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# Report
# "The Legal Protection of the Accused from a comparative view"

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## A. Preliminary Remarks

### *I. Approach of this paper*

The following paper is an updated and adapted version of my "Comparative Overview" of my project published in: Eser, Albin/Lagodny, Otto/Blakesley, Christopher L. (eds), The Individual as Subject of International Cooperation in Criminal Matters, A Comparative Study; Baden-Baden, 2002. pp. 695 and subs. as far as the accused is concerned. The questions at stake in the NEW-START-project are so intertwined with those of the project that the questions of the NEW-START-project may – from my scientific point of view – only be answered in a comprehensive way as follows.

The procedural focus of the NEW-START-project meets with the results of the project: the main area of lacks and loopholes is the procedural area of law, not the substantive law. This is alrweady reflected by the questionnaire of the project which is reproduced in annex I. The project was not confined to extradition or letters rogatory. A new and additional perspective was given by including internatinal cooperation in adminstrative matters, i. e. it tax matters.

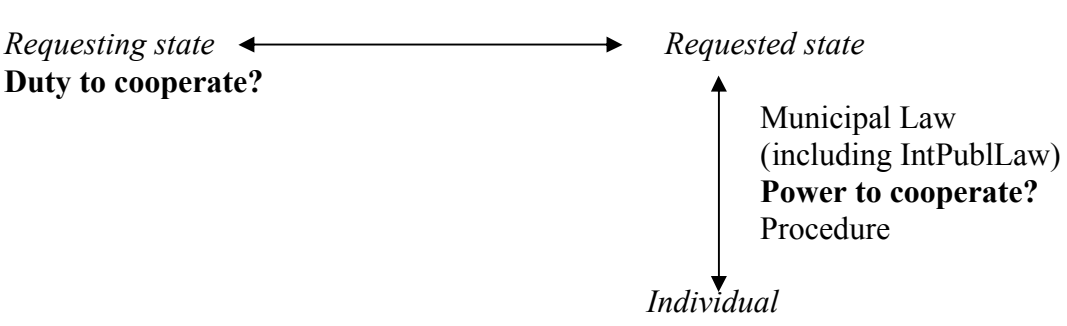
The national reports published in the book are the first and main basis for my observations. In addition, I will refer to other sources and to other countries in order to complete the picture as far as possible. However, the second sources will surely provide for a mere point-by-point picture in this respect, as they necessarily cannot be evaluated in the national context.

### *II. Criteria for structuring this overview*

The main question of the project is: To what extent is the individual still regarded as the mere object in the law of international cooperation in criminal matters? Criteria for such a position as an object may be hidden

- behind the **substantive requirements**, such as double criminality or the death penalty exception,
- and especially behind the **procedural (fair trial) situation** of the individual concerned.

These two questions are embedded in the structure of legal relations as follows:



The duty to cooperate is governed by international public law. Generally, there is no duty to cooperate unless there is a treaty obligation or a resolution of the Security Council of the United Nations.

The powers to cooperate as well as the procedure are a matter of municipal law which may[1] include international public law. The power to cooperate refers to the (national) principle of legality. It concerns questions, such as whether the relevant act of cooperation is allowed in the relationship between the relevant state and the individual concerned, under circumstances, including the transfer of the person (e.g., extradition) or the transfer of information or objects (e.g., documents or physical evidence) when other forms of cooperation are applied.

The substantive requirements for cooperation are either contained in international treaties if there is a mandatory treaty requirement, like in the U.S. as far as extradition is concerned, or in national laws of international cooperation, like the Law on International Assistance in Germany (*Gesetz über die internationale Rechtshilfe in Strafsachen - IRG*, hereinafter: LIACM [GER]). In the former, the question will be to what extent *international* human rights guarantees modify the duty as well as the power to cooperate. In the latter situations, they create a municipal power to cooperate in the requested state. This power to cooperate does not create a duty to do so.

In the U.S., the power and the duty to cooperate, therefore, run parallel if national constitutional guarantees do not interfere. In legal orders like Germany or other continental states, this might be different, because the power to cooperate may strongly be influenced by constitutional guarantees. As will be seen infra, this problem is one of the important questions as far as substantive requirements are concerned.

Procedural questions, which concern the relation between the state and the individual are to a great extent ruled by municipal law. As will be seen more in detail, the (municipal) balance (and separation) of powers between the executive, the judiciary and the legislature is of great importance: The more power that is reserved for the executive, and the more the judiciary is precluded concomitantly from the subject matter to decide, the more this procedural approach can be characterized as “two-dimensional” or the “object” approach.

In cooperation proceedings we recognize a differentiation between judicial procedures and the executive granting procedure. Albeit the executive may well also have to consider concerns of the individual in the granting procedure, its main task is to care for the external relations vis-à-vis the requesting state. Traditionally and generally, the granting authority has a very broad discretion. In this sense, one may consider the granting procedure as administrative. This fact creates a link to other administrative procedures of purely national concern.

These issues can be elaborated by comparing the procedural fair trial safeguards in:

- criminal or administrative proceedings for which *no* assistance from abroad is needed (e.g., murder within the country and for which all evidence etc. is already available in that country), and

1 As to the clear-cut dualistic approach of the U.S. legal order, see *Blakesley*, U.S. report, ch. 1 C.

- criminal or administrative proceedings for which assistance from abroad is needed.

We will ask whether there are differences between four possibilities, which may not be considered legitimate (infra C.).

This approach made it necessary to analyze not only the law of extradition, but also the law of cooperation in criminal matters as well as cooperation in administrative matters. In all these areas, the following fair trial rights were checked for the granting procedure as well as for the judicial procedure.

As far as the situation in a *requested* state is concerned, the questionnaire focussed on the following fair trial rights:

- right to be informed by then authorities of the requested state about the nature and cause of the accusation in the requesting state and about the privilege against self-incrimination,
- right to counsel,
- right to look into the complete file/to disclosure,
- right to be heard/to submit written statements,
- evidence, e.g., the subject matter (i. e.: grounds for refusing extradition) to be covered by the evidence, the right of the individual to bring evidence, standard and burden of proof (including the presumption of innocence),
- right to have conditions or limitations inserted in the granting decision,
- right to require the granting authority or the court to render its decision within reasonable time,
- right to be informed about the decision of the granting authority or the court,
- right to appeal,
- right to compensation.

