



The U.S. accuses Germany of breach of treaty: the refusal to extradite Adem Yilmaz

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On 4 September 2007, German authorities arrested Turkish citizen Adem Yilmaz, also known as Ebu Talha, together with two other members of a terrorist cell of the Islamic Jihad Union (IJU). The three had plotted bombing attacks against public places and U.S. military facilities in Germany, including Ramstein Air Base. The suspects had acquired chemical substances to make explosives equivalent to 550 kilograms of dynamite. On 4 March 2010, the Higher Regional Court of Düsseldorf sentenced Adem Yilmaz to 11 years imprisonment for participating as a member in a terrorist organization abroad; conspiracy to commit murder, cause an explosion and coerce constitutional organs; and acts in preparation of an explosion offence. Rendering the judgment, the presiding judge said that the case had “shown with frightening clarity what acts young people who are filled with hatred, blinded and seduced by wrong-headed ideas of jihad are prepared and able to carry out.”

On 27 October 2008, Adem Yilmaz was listed by the United Nations Security Council Al-Qaida Sanctions Committee as being a member of the IJU group associated with Al-Qaida, Usama bin Laden or the Taliban pursuant to paragraphs 1 and 2 of Security Council resolution 1822 (2008).

On 21 May 2015, U.S. federal prosecutors indicted Adem Yilmaz in the District Court of the Southern District of New York on seven counts, including participating in attacks on U.S. troops on the Pakistan-Afghanistan border in 2006 and providing material support to a terrorist organization. In addition, he was accused of giving advice and instructions on how to receive military-style training to a man involved in a 2008 suicide bombing in Afghanistan that killed two U.S. soldiers and injured at least 11 others. On 12 January 2016, the United States sought Adem Yilmaz’s extradition under the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition. When his prison term came to an end on 1 October 2018 he was kept in custody awaiting the decision on the U.S. extradition request.

On 6 July 2017, the Frankfurt am Main Higher Regional Court handling the extradition request had ordered the detention of Yilmaz for the purpose of extradition. However, under count one of the indictment, the Court limited the detention order to only three

offences. With regard to all other counts of the indictment, the Court noted that extradition would be inadmissible because of the principle of double jeopardy, according to which no one may be prosecuted twice for the same offence. The Court found that all other offences were already covered by the judgment of the Düsseldorf Higher Regional Court, including the sentencing for participating as a member in a foreign terrorist organization. The Court also referred to the case-law of the Federal Constitutional Court with regard to the principle of speciality, according to which a person who has been extradited may only be tried for those offenses for which extradition has been sought, and not for any other pre-extradition offenses. On 16 February 2018, the U.S. authorities promised to abide by the principle of speciality.

Against this background, on 18 May 2018 the Frankfurt Public Prosecutor's Office which acted as intermediary between the U.S. authorities and the Court requested a court order declaring the extradition of Adem Yilmaz for the three offences under count one of the indictment to be admissible, but extradition for all other offences under the indictment to be inadmissible.

On 2 August 2018, the Frankfurt am Main Higher Regional Court issued another order requesting further information from the U.S. authorities on the rights of a defendant to invoke, in his own right, the rule of speciality in criminal proceedings before the U.S. courts. Additionally, the Court asked what opportunities there were for the defendant to regain his liberty if he were sentenced for life. The court order was transmitted to the U.S. authorities by diplomatic note on 27 August 2018. The U.S. Department of Justice responded with an extensive letter, dated 29 November 2018, in which it laid out the U.S. case against Yilmaz and explained why the U.S. wanted him extradited. The reply of the U.S. authorities was submitted to the Court on 11 December 2018 and reads, in part, as follows:

“If extradition is allowed to proceed, Yilmaz will have no right to object to the criminal proceedings or to appeal his conviction in the United States if, in this view, the United States does not comply with the extradition treaty between the United States and Germany as Yilmaz cannot rely on the treaty.

The United States reaffirms its commitment to fulfil its obligations under the bilateral extradition treaty, including the principle of speciality.”

