court under Rule 39 of its Rules.

124. Nevertheless, having regard to all the circumstances and the course of events as set out above, the Court finds that the case still raises an issue of whether the respondent State is in breach of its undertaking under Article 34 not to hinder the applicant in the effective exercise of his right of individual application. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications (see, *inter alia*, *Mamatkulov and Askarov*, cited above, § 101; and *Aoulmi*, cited above, § 109).

125. As stated above, the objects of an interim measure are both effectively to protect an applicant who has plausibly asserted that there is a risk of irreparable damage to the enjoyment of one of the core rights of the Convention and to enable the Court to carry out an effective examination of the application. The Court reiterates in that connection that Article 31 § 1 of

the Vienna Convention on the Law of Treaties provides that treaties – such as the Convention – must be interpreted in good faith in the light of their object and purpose, and therefore in accordance with the principle of effectiveness (see, *inter alia*, *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, § 55, ECHR 2001-XII and *Mamatkulov and Askarov*, cited above, § 123). Therefore, the Court does not exclude the possibility that acts or omissions by the authorities of a respondent State intended to prevent the Court taking a decision on a Rule 39 request or notifying the Government thereof in a timely manner may amount to a violation of a State's obligations under Article 34, second sentence, of the Convention, which requires cooperation in good faith with the Court (compare, *mutatis mutandis*, *Shamayev*, cited above, §§ 475, 479).

126. The Court observes that it is a point of contention between the parties whether or not the applicant's representative – a lawyer experienced in dealing with cases of this type – had informed the Ministry of Justice on 14 November 2003 by telephone that the applicant had already lodged a request for interim measures under Rule 39 of the Rules of Court (see paragraph 44 above). However, a faxed copy of the application which the applicant's lawyer had intended to send did not reach the Ministry. Accordingly the Court cannot consider it established that the Ministry was duly informed that a request under Rule 39 had already been made. Nor can the Court consider it established that a staff member of the Federal Ministry of Justice who answered the telephone call from the applicant's lawyer deliberately deceived the latter into believing that the applicant's extradition was not imminent, despite knowledge to the contrary. As stated above, the Ministry was not directly involved in the execution of the extradition itself. It is not without significance in this connection that the Government stressed that, in accordance with their constant practice – a practice which the Court can confirm – they would have ordered a provisional stay of the applicant's extradition if the Court itself had asked them to await its decision on the applicant's Rule 39 request.

127. Against this background, the Court's assessment of the material before it leads it to find that there is an insufficient factual basis to enable it to conclude that the authorities of the respondent State deliberately prevented the Court from taking its decision on the applicant's Rule 39 request or notifying them of it in a timely manner in breach of their obligation to cooperate with the Court in good faith.

128. In these circumstances, the Court concludes that the respondent State cannot be found to be in breach of its undertaking under Article 34 not to hinder the applicant in the exercise of his right of application.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President