As far as the situation in a requesting state is concerned:

- Does the fact that the rules of procedure in the requested state have not been observed have impact on the use of the results of a request?
- Should there be a transnational exclusionary rule? If so, what should that rule be? When and how should it apply?
- Adherence to conditions imposed by the requested state: Has the individual a possibility to force the authorities of your state to adhere to conditions imposed by the requested state? If so, how can this be done? Can an individual raise the point to a court and force respect of conditions?

These are the criteria for the following overview. We will point out only those problems and questions that from our perspective illustrate the position of an individual either as an object or a subject. As the main writer of this part's perspective is dominated by a German perspective and way of legal thinking (even though I try to understand and to provide for other approaches, perspectives, and ways), I would like to invite the reader to go through the overview and the reports with a view to contrasting and comparing his or her own understanding of the criteria mentioned.

### *III. Focus on national procedures*

The overview will, thus, focus mainly (but not exclusively) on national procedures and the impact of international and national human rights on a fair trial. This will be explained in more detail by showing general trends in the national reports. These indicate that substantive requirements are more and more influenced by human rights. This trend is due to an international development. Each state's promises have to be implemented in the national procedures. This is the most crucial question. I will therefore "take stock" by pointing out the most interesting results of the national reports and their chapters 2 to 11.[2] This will lead to a quite disappointing result, if one is wishing for a clear-cut set of answers: We have found that this arena provides a lot of new questions, but only few answers (infra B.).

Then the focus of this overview will turn to specific problems encountered throughout the stocktaking. We can structure the (few) results by pointing out (in-)consistencies of national cooperation procedures with other national procedures, i.e., criminal and administrative (infra C.). The following chapters will discuss possible explanations by looking at the concepts of national human rights and their scope (infra D.). On the national level, the relationship between the legislature, the executive and the judiciary, i.e., the question of separation of powers, has to be considered more closely (infra E.). On the international level, the relation between the two cooperating states involved with their division of responsibility and the impact of that cooperation on national proceedings (infra F.). A final chapter will draw some conclusions (infra G.).

## B. General Trends

The order of presentation of the comparative results will deviate from the analytical order of the questionnaire and the national reports. These have shown that the rules governing extradition (chapters 7 and 8 of the questionnaire) are far more developed than those of other forms of judicial cooperation (chapters 4 and 5 of the questionnaire). Chapters 4 and 5, on the other hand, are more elaborated than those of administrative cooperation (chapters 2 and 3 of the questionnaire). As the structure of procedure in principle is the same in these three areas, the presentation will reverse the order, thereby allowing us to show the relevant problems more clearly: extradition (infra I.), other forms of judicial cooperation (infra II.), and administrative cooperation (infra III.). Questions of the choice of forum can be more adroitly presented after having dealt with these three areas (infra IV.). Cross-border enforcement (chapters 9 and 10 of the questionnaire) will be difficult to elaborate (infra V.).

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2 Sources of law (chs. 1 of the national reports) will be discussed where it is important due to the matter of substance, see infra C.-H.

## *I. Extradition*

### *1. Proceedings in the requested state*

a) General observations

aa) In national extradition procedures we still[3] observe that there are two procedures: a granting procedure of the executive branch (which hereinafter is also called "administrative procedure") and a court procedure, obviously in the judiciary.[4] For our comparative analysis it is important to distinguish the following questions:

As to the *court*:

(1) Why does a court decide a given issue?

(2) At what stage of the granting procedure does a court decide, i.e., before or after the final granting decision has been taken?

(3) What rules govern the proceedings?

(4) On what subject matters does it decide?

As to the *granting authority*, the same questions are relevant.
Questions (2) and (3) will be examined here because they show the relevance of the "Why" (question 1) which will be considered again with the "subject" question (4) separately in part D.
As to the stages, the following is common to the extradition procedure of the countries examined in the national reports:
- first stage of administrative/granting procedure: Upon receipt of the request, the granting authority, i.e., in most cases the (federal) Minister of Justice, checks whether the request may be complied with for legal *and* for political reasons.

- (first) judicial decision: A court will then decide on the legal admissibility[5] of extradition. There are different answers to whether this decision is open for appeal. A final negative decision stops proceedings, a final positive decision opens the second stage of administrative decision: The granting authority then definitively decides whether or not to extradite. In Europe, the discretion of the executive to deny extradition even if the court declared that extradition is allowed, is not under debate. In the U.S., this is also generally true, but there is

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3 The European Arrest Warrant intends to abolish the granting procedure what e. g. Germany did not do, see: *Lagodny*, in: Blekxtoon, Rob, Handbook on the European Arrest Warrant, Asser Press, 2005, 39-45.

4 As to the explicit distinction between "the administrative and the judicial stages" see the provision in Art. 46 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20.

5 The notion "admissibility" has nothing to do with the "admissibility" of evidence as known in the U.S. In the context here, it means that the court has approved of the legality of the act as far as the court's examination reaches.

discussion over whether the granting authority is bound also to a positive decision of the court and, therefore, is obliged to grant extradition due to the separation of powers.[6]

- A highly debated question is whether a court may control this final granting decision.
There are exceptions: In Belgium, the court has only the task (and authority) to give advice to the granting authority. Even a judicial decision denying the legality of extradition is not binding.[7] In Switzerland, a court only decides after the granting authority has finally made up its mind to extradite and only upon the initiative of the individual concerned. In Portugal, the court also decides after the final decision of the granting authority, but this administrative decision is *ex officio*, so the court takes the "final decision" to grant extradition.[8]

bb) Before we go into the details of the proceedings in the requested state, we should recall that the Court of the European Communities (in Luxembourg)[9] considers all the fair trial rights mentioned in the questionnaire to be "fundamental."[10] This certainly reflects also the attitude in the Member States as far as national proceedings on these issues are concerned. However, when it comes to questions of international cooperation, these rights somehow seem to vanish.[11] This appears quite strange to us.

This is the background which illustrates the reason why there is, in general, a trend to strengthen the rights of the individual. This trend is reflected by the No. 5b of the Resolution of the 16th Congress of the International Penal Law Association 1999 in Budapest, which reads:[12]

> "In extradition proceedings and in mutual assistance proceedings that involve coercive measures in the requested state, the individuals involved in such proceedings should have the following minimum rights:

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6 *Blakesley*, U.S. report, ch. 7 C.I. referring to the *Lobue* decision of the U.S. District Court for the District of Washington D.C. and subsequent decisions.

7 *Van den Wyngaert*, 65 RIDP 190 (1992).