On 4 January 2019, the Frankfurt Public Prosecutor's Office endorsed the position of the U.S. Department of Justice stating that there was no indication that the “U.S. authorities would not comply with the assurances/explanations given in the present case” and that, in the Public Prosecutor's view, the declaration of the U.S. authorities showed once again “the seriousness of the assurance to comply with the rule of speciality in the present case.”

However, the Court was unconvinced by these assurances. As indicated in its order of 6 July 2017, the Court ruled that extradition on six out of seven counts of the indictment was inadmissible because of the principle of double jeopardy. With regard to the remaining three offences, under count one of the indictment, extradition was declared to

be inadmissible because of a violation of the principle of speciality. For the Court, it was decisive that in some U.S. courts the defendant can assert a breach of the rule of speciality only “if the State which has extradited the person has first officially protested the breach.” This meant that, in a worst case scenario, Adem Yilmaz would have been dependent on Germany officially protesting the breach of the rule of speciality. This was incompatible with the principle of speciality as interpreted by the German Federal Constitutional Court. On 28 January 2019, the Court thus rejected the U.S. request for extradition. Consequently, it also ordered the release of Adem Yilmaz. The spokesperson for the Court was quoted as saying:

“One may not be punished twice for the same offence. We extradite only if it is clear that the defendant will not be punished twice.”

“An extradition could have only occurred if the Americans [had] said they would restrict the charges to crimes not already punished.”

“The extradition was declared inadmissible by the Senate because it could not be guaranteed that the requirements established by the case law of the Federal Constitutional Court would be complied with. The defendant must be able, in his own right, to invoke the rule of speciality in the United States.”

The Court’s decision regarding the admissibility of the extradition was not subject to appeal. However, the Court may review its decision at any time if, after the decision, circumstances arise or become known which may justify a different decision on admissibility of extradition. Against this background, the U.S. authorities provided additional information and assurances, attempting to address the Court’s concerns. In the afternoon of Friday 1 February 2019 the Frankfurt Public Prosecutor’s Office filed an application for review of the decision on admissibility of extradition and an application for detention for the purpose of safeguarding extradition. However, this was only formally received by the Court on Monday 4 February 2019.

After serving his sentence, Adem Yilmaz was formally subject to deportation. In Germany, questions of deportation are decided at the federal state level, and the Federal Government cannot interfere in these decisions. The security agencies considered Yilmaz to be a “ticking time bomb” who may carry out another terrorist attack at any time. On 29 January 2019, the immigration authorities of the State of Hesse thus applied to the Frankfurt am Main County Court for an order to keep Adem Yilmaz in custody pending deportation. After the Turkish authorities had issued the necessary papers, Hesse state officials immediately deported Adem Yilmaz by plane to Turkey in the early hours of Tuesday, 5 February 2019, before the Frankfurt Higher Regional Court could consider the application for review of its decision on the admissibility of extradition to the United States. By the time Adem Yilmaz was deported to Turkey, the Court had not been able to retrieve the papers of the case. The Frankfurt Public Prosecutor’s Office did not try to stop the deportation, as in this case Adem Yilmaz would have had to be released from prison due to the lack of a valid custody order – a situation the authorities were desperate to avoid.

Upon learning of the deportation of Adem Yilmaz to Turkey, the U.S. Ambassador to Germany, Richard Grenell, stated:

“We are gravely disappointed by Germany’s decision to deport a dangerous terrorist early this morning to Turkey, despite our pending request to extradite him to the United States. Adem Yilmaz is responsible for the deaths of U.S. service members. This failure to extradite him to the United States violates the terms and spirit of our extradition treaty.”

On 6 February 2019, Deputy U.S. Secretary of State John Sullivan called a meeting with German Foreign Minister Heiko Maas, who was in Washington for a conference, to voice the United States’ displeasure with the decision to deport Adem Yilmaz to Turkey. The tense meeting was described in diplomatic language as “probably [not] the happiest meeting ever.” The U.S. side was particularly frustrated, because the court involved in Yilmaz’s deportation had not been aware of the U.S. Department of Justice’s letter of November 2018 setting out the U.S. case for extradition. During the meeting, the German side explained that:

“the Federal Government cannot influence a court decision. In the end, a security decision had to be made. Most likely, the court would have freed the person yesterday due to the fact that the US has not provided the documents the court had asked for about nine months ago.”