8 See Arts. 48 and 49 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20.

9 The Court of the European Communities (Luxembourg), which decides on issues of the law of the European Communities/European Union must not be confounded with the European Court of Human Rights (Strasbourg) which decides on violations of the European Convention on Human Rights.

10 *Gleß*, EU report, part 1 ch. 1 A.

11 As to the extradition procedure in Canada see *McCann*, 30 Cornell International Law Journal 139-171 (1997).

12 15 International Enforcement Law Reporter (1999), 502-507 at 506.

- The right to be informed of the charges against them and of the measures that are requested except where providing such information is likely to frustrate the requested measures.
- The right to be heard on the arguments they invoke against measures on international cooperation.
- The right to be assisted by a lawyer and to have free assistance of a lawyer [...]
- The right to expedited proceedings. [...]"

cc) When we look at the Swiss procedure in extradition matters, we see that it totally differs from the other approaches. In Switzerland, the granting authority must make its final decision on the request. Only this decision is open to appeal by the individual according to Art. 25 para. 1 of the Federal Law on International Cooperation in Criminal Matters (Bundesgesetz über internationale Rechtshilfe in Strafsachen - IRSG, hereinafter LICCM [CH]). This appeal goes to the highest administrative court, i.e., the Bundesgericht. The decision of the granting authority is prepared incident to a hearing of the individual by a public authority of the Kanton where he or she is taken into custody. This hearing does not have the character of a decision on the admissibility, like the hearing in U.S. procedure, or the decision of the Regional High Court in Germany. In the granting decision, the granting authority has to inform the individual of his right to appeal pursuant to Art. 22 LICCM (CH). In sum, the Swiss procedure could serve as a yardstick. However its construction is totally different from the procedure of the U.S., e.g., where more than in other places the hearing is considered to have many characteristics of a criminal procedure. The Swiss "administrative" approach, however, cannot be understood unless we take into consideration that Swiss law generally recognizes judicial review of administrative acts, whereas it certainly is the exception in U.S. extradition procedure. In Germany, such an administrative approach could have important consequences, as Art. 19 para. 4 Basic Law (*Grundgesetz - GG*, hereinafter: BL) guarantees an overall judicial review.

*b) Decisions of the granting authority*

aa) There are nearly no explicit rules in any of the national systems studied for the granting procedure and fair trial rights. In the Netherlands, at least the 1992 General Act on Administrative Procedure is applicable to the extradition granting procedure after the judicial decision.[13] This is a consequent approach as it deals with extradition granting proceedings as "normal" administrative proceedings.

Similarly in Germany,[14] all fair trial rights mentioned in the questionnaire, e.g., the right to counsel,[15] would be guaranteed for the granting procedure, if the national law concerning general rules of administrative procedure were applicable. This is, to date, not the case. The arguments on this point are unclear or indeterminate. If we take the example of Art. 6 ECHR, we have to face the argument: no "criminal charge" in the requested state. Then it should be something else. But apparently, extradition procedures are - except from the Netherlands - not considered to be "administrative" procedures. The consequence, then, would be: no fair trial rights for the granting procedure. This would mean (and obviously means in practice): unfettered executive discretion with regard to procedural safeguards. In our view, this reflects

13 *Swart*, Dutch report, ch. 4 B.II.; 7.C I. who points out that the right to appeal which is guaranteed by the 1992 General Act, however, is not applicable.

14 *Lagodny/Schomburg*, German report, ch. 2 B.; ch. 4 B.; ch. 7 B.

15 *Swart*, Dutch report, ch. 7 C.I., II.

an “object approach” because there is a procedure, i.e., the granting procedure, which is not governed by law.

The applicability of rules of criminal procedures in addition to special rules for extradition procedure[16] does not alter this vicious circle as it concerns judicial procedure only, not the administrative granting procedure.

Again, an important exception exists in the Swiss system. Article 12 LICCM (CH) stipulates that the law on general rules of administrative procedure are applicable as far as federal authorities are concerned; the authorities of the Kantons apply their law respectively. Only for “Prozesshandlungen” (literally translated as “procedural acts,” i.e., the law concerning criminal procedure) is applicable. “Prozesshandlungen” in the sense of Art. 12 comprise the taking into custody, search and seizure, interrogations, etc. This shows that the Swiss approach is radically different from, e.g., the U.S. approach and which will show important consequences for the question of judicial review.

In addition to the hearing by an authority of the Kanton, the granting authority of Switzerland gives the extraditee the right to present his objections (Art. 55 LICCM [CH]).

*Breitenmoser* argues that for the Swiss legal order acts on the national level which provide for international cooperation must be considered as “Verfügungen” or “Verwaltungsakte”[17] (both being formal administrative decisions), and that *therefore* the whole national procedure connected with international cooperation, especially including the granting procedure has to be considered as an administrative procedure. Thus, it must be strictly separated from the criminal procedure in the requesting state.[18] He concludes from this that the principles governing *administrative procedure* are applicable. These principles in Switzerland include:[19]

16 See sec. 77 LIACM (GER): "To the extent that this Law does not contain any special procedural rules, the provisions of the Judicature Act and its Introductory Act *[Einführungsgesetz zum GVG]*, of the Code of Criminal Procedure, of the Juvenile Court Act, of the Fiscal Code*[Abgabenordnung]*, and of the Law on Administrative Offences *[Ordnungswidrigkeitengesetz - OWiG]* shall apply analogously" as well as sec. 10 of the Hungarian "Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters" Hungary (English translation: Council of Europe, PC-OC/INF 26) and numerous other extradition laws; in some states, extradition procedure is integrated into the CCP.

17 *Breitenmoser*, Internationale Rechtshilfe 1995, part E.2. The terms are difficult to translate. As to the Swiss procedure see now also *Popp*, Grundzüge der internationalen Rechtshilfe in Strafsachen 2001, ann. 456-587.

18 Id., part E.2.2.

19 Id., part E.II.2.2., text following footnotes 371 and subs.

- appeal to a court in such procedures;[20]
- that foreign states cannot participate in such procedures;
- that third parties whose legal interests are concerned by the decision may participate;
- that the "Untersuchungsgrundsatz" is applicable. This means that the facts will be investigated also by the court and not only by the parties;
- that the principles of administrative discretion and its limits are applicable;
- that always the principles of basic rights are applicable.

In Switzerland, there is - according to *Breitenmoser* - no distinction between the granting procedure and a judicial procedure, including a court control.[21] The courts, however, may only be involved after the executive has made up its mind.

bb) It is not surprising that there is no right of the individual that the granting authority impose conditions on the requesting state. There seems to be, in this regard, an unlimited discretion in the executive branch,[22] which applies unless the court, which decides on the admissibility, states explicitly that extradition is only admissible if certain conditions are met.[23]

Swiss law provides an exception. Article 38 LICCM (CH) sets up three standard conditions: speciality, no extraordinary court and the right of Swiss authorities to receive a copy of the final decision of the requesting state.

cc) Other peculiarities are to be observed when looking at the "speed" of the decision-making process in the granting authority before the case goes to the court. An explicit example of this can be found in Austria: According to sec. 30 sentence 2, the Austrian granting authority, i.e., the federal Minister of Justice, has to check at the very beginning of the procedure, whether any of the following obstacles to extradition obtain Austrian *ordre public*/essential Austrian interests (sec. 2 of the *Auslieferungs- und Rechtshilfegesetz - ARHG*, hereinafter LECCM [A])[24] or reciprocity (sec. 3 para. 1 LECCM [A]).

The granting authority (ministry) checks the "merits" of the request before a court is involved.[25] In Germany, the granting authority even has a constitutional duty to check legal admissibility from the very beginning.[26] However, there are cases in which the German granting authority does not decline the request at the beginning but waits for a negative

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20 Interestingly, in Austria, the right to appeal against an administrative decision is an exception from the view of the Constitution: Art. 94 of the Bundes-Verfassungsgesetz (Law of the Austrian Constitution) stipulates: "Die Justiz ist von der Verwaltung in allen Instanzen getrennt" (roughly translated as: "The judiciary is separated from the administration in all levels of procedures"). Redress to a court against an administrative decision, therefore, is an exception to this constitutional rule.

21 *Breitenmoser*, Internationale Rechtshilfe 1995, part E.II.3.1. and 3.2.2.

22 *Blakesley*, U.S. report, ch. 2 A.

23 See infra I.1.b.

24 (Austrian) Auslieferungs- und Rechtshilfegesetz of 1979 = Law on Extradition and Other Forms of Co-operation in Criminal Matters.

25 *Tallgren*, Finnish report, ch. 7 B.I.; *Parisi*, Italian report, ch. 7 A.; see also *Swart*, Dutch report, ch. 7 A.; *Lagodny/Schomburg*, German report, ch. 7 A.

26 *Lagodny/Schomburg*, German report, ch. 7 A., B. See also Art. 17 para. 2 and Art. 78 para. 2 LICCM (CH) which also require a first summary check of the granting authority.

judicial decision.[27] This could be considered an abuse of the procedure. Portugal provides an explicit time limit of 30 days for this first check of the granting authority.[28]

In Switzerland, the principle of speedy decision-making (or the "speedy trial rule") is explicitly provided by law, i.e., Art. 17a LICCM (CH) which was inserted in 1996. If the authority does not decide in due time and has no substantive grounds for postponing its decision, this conduct is treated as if the authority has made a negative decision, which is open to judicial review. Interestingly, the individual may insist on immediate execution of extradition according to Art. 56 para. 1 lit. a LICCM (CH). There are, of course, situations in which the individual has an interest in being extradited as soon as possible, e.g., if he wants to avoid extradition detention in the requested state.

Time limits also exist for the decision of the granting authority after a positive decision of the court: 60 days in Israel,[29] 45 days in Italy.[30] The speedy surrender of a youth offender is required by sec. 36 para. 3 LECCM (A).

The Austrian law provides for a maximum period of extradition detention of one year without the granting decision being made (sec. 29 para. 6 LECCM [A]). The Regional High Court *(Oberlandesgericht)*, which is to decide on the admissibility of extradition (sec. 33 LECCM [A]), therefore, has also to decide within this one-year term.

dd) In Italy, there is, in addition to the court's decision on the admissibility of extradition, the possibility to appeal also against the granting decision.[31] In Germany, such a right is now explictly excluded by para 74 b LIACM (GER)/IRG, which – in my view – violates the constitutional guarantee of a judge's decision according to art. 19 para. 4 BL/GG. In the U.S., no appeal is available for extradition decisions,[32] although a *habeas corpus* action may be possible.

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27 Very recently, see the case of Brandenburgisches Oberlandesgericht, decision of 28 May 1997 - 2 Ausl. (A) 7/97 (not published) where the defendant whose extradition was sought by Turkey had been recognized as a fugitive in France. The court refused repeatedly to launch a provisional extradition detention order, based also on the granting authorities' statement that from their view, political persecution is threatening as well and that the granting authority with "high probability" will refuse extradition.

28 Section 48 paras. 1 and 2 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20.

29 Section 19 Extradition Law, 5714-1954, see Council of Europe document PC-OC/INF 28, p. 5. The court may extend the time limit.

30 *Parisi*, Italian report, ch. 7 B.VI.

31 *Parisi*, Italian report, ch. 7 B.VII *bis*.

32 *Blakesley*, U.S. report, ch. 7 C.X.

The rationale behind not allowing an appeal against the granting decision in states which have a court decide prior to the final granting decision, e.g., in Germany, seems to be the following: One court decision is sufficient - no need for a second one. This reasoning is only convincing as long as the court may decide on all relevant substantive matters for the individual.[33]

In the U.S., the rationale seems to be that if administrative decisions are not in general to be controlled by courts, or at least to have a lesser standard of protection if a court of some sort hears an issue, there is no argument to have them for granting proceedings. In Austria, there is no general possibility to have administrative decisions reviewed by a court. To the contrary: Art. 94 of the Austrian Constitution - as a general rule - forbids this. Exceptions to this rule which stems from the 19th century are provided for, e.g., in Art. 130 as to the "Verwaltungsgerichtshof" (Court for Administrative Proceedings), which may decide only in certain cases, i.e., when there is a "Bescheid" (general form of an administrative decision), or in Art. 129 as to the "Unabhängige Verwaltungssenate" (Independent Senates of Administration), or in Art. 144 as to the "Verfassungsgerichtshof" (Constitutional Court). As the granting decision is not directed to the person concerned, there is no possibility to receive an administrative court's decision on it. Exceptions can be found in the Austrian-German Treaty on Mutual Assistance in Administrative Matters.[34]

The situation is somewhat different in Finland, where the individual is able to bring the case to the Supreme Court prior to the rendering of the final granting decision.[35] It, therefore, is argued that an appeal is unnecessary, as already the highest court has made a decision.[36] Here again, however, the value of this argument's rationale is dependent on the nature and scope of the subject matter of the court's decision.[37]

The Dutch system is comparable to the French system.[38] The Dutch 1992 General Act on Administrative Procedures excludes appeals against the granting decision. However, the individual may, on the basis of the Dutch New Civil Code, approach a district court which controls whether the principles of the General Act have been observed by the Minister of Justice. This injunction has a residuary function which is important in Dutch practice as it offers the full control by a (civil) court of the granting decision.[39]

33 As to this question see infra E.II.

34 Austrian Federal Law Gazette 1990, 526.

35 *Tallgren*, Finnish report, ch. 7 A.