Hours after the meeting between Sullivan and Maas, Acting U.S. Attorney General Matthew Whitaker issued a sharply worded statement which reads in part:

“We are gravely disappointed by Germany’s decision to deport a dangerous terrorist – Adem Yilmaz – to Turkey, rather than to extradite him to the United States to face justice for his complicity in the murder of two American servicemen.

The German government deliberately helped Yilmaz escape justice by placing him on a plane to Turkey.

The German government has refused to take any responsibility for failing to extradite him to the United States, has flouted their treaty obligations and has undermined the rule of law.”

Whitaker accused the Frankfurt am Main Higher Regional Court of changing “the terms of our extradition treaty with Germany”. The U.S. view was reiterated the next day during the U.S. Department of State’s daily press briefing, when Deputy Spokesperson Robert Palladino stated:

“Deputy Secretary Sullivan made very clear yesterday our concerns with Germany’s refusal to extradite Yilmaz. Yilmaz is a convicted terrorist; he’s charged with serious crimes by the United States. Two American service members were killed and 11 wounded as a result of a suicide bomb attack in Afghanistan in 2008. And this bombing was facilitated by actions that Yilmaz took in support of terrorism. [...]

We’re disappointed by Germany’s [...] decision to deport him to Turkey rather than to extradite him to the United States. He’s been indicted by the Southern District of New York on terrorism charges, and the refusal to extradite him is inconsistent with Germany’s obligations under the Bilateral Extradition Treaty between the United States and Germany.”

Some of the frustration of the U.S. authorities may be explained by the ignorance of the German legal and federal judicial system. The extradition proceedings must be clearly distinguished from the deportation proceedings, which were dealt with by different courts. In the case of Adam Yilmaz, the judicial proceedings were a matter for the federal state of Hesse and its courts, not for the German Federal Government. German Foreign Office officials were quoted as saying: “We don’t like the outcome either, but it’s up to the court to decide” and “It’s very unfortunate. It’s not the choice we would have made, but we have to follow the rule of law.”

The U.S. officials accused Germany of breaching its obligations under the Extradition Treaty between the two countries. In Article 1(1) of that Treaty, the Contracting States agree to extradite to each other persons found in the territory of one of the Contracting Parties who have been charged with an offense by the other Contracting Party. However, there is one important proviso to this obligation. Any obligation to extradite is “subject to the provisions described in this Treaty.” Two provisions are of particular relevance to the present case. Article 8 provides:

“Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for the offense for which his extradition is requested.”

The Frankfurt am Main Higher Regional Court held that most of the offences for which Adem Yilmaz’s extradition was sought by the United States had already been covered by his conviction for participating as a member in a terrorist organization abroad. Germany was thus entitled to refuse extradition for all offences under counts two to seven of the indictment, as it would have led to double jeopardy.

The other relevant provision of the Extradition Treaty is Article 22(1) which reads in part:

“A person who has been extradited under this Treaty shall not be proceeded against [...] for any offense committed prior to his surrender other than that for which he was extradited [...] except in the following cases:

(a) When the State which extradited him consents thereto. [...].”

The rule of speciality in Article 22(1) of the Treaty has been interpreted by the German Constitutional Court to require that a defendant must be able, in his own right, to invoke the rule of speciality in the United States.