36 *Tallgren*, Finnish report, ch. 7 B.X.

37 See infra E.II.

38 As to the French system, see infra C.I.1.c.

39 *Swart*, Dutch report, ch. 7 C.IX.

ee) An explicit rule in Finland - sec. 7 of the Nordic Extradition Act - provides that a copy of the granting decision is given to the extraditee.[40] The Law of Liechtenstein of 2000[41] requires in Art. 34 para. 4 that the government inform the prosecuted person as well as his defense counsel of the granting decision.
In Germany, the individual will not officially be informed about the granting of the request. He will learn about it only when it comes to execution, i.e., "transport" enforcement.[42] This reflects at a hidden place, a clear "object" approach.

*c) Court decision on admissibility*

aa) As we have just seen with regard to the right to appeal against the granting decision, the quality of integration of the judiciary into extradition proceedings mainly depends on the scope of substantive matters which the court will be empowered to decide. A paramount example of this is the rule of non-inquiry, which is dominant in the U.S. This rule means that the factual or legal situation of another country (in which the fugitive will be prosecuted if extradited) may not be evaluated by a U.S. court, but only by the executive. This is a problem of division or sharing of powers: May only the executive or also/only the judiciary decide on certain questions?

There are, however, other examples, such as: Who decides on discretionary treaty clauses, which leave it to the discretion of the requested state to refuse extradition? In the Netherlands, some legal questions are reserved for the executive. These problems all have to do with the separation of powers, which will be dealt with infra E.II.

bb) The Dutch judicial extradition procedure contains numerous fair trial rights. The reason might be that already by the 1960s, the Dutch legislator started from the assumption that Art. 5 ECHR is applicable in extradition proceedings.[43] The Extradition Act of 1967, therefore, contains fair trial rights. It is remarkable, e.g., that under Dutch law, the public prosecutor already has the explicit duty to inform the requested person of an extradition request as soon as he has submitted the request to the district court.[44] This is not to be found in other states.

Also the Finnish legislator, in promulgating the 1993 Act, considered the rights found in Art. 6 ECHR.[45] In Germany, on the contrary, the ECHR has been considered as being - to say it ironically - not so important as to require it to be taken into consideration when establishing the LIACM (GER). Guarantees of the Basic Law (e.g., Art. 104 para. 3 BL) have, to date, not been considered sufficient in the extradition procedure.

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40 *Tallgren*, Finnish report, ch. 7 B.VII.

41 Gesetz über die internationale Rechtshilfe in Strafsachen (Law on International Assistance in Criminal Matters) of 15 September 2000, Liechtensteinisches Landesgesetzblatt (Law Gazette of Liechtenstein) 2000, No. 215 of 6 November 2000 (pp. 351, 1-42) in force since 6 November 2000.

42 *Lagodny/Schomburg*, German report, ch. 7 A.

43 *Swart*, Dutch report, ch. 7 B.I.

44 *Swart*, Dutch report, ch. 7 B.II.

45 *Tallgren*, Finnish report, ch. 4 D.I.

cc) The right of the extraditee to counsel as such seems to be beyond all question. The problems begin only in relation to the criteria for obligatory counsel. In Germany, counsel is obligatory if assistance of legal counsel appears necessary because of the difficult factual and legal situation. This seems to be an exception. But the argument that extradition cases, in general, involve a difficult factual and legal situation was the reason to position court proceedings on a high level (RHC) not on a low level (i.e., magistrate/local courts. This is a clear contradiction.[46]

In Italy, there seems to be no right of the individual to defend himself, which is required before the right to counsel becomes obligatory.[47] The 24-hour limit mentioned in the Italian report may be very detrimental: Counsel has to be nominated at least 24 hours before the court proceedings.[48] A mere 24 hours of preparation makes one wonder whether the rule is designed for appearance more than substance.

In France, there is no right to counsel during the first interrogation by the prosecutor, or by the court which decides on the a warrant of arrest. The French *Cour de Cassation* considered this to be in compliance with Art. 6 para. 3 lit. a ECHR which guarantees the right to counsel.[49] In the European context, this seems to be an exception. The problem, of course, is that by the time the first interrogation is finished, the value of having counsel is probably eviscerated.

dd) A right to look into the - complete - file exists in Germany in criminal procedure. It is currently under debate whether and to what extent the files originating from the requesting state are covered by this right in extradition proceedings. In the U.S., however, the judge has discretion.[50]

ee) A right to a hearing in the presence of the extraditee is guaranteed in the Netherlands according to the explicit rule of Art. 25 Extradition Act.[51] The same rule obtains in Finland[52] and also in Austria.[53] In the U.S., a hearing is guaranteed as well, because the extradition procedure is considered at least to be a quasi-criminal procedure due to constitutional reasons as a decision on physical liberty is made.[54] In France, the extraditee has to be present at the hearing of the *Chambre d'Accusation*. Without him, the hearing is not possible.[55]

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46 See *Lagodny/Schomburg*, German report, ch. 7 C.3.

47 *Parisi*, Italian report, ch. 7 C.III.

48 *Parisi*, Italian report, ch. 7 C.III.

49 See *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, at p. 97 referring in footnote 210 to "Cass. crim. 2 déc. 1986, Bull. crim. 1986 No. 129."

50 *Blakesley*, U.S. report, ch. 7 C.V.; ch. 2 B.II.

51 *Swart*, Dutch report, ch. 7 B.V.

52 *Tallgren*, Finnish report, ch. 7 B.I.

53 According to sec. 31 para. 1 sentence 1 in connection with sec. 29 para. 3 LECCM (A) the individual has a *right* to a public hearing. In addition it is obligatory that the individual and his counsel have eight days minimum for preparation (sec. 33 para. 2 sentence 4 LECCM [A]).

54 *Blakesley*, U.S. report, ch. 7 C.V.

55 *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, p. 113 (Art. 14 French Extradition Law).

Surprisingly from a U.S. point of view, in Germany a hearing is at the discretion of the court.[56] In practice, most extradition procedures of the RHC proceed only on the basis of written statements. The court, thus, does not see the individual fugitive personally. A superficial explanation might be that German courts - like other continental courts - do not apply the *prima facie* test on probable cause. The U.S. provides for a mandatory investigation into the question of guilt which has traditionally been considered to be a constitutional requirement or at least to have a constitutional dimension.[57] Continental states indicate the requirement of probable cause only in exceptional cases. However, in some of these cases it might be considered to be a constitutional or another human rights requirement.[58] Here again, we come to general questions which have to be dealt with separately.[59]

ff) In the Netherlands, the individual has far-reaching rights to present evidence.[60] In Finland's evidence procedure the general norms on criminal procedure are applied. There are no general bars to evidence.[61] In general, evidence has not been reported to be inadmissible except from the question of insanity under the double criminality requirement.[62] This is not a question of inadmissible evidence, but rather a question of irrelevant evidence.

Special problems of evidence exist in, but are not limited to human rights cases: Information given by non-governmental organizations like Amnesty International is not excluded and - in addition - is required for constitutional reasons (exhaustion of available evidence).[63] The standard and burden of proof becomes decisive: Is the "mere probability" of treatment contrary to Art. 3 ECHR sufficient to deny extradition?[64] Or is it necessary to establish a "real risk?"[65] Possible answers have to be seen in a general context of human rights questions.[66]

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56 *Lagodny/Schomburg*, German report, ch. 7 C.V.; *Parisi*, Italian report, ch. 7 C.V.

57 *Blakesley*, U.S. report, ch. 7 C.VI. Also in Italy, there is some discussion on a constitutional obligation to check probable cause in *every* case, *Parisi*, Italian report, ch. 7 C.VI.1.

58 *Lagodny/Schomburg*, German report, ch. 7 C.VI.2.; *Parisi*, Italian report, ch. 7 C.VI.1.; *Swart*, Dutch report, ch. 7 B.VI.

59 Infra 3.

60 *Swart*, Dutch report, ch. 7 B.VI.

61 *Tallgren*, Finnish report, ch. 7 B.IV.

62 See infra III.4.

63 *Lagodny/Schomburg*, German report, ch. 7 C.VI.4.

64 The Polish Supreme Court in the *Mandequi* case: judgment of the Supreme Court of 29 July 1997 II KKN 313/97; OSNKW 1997 cited according to *Płachta*, 6 European Journal of Crime, Criminal Law and Criminal Justice 100 (1998), footnote 19.

65 See *Soering* case, ECHR, Series A, No. 161 (1989), para. 9 of the decision. See also Draft Recommendation of the Committee on Extradition and Human Rights of the ILA in the General Report of *Dugard/Van den Wyngaert*, in: ILA, Report of the Sixty-Eighth Conference Taipei 1998, pp. 135-138 and 152.

66 See infra D.III.

In Switzerland, there is a right to present evidence concerning an alibi. In clear-cut cases, this might lead to the denial of the extradition request (Art. 53 LICCM [CH]). In Germany, such cases may be covered by sec. 10 para. 2 LIACM (GER).[67]

gg) In Switzerland, there is a long standing-practice allowing that the court has the power to impose conditions which the Swiss granting authority has to present to the requesting state. The Swiss Federal High Court makes use of this power to a great extent.[68] The basis for this might be the construction of Art. 38 LICCM (CH) which explicitly deals with "conditions" to be insisted upon by Swiss authorities. And in Art. 38 we see that speciality is just one example of such conditions. In France, the *Chambre d'Accusation* is entitled as well to insist on conditions which the granting authority has to integrate into its decision.[69]

In the Netherlands, there are no explicit rules on the question whether the individual has a subjective right that the court imposes conditions. *Swart* supposes that courts will have only the function of giving advice to the executive.[70] In Germany, this issue is under discussion[71] whereas in Italy, the ministry has full and uncontrolled discretion to insert conditions.[72]

hh) In the Netherlands, a limit of two weeks exists, within which the court must decide.[73] Also Portugal, where the court makes the final granting decisions, calls for strict time limits in Art. 57 of the Portuguese Law on International Judicial Cooperation in Criminal Matters.

In Germany, the speedy trial guarantee applies to the phase of the court decision as well, due to the deprivation of liberty that it entails. This rule has also been the rule in practice.[74] In the U.S., there is no right to a speedy court decision[75] even though the extradition hearing has the impact of a criminal proceeding, which binds a person over for trial. However, courts in the U.S. still hold that an extradition hearing is not of a criminal nature.[76]

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67 *Lagodny/Schomburg*, German report, ch. 7 C.VI.2.

68 *Breitenmoser*, Internationale Rechtshilfe 1995, part D.I.2.3.

69 *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, at p. 128 with footnote 358.

70 *Swart*, Dutch report, ch. 7 B.VII.

71 *Lagodny/Schomburg*, German report, ch. 7 C.VII.

72 *Parisi*, Italian report, ch. 7 B.V., C.VII.

73 *Swart*, Dutch report, ch. 7 B.VIII.

74 *Lagodny/Schomburg*, German report, ch. 7 C.VIII., B.VI.

75 *Blakesley*, U.S. report, ch. 7 C.VIII.

76 *Blakesley*, U.S. report, ch. 7 C.V., who argues that because of the fact that the extradition decision will determine or impact upon a fugitive's liberty, it contains the essential elements of a criminal "binding over" for trial. Thus, it is no different from any other criminal "binding over," and ought to provide all the protections that apply thereto.

There are several time limits in the French procedure in order to speed up proceedings, especially the decision of the *Chambre d'Accusation,* which has to start its proceedings within eight days after the apprehension of the fugitive.[77]

ii) The Italian report stresses the right of the individual to be informed of the court's decision and its reasons,[78] whereas in the Netherlands, there is an explicit rule on this question, requiring that the defendant be informed.[79]

Curiously enough, the decision of the French *Chambre d'Accusation* is required to contain reasons, but the reasons need neither be communicated to the fugitive nor pronounced in public. The reason for this curiosity is that the decision of the court somehow is regarded as an internal matter.[80]

jj) Some states recognize a right of the individual to ordinary appeal.[81] This can be regarded as a sign of change from the object to the subject and party approach. Some states exclude appeals.[82] Interestingly, the Portuguese law in Art. 24 para. 2 excludes the right to an appeal against a negative decision on the admissibility or acceptability of extradition.