In March 2016, the German Constitutional Court stopped the extradition of a person to the United States on the grounds that extradition was incompatible with the minimum standard under public international law. Under Article 25 of the Basic Law, this minimum standard is applicable in Germany. The Constitutional Court considered the principle of speciality to be part of the general rules of international law. Therefore, pursuant to Article 25 of the Basic Law, German courts are required to verify whether the authorities and courts of the requesting State observe that principle. If strict compliance with the principle of speciality is not ensured, the extradition will entail a serious violation of the fundamental rights in Article 2(2) and Article 2(1) of the Basic Law. The reasoning of the judgment is worth quoting at length:

“[40] a) According to the settled case law of the Federal Constitutional Court, when examining the permissibility of an extradition, constitutional law requires the German courts to consider whether the requested extradition violates the inalienable principles of the Constitution or the inalienable core of fundamental rights protection (as provided for in Article 79(3) of the Basic Law in conjunction with Article 1 and Article 20(3) of the Basic Law). In particular, in the context of extraditions with States that are not Member States of the European Union, the courts must in addition examine whether the extradition and the acts on which it is based are in line with the minimum standard under public international law that is obligatory in the Federal Republic of Germany under Article 25 of the Basic Law. Article 25 of the Basic Law provides that the courts and the administration must observe the general rules of public international law when interpreting and applying the rules of domestic law. From this, it follows, in particular, that the authorities and courts are generally prevented from interpreting and applying domestic law in a manner that violates the general rules of public international law. They are also under an obligation to refrain from giving effect within the area of application of the Basic Law to any act of non-German authorities which are in violation of general rules of public international law. They are also prevented from participating in any meaningful way in an action of non-German authorities which is contrary to the general rules of international law. Section 73 of the Act on International Cooperation in Criminal Matters establishes this constitutional command at the level of ordinary law by expressly providing for the inadmissibility of legal assistance if this would conflict with basic principles of the German legal system. According to Article 27 of the Germany-U.S. Extradition Treaty this provision is applicable to extradition proceedings with the United States of America.

[41] It is true that in extradition proceedings the requesting State is, in principle, to be trusted with regard to the observance of the principles of fundamental rights protection and public international law. [...]

[42] However, this trust can be called into question by facts to the contrary. This is the case where there are concrete indications that, in the event of extradition, the inalienable principles of the Constitution or the inalienable core of fundamental rights protection or the binding international minimum standard applicable under Article 25 of the Basic Law will not be complied with. In this case, the court deciding on the extradition must examine on a case-by-case basis whether the aforementioned limits of extradition are actually respected. This may require the court to investigate the law and practice in the requesting State. [...]

[44] c) The examination of the observance of the principle of speciality by the Frankfurt am Main Higher Regional Court does not meet the constitutional requirements. The principle of speciality has been enshrined in Article 22 of the Germany-U.S. Extradition Treaty.

[45] The principle of speciality, which applies in the context of extraditions, is part of the general rules of international law; it is merely codified in section 11 of the Act on International Cooperation in Criminal Matters and Article 22 of the Germany-U.S.

Extradition Treaty. Therefore, pursuant to Article 25 of the Basic Law, the German courts are required to verify whether the authorities and courts of the requesting State indeed observe that principle.”

Against this background, the Federal Constitutional Court examined the possible impact the 2015 ruling of the U.S. Court of Appeals for the Second Circuit in *United States v. Suarez* may have on extradition relations between Germany and the United States. In interpreting the principle of speciality, the U.S. court had held that an extradited person lacks standing to challenge the requesting State’s adherence to the principle of speciality in the absence of an official protest by the extraditing State. Following *Suraez*, the Federal Constitutional Court was no longer certain that the United States strictly observed the principle of speciality. The Federal Constitutional Court held:

“[48] [...] As a result of the *Suarez* decision, it must be assumed that the applicant [i.e. the person extradited] can claim a violation of the principle of speciality only under aggravated circumstances that are impermissible under [German] constitutional law. This must already be taken into account when deciding on the permissibility of extradition. Since the Frankfurt am Main Higher Regional Court disregarded these considerations [...], its decision [allowing extradition] violates the fundamental rights of the applicant under the second sentence of Article 2(2) [right to personal freedom] and, at the very least, his rights under Article 2(1) of the Basic Law [right to general freedom of action] in conjunction with Article 25 of the Basic Law [application and primacy of general rules of public international law].