Extraordinary appeal for the individual is recognized in some states.[83] There are, however, also some extraordinary appeals which are accessible only to the minister or the public prosecutor.[84]

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77 See *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, at p. 114.

78 *Parisi*, Italian report, ch. 7 C.IX.; there is, however, no duty to inform the individual of the granting decree (ch. 7 B.VII.).

79 *Swart*, Dutch report, ch. 7 B.IX.

80 This is the explanation given by *Haas,* Die Auslieferung in Frankreich und Deutschland 2000, p. 127 quoting *Aymond*, Encyclopédie Dalloz 1968, mise à jour 1981, ann. 349.

81 *Swart*, Dutch report, ch. 7 B.X.; *Parisi*, Italian report, ch. 7 C.X.; International Legal Assistance Law 5758-1998 (Israel), in force since 7 February 1999, Council of Europe Document PC-OC/INF 29 of 23 February 1999, No. 13: right to appeal against the district court's decision; Article 58 para. 1 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20.

82 *Blakesley*, U.S. report, ch. 7 C.X.; Germany: see sec. 12 LIACM (GER).

83 *Blakesley*, U.S. report, ch. 7 C.X., D.I. (*habeas corpus* procedure).

84 *Lagodny/Schomburg*, German report, ch. 7 C.X.

*d) Extradition detention*

aa) In the U.S.,[85] in Finland[86] and to a great extent in Germany,[87] extradition detention seems to be mandatory, at least in the sense of how it has traditionally been practised. In *Paretti v. United States* for the first time in the history of extradition detention procedure, bail was considered possible.[88] In the Netherlands, on the contrary, detention is "never"[89] mandatory. Article 47 LICCM (CH) like sec. 25 LIACM (GER) make clear that extradition detention is not considered mandatory by the lawmaker.

bb) No. 5 b of the Resolution of the 16th Congress of the International Penal Law Association 1999 in Budapest reads:[90]

> "[...] In case of detention for the purpose of extradition, the individual subject to this procedure should have the same rights as any other person who is deprived of his liberty in a domestic criminal case. [...]"

The relevant problems mentioned in the German report[91] as to a different procedure in ordinary detention compared to extradition detention obviously do not exist in other states. The regulations in the Netherlands are - according to *Swart* - not in accordance with the ECHR.[92]

cc) Compensation is granted like in other cases in the Netherlands.[93] In Portugal (Art. 14 of the Law on International Judicial Cooperation in Criminal Matters),[94] we also have a clear-cut compensation provision as far as responsibility is concerned (another question, however, is to what extent Portuguese national law, as such, grants compensation).[95] Article 14 says:

> "Portuguese law shall apply to compensation for illegal or unjustifiable deprivation of liberty, or for other damages suffered by the suspect or the accused person,
> a) during proceedings initiated in Portugal as a consequence of a request for cooperation made to Portugal;
> b) during proceedings initiated abroad as a consequence of a request for cooperation made by a Portuguese authority."

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85 *Blakesley*, U.S. report, ch. 7 D.I.

86 *Tallgren*, Finnish report, ch. 7 D.II.: the provisions on remand are applicable, but, as a rule, the person is taken into custody.

87 *Lagodny/Schomburg*, German report, ch. 7 D.I.

88 *Blakesley*, U.S. report, ch. 7 D.I., II.

89 *Swart*, Dutch report, ch. 7 D.I.

90 15 International Enforcement Law Reporter (1999), 502-507, at 506.

91 *Lagodny/Schomburg*, German report, ch. 7 D.II.

92 *Swart*, Dutch report, ch. 7 D.II.

93 *Swart*, Dutch report, ch. 7 D.II.

94 Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000).

95 Cf., also Art. 15 LICCM (CH) which stipulates that compensation may be required for both situations, i.e., the situation described in Art. 14 lit. a and b of the Portuguese Law. A Swiss court, however, may according to Art. 15 para. 5 LICCM (CH) take into consideration the extent to which the individual may get compensation from another state.

*Litera* a is of importance, because in Germany, this situation causes problems. The Federal High Court denied compensation for extradition detention in Germany after the request had been withdrawn by the requesting state due to an error of that state about the person's identity. The argument was that only the requesting state's officials are responsible, not German officials. The question of whether German authorities nevertheless are responsible on the basis that they trusted in the other state's request, has not been considered by the court.

Exactly the opposite result is reported from Finland: The Finnish Supreme Court decided in a case that the individual shall receive compensation after his extradition to Norway and his acquittal there. The main argument for this was that the person was within the domain of Finnish jurisdiction at the time of his detention, so Finland was responsible.[96]

Compensation in the U.S. is granted only in cases of "egregious tort," and this seems only to have occurred once.[97] According to sec. 2 para. 1 lit. b StEG[98] compensation in Austria will only be given for detention in Austria caused by a foreign request, not for detention abroad caused by an Austrian request for extradition.

As far as the situation of lit. b of the Portuguese Law is concerned, Dutch law offers compensation for detention in the requested state.[99]

*2. Proceedings in the requesting state*

The previous part dealt with the view of the requested state. Now we consider the view of the requesting state and the role of the individual there.

a) In Liechtenstein, there are now - like in Austria (sec. 68 para. 2 LECCM [A]) - explicit criteria of proportionality which seriously limit the acceptability of an extradition request or a request for other forms of cooperation. These limitations are at the discretion of the judicial branch.[100]

b) The individual has no possibility of preventing or terminating a request made by the state where the individual is present.[101] In addition, judicial review of requests on the initiative of third persons is not allowed.

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96 *Tallgren*, Finnish report, ch. 11 A.

97 *Blakesley*, U.S. report, ch. 7 D.III.; ch. 2 B.VII.; ch. 3 B.III.

98 Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen; roughly translated: Law on Compensation in Criminal Matters.

99 *Swart*, Dutch report, ch. 8 B.III.

100 See Art. 68 para. 2 of the Law on International Assistance in Criminal Matters of 15 September 2000, Liechtensteinisches Landesgesetzblatt (Law Gazette of Liechtenstein) 2000, No. 215 of 6 November 2000 (p. 351, 1-42) in force since 6 November 2000.