[49] (1) The Higher Regional Court correctly assumed [...] that in the *Suarez* decision the United States did not generally call into question the observance of the principle of specialty. However, the decision indicates that, unlike in the past, the U.S. courts and, in particular, the relevant Court of Appeals [for the Second Circuit], will no longer strictly observe the principle of specialty but will do so only after a violation of the principle has been protested by the State to which the United State has promised, generally or in a specific case, to observe the principle of specialty. In such a situation, a detailed examination was required as to whether, in the present case, observance of the principle of specialty could indeed be expected. [...]

[52] The declaration of the requesting State that it is bound by the principle of speciality is not sufficient when examining whether the requesting State is actually observing of the principle of speciality. [...]

[54] When examining the observance of the principle of speciality in light of the *Suarez* decision the Higher Regional Court failed to recognize the significance of the second sentence of Article 2(2), or at the very least of Article 2(1) of the Basic Law in conjunction with Article 25 of the Basic Law for the interpretation of section 73 of the Act on International Cooperation in Criminal Matters. [...]

[56] When interpreting section 73 of the Act on International Cooperation in Criminal Matters the courts must take account of the general rules of public international law in Article 25 of the Basic Law, including the principle of speciality. This applies irrespective of whether a general rule of public international law has the primary aim of protecting the person to be extradited. Article 25 of the Basic Law requires German courts and authorities to refrain from giving effect within the area of application of the Basic Law to any act of non-German authorities which are in violation of general rules of public international law, and from participating in any action of non-German authorities which violates the general rules of public international law. By codifying the commands of Article 25 of the Basic Law at the level of ordinary law, the provision is not only intended to safeguard the basic principles of the German legal system aimed at protecting the person to be extradited, but also to protect the objective rules of general international law which are indispensable for the German legal system. The Frankfurt am Main Higher

Regional Court did not take this into consideration and thus interpreted section 73 of the Act on International Cooperation in Criminal Matters in a manner contrary to Article 25 of the Basic Law.

[57] 4) Applying the principles established in the *Suarez* decision, the United States may not comply with the principle of speciality. Referring the applicant [i.e. the person extradited to the United States] in such a situation to the possibility of applying to the Federal Government to protest the violation of the principle of speciality and thereby to secure the observance of the principle in the criminal proceedings against the applicant reveals a profound misunderstanding of extradition law and the principle of speciality. Such a view also completely disregards that an extradition that is not in compliance with extradition law is regularly accompanied by massive violations of the person's rights under the second sentence of Article 2(2) or, at the very least, of Article 2(1) of the Basic Law, against which there is no longer any effective means of redress. [...]

[59] By relating the decisions to grant extradition to very specific offenses, the principle of speciality is to ensure that the person extradited will be prosecuted in the requesting State only for those (specific) offences committed prior to extradition for which the admissibility of extradition has been examined, and extradition has been granted. Unless otherwise agreed by treaty, the principle of speciality means that the requested State may make the provision of legal assistance subject to certain conditions and that the requesting State may only make use of the legal assistance provided subject to those conditions and, in particular, the object and purpose of the legal assistance as specified by the requested State. The principle of speciality is a fundamental principle of extradition law; it serves to ensure the observance of the conditions and obstacles of extradition (with regard to specific offenses). In order to preserve the purpose of the principle of speciality, extradition may not be declared admissible unless it is assured that the requesting State will observe the principle of speciality, provided it has not been waived. Otherwise, the court assumes joint responsibility for an extradition in breach of the principle of speciality, contrary to its obligation under Article 25 of the Basic Law. In such a case, the declaration of admissibility and the grant of extradition for specific offences would be without any meaning.

[60] In such a situation, to refer the person concerned to the possibility of asking the requested State to protest [the violation of the principle of speciality] with the requesting State in fact constitutes a denial of legal protection against an extradition that does not comply with the conditions for extradition and thus regularly violates Article 2(2) or, at the very least, of Article 2(1) of the Basic Law. In fact, this constitutes a denial of legal protection in violation of Article 19(4) of the Basic Law [...]. In this connection, it must be observed in particular that, in case the principle of speciality were to be disregarded in the U.S. criminal proceedings, it is by no means certain that the applicant would be able to turn to the Federal Government in good time and for the Federal Government to lodge a timely protest. Unless specifically agreed in an international agreement, the Federal Government will not

automatically be informed by the requesting State of the subject matter and the stage of the criminal proceedings against the person extradited. In addition, the applicant is not a German national and is not entitled to diplomatic protection by the Federal Republic of Germany.”

The Federal Constitutional Court further refined its position on the significance of the rule of speciality in extradition relations with the United States in a later decision in May 2017. The Court established a twofold requirement for the denial of extradition to the United States. Firstly, the person to be extradited must not have standing to challenge a violation of the principle of speciality before the U.S. courts in his/her own right. Secondly, there must be solid indications of a violation of the principle of speciality.

The first requirement is usually fulfilled with regard to indictments in the various district courts of New York. Appeals from the New York district courts are taken to the United States Court of Appeals for the Second Circuit. For that circuit, there is no binding precedent which would give defendants a right to challenge indictments based on a violation of the speciality principle without a preceding protest by the extraditing State. On the contrary, both New York district courts and the Court of Appeals for the Second Circuit have considered the principle of speciality, as part of international law, to be a right of the requested State – not an individual right of the defendant. Thus, the defendant can only “piggyback” on an objection of the extraditing State. If the extraditing State has not protested the breach, this may be considered a waiver of the principle of speciality. Other circuits have taken a different position. The result is a so-called “circuit split” on the question of legal standing to assert a violation of the principle of speciality. Thus, extradition to other parts of the United States may not face the same difficulties as extradition requests concerning indictments in the New York district courts.

The Federal Constitutional Court ruled that, even if U.S. prosecutors guaranteed they would not object to the defendant challenging the indictment based on a violation of the speciality principle, the defendant’s fundamental rights under the Basic Law would still be insufficiently ensured. The question of standing was not one for the prosecution, but for the courts. The U.S. authorities were not in a position to provide an assurance that the courts would render a substantive decision on an unopposed challenge by the defendant based on the principle of speciality. All the U.S. authorities were able to say was that the Court of Appeals would “probably consider” such a challenge.

The second condition required the Frankfurt am Main Higher Regional Court to examine whether there were specific indications of a violation of the principle of speciality in the case of Adem Yilmaz’s extradition to the United States. According to the Federal Constitutional Court, the statement by U.S. authorities that the prosecution, when prosecuting the offense for which extradition was granted, was not bound by the facts contained in the extradition request, and that all admissible evidence would be introduced in the criminal proceedings, does not indicate a violation of the principle of speciality. However, there were other indications of a violation of the speciality principle. Earlier, the Frankfurt am Main Higher Regional Court had been seized with the question of a blatant discrepancy between the offences for which the U.S. authorities sought extradition and the offences for which the German court ordered the detention of the defendant for the

purpose of extradition. Such a blatant discrepancy was a solid enough indication of a potential violation of the principle of speciality. The Court had thus concluded that in such a situation it must ensure, as part of its decision on the admissibility of extradition, that the defendant has access to effective legal remedies against any violation of the principle of speciality on the part of the United States. As the Court had restricted Adem Yilmaz's detention for the purpose of extradition to only three offences under count one of the indictment, and had ruled that extradition for all other offences under the seven-count indictment was inadmissible, such a blatant discrepancy existed.

All of the above are considerations of German constitutional law. The question remains of how such considerations feed into the interpretation and application of the U.S.-German Extradition Treaty. Unlike the principle of double jeopardy in Article 8 of the Extradition Treaty, the principle of speciality in Article 22 does not expressly allow the requested State to refuse extradition – at least not if, as in the present case, the requesting State provides an express assurance that it will “fulfil its obligations under the bilateral extradition treaty, including the rule of specialty.” The Federal Constitutional Court noted that extradition proceedings are based on mutual trust. It stated:

“The requesting State has a considerable interest in the continuation and effectiveness of mutual legal assistance. For this reason, a requesting State will regularly refrain from committing infringements that would inevitably affect the future functioning of the extradition relations. The principle of mutual trust can claim validity as long as it is not called into question by facts to the contrary. Mutual trust can be called into question if there are actual indications that, in the event of extradition, [...] the binding international minimum standard, which is applicable pursuant to Article 25 of the Basic Law, is not met. There must be substantive reasons which indicate that, in the case at hand, there is a considerable likelihood that the international minimum requirements will not be respected in the requesting State.”

Article 22 of the Extradition Treaty codifies the principle of speciality as a right between the requesting and the requested States, as it exists under customary international extradition law. The provision does not establish a third-party beneficiary right for the person extradited. Even less does it establish a self-executing right of standing to challenge violations of the principle of speciality in the courts of the requesting State. The German Federal Constitutional Court expressly left open the question of whether the principle of speciality aims to protect the person to be extradited. To the extent that a refusal to extradite was based solely on the defendant's lack of legal standing to challenge a violation of the principle of speciality in his or her own right, such a refusal was thus contrary to the Extradition Treaty between Germany and the United States.

The Federal Constitutional Court held that German constitutional law requires the defendant to be able to challenge violations of the principle of speciality in his or her own right. According to the Constitutional Court, section 73 of the Act on International Cooperation in Criminal Matters established this constitutional command at the level of ordinary law by expressly providing for the inadmissibility of legal assistance if this would

conflict with basic principles of the German legal system. In the Court's view, this provision was applicable to extradition proceedings with the United States according to Article 27 of the Germany-U.S. Extradition Treaty, which provides:

“Except where this Treaty otherwise provides, the law of the Requested State shall be applicable with respect to provisional arrest, extradition and transit.”

Thus, the Federal Constitutional Court – through the “back-door” of Article 27 – imported German constitutional law requirements concerning the principle of speciality into the Extradition Treaty. However, the savings clause on the applicable law in Article 27 only applies where the Extradition Treaty does not provide otherwise. Article 22 of the Extradition Treaty contains a clear provision on the principle of speciality, which does not require the defendant to have standing before the courts of the requesting State in order to challenge violations of the principle. The Frankfurt am Main Higher Regional Court admitted as much with the statement that Article 22 only establishes the principle of speciality between the contracting parties – it does not contain any indication as to the procedural implementation of the principle, or the legal remedies available to the defendant in the requesting States in the case of a violation. From this silence the Court then concludes that the principle of speciality must be interpreted in line with the meaning given to it by the German Federal Constitutional Court. However, Germany's constitutional law requirements are irrelevant in terms of Germany's obligations under the Extradition Treaty. Germany cannot unilaterally impose an interpretation of the principle of speciality in Article 22 on the United States.

The refusal to extradite Adem Yilmaz to the United States is a classic conflict between domestic constitutional law and international treaty law which, at German domestic level, is decided in favour of domestic constitutional law. Nevertheless, at international law level, a refusal to extradite Yilmaz solely on the basis of his lack of standing to challenge any violation of the speciality principle before the U.S. courts constituted a breach of the Extradition Treaty. The decisions of its courts, both at the federal and at the state level, are attributable to Germany. Any violation of the German-U.S. Extradition Treaty by its courts incurs Germany's international responsibility. The Federal Government cannot hide behind the independence of the judiciary or the rule of law, both of which do not constitute circumstances precluding wrongfulness.

The German interpretation of the principle of speciality as requiring effective legal remedies in the United States does not conform with the ordinary meaning of the terms of Article 22 in their context, and in light of the object and purpose of the provision. However, this does not necessarily mean that through their refusal to extradite Adem Yilmaz, the German authorities have – as claimed by Acting U.S. Attorney General Matthew Whitaker – “flouted their treaty obligations and [have] undermined the rule of law”. If there were concrete indications that the U.S. judicial or prosecutorial authorities would violate the principles of speciality, double jeopardy, or double criminality, the German courts would have been perfectly entitled to refuse extradition. In this case, however, the Higher Regional Court would have had to say so.

Categories: Law of treaties

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