101 *Tallgren*, Finnish report, ch. 8 A.: no judicial review in Finland. In the Netherlands, there is a theoretical basis (New Civil Code), practically it would not be successful (*Swart*, Dutch report, ch. 8 A.). In Switzerland, appeal against a Swiss request other than for transfer of criminal proceedings is explicitly excluded (Art. 25 para. 2 LICCM [CH]).

c) In Germany - like in Austria[102] -, there is a special legal provision (sec. 72 LIACM [GER]) requiring German authorities to abide by conditions indicated by the requested state, e.g., the speciality requirement.[103] In the Netherlands, such a provision exists only for extradition. In Italy, according to sec. 699 para. 4 CCP, the fulfillment of conditions is supervised only by the ministry.[104]

In the U.S., the issue of whether the individual has standing to raise, the question of speciality or other treaty-based or human-rights-based interests is currently hotly debated. The background of this discussion is the question whether the speciality principle is considered self-executing or not.[105] Federal circuits are split in this question. As a consequence, in the circuits in which he has no "standing to raise the issue," the individual "is entirely dependent on the requested state's protest."[106] These questions neither arise in Germany nor in the Netherlands, due to the legal situation: As there is an explicit provision in national law, this issue is beyond debate and the individual may appeal against the disregard of these protections, e.g., speciality.

In the *Venezia* case, another problem arose: The Italian Constitutional Court held that assurances of the U.S. not to impose the death penalty were not sufficient as they were given by the executive which could not bind the judiciary.[107]

*3. Requirements and bars/limitations with human rights aspects*

*a) General observations*[108]

aa) In all countries either a treaty or at least a national statute is required for extradition. This means that the legislator has to decide on the conditions. It is not only the free discretion of the executive on what conditions extradition is granted.

This does not mean that the laws governing international cooperation are clear and easily to be found. In the European context, there is a real "chaos" of conventions, treaties, and other legal sources. In many cases there are more than 10 or even more than 15 layers of legal sources to be checked. This chaos is even expanded by worldwide conventions on specific subjects which also contain rules on international cooperation, e.g., the UN Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or the UN Convention against Transnational Organized. Considering the view of a law enforcement agent or a magistrate, one could call this "instigation to perversion of justice."

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102 See sec. 4 LECCM (A). As to Italy, see Arts. 721 and 729 CC.

103 See also Art. 30 para. 3 LICCM (CH); *Tallgren*, Finnish report, ch. 5 B.II. See also the laws of Hungary (1996, sec. 8) and para. 24 of the International Legal Assistance Law 5758-1998 (Israel), in force since 7 February 1999, Council of Europe Document PC-OC/INF 29 of 23 February 1999.

104 *Parisi*, Italian report, ch. 7 E.VIII.

105 *Blakesley*, U.S. report, ch. 8 B.

106 *Blakesley*, U.S. report, ch. 8 B.III.1.c.

107 As to the *Venezia* case, see *Parisi*, Italian report, ch. 7 E.II.; *DeWitt*, 47 Catholic University Law Review 535-589 (1998) with an English translation of the judgment (pp. 591-601); see also *Dugard/Van den Wyngaert*, 92 American Journal of International Law 197. In reality, in the U.S., it is likely that a promise from the proper executive authority will bind the judiciary on an issue impacting life or liberty.

108 As to the question of which human rights in general are obstacles to extradition when there are problems in the requesting state see also *Dugard/Van den Wyngaert*, 92 American Journal of International Law 187-212

The principle of legality has lost its influence before the background of such an evolution. It has become a mere chimera.

bb) Extradition and human rights exceptions have been steadily increasing in the last two decades.[109] As a general trend, we can also observe a "constitutionalization" of substantive requirements by transforming concepts of national human rights[110] as well as a steadily growing acceptance of the individual as a subject of international law.[111] Thus, in a dissenting opinion of a decision of the European Commission of Human Rights in 1991, it was stressed that in extradition proceedings three parties are concerned.[112]

*Parisi* is right when she observes that national and international requirements merge in this arena. This is especially true for the Italian situation under the new Code.[113] This is due to the "mixture" of international and domestic law that govern extradition. There is however at least some discussion starting from and within the national legal orders.

Taking human rights seriously also in the law of extradition and its substantive requirements is a development which started in Europe in the 1970s and 1980s.[114] If we compare the situation at that time with the present, just to mention the postulations of the International Law Association (ILA),[115] we can observe an impressive improvement which, however, is far from being perfect. Legal theory and practice in this respect, at least, have become aware of the fact that extradition is no longer a problem of double criminality and other "classical" requirements only, but also, if not primarily, a matter of human rights.

cc) General human rights clauses are rare.[116] Clauses relating to the criminal law in the requesting state, like those concerning the death penalty,[117] are more frequent. The European states recognize the death penalty exception to a large extent whereas the U.S. does not.[118] In Germany, there are some cases where excessive penalties have been a bar to extradition.[119]

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109 *Dugard/Van den Wyngaert*, 92 American Journal of International Law 187-212. See also *Gilbert*, Transnational Fugitive Offenders in International Law 1998, especially pp. 147-173.

110 *Parisi*, Italian report, ch. 1 E.

111 See in detail *Breitenmoser*, Internationale Rechtshilfe 1995, part C.III.2.

112 Kolompar./.Belgium, report of 26 February1991, B/216 C as quoted by *Breitenmoser*, Internationale Rechtshilfe 1995, part C.III.2. with footnote 498.

113 *Parisi*, Italian report, ch. 1 E.

114 See *Swart*, 85 Mededelingen van de Nederlandse Vereniging voor Internationaal Recht 1982, 87-149; *Van den Wyngaert*, The Political Offence Exception to Extradition 1980; as to the discussion in Germany, see *Lagodny*, Rechtsstellung des Auszuliefernden 1987.

115 ILA, Report of the Sixty-Eighth Conference Taipei 1998, pp. 132-163.

116 *Parisi*, Italian report, ch. 7 E.I.; *Swart*, Dutch report, ch. 7 E.I.: only in recent bilateral treaties. See also ss. 19 or 51 LECCM (A).

117 As to the problem of minimum sanctions which are unknown in the Netherlands, see *Swart*, Dutch report, ch. 7 E.II.

118 As to the problems of the U.S. to deal with European countries as requested states, see *Blakesley*, U.S. report, ch. 8 B.III.2.

119 *Lagodny/Schomburg*, German report, ch. 7 E.II.

The death penalty clauses, such as Art. 11 ECE, according to which the requested state may require assurances that the death penalty will not be carried out, involve the questions: When are such assurances reliable? Who decides on the reliability of such assurances - only the granting authority, only the court, or both? Here again we are facing the general problem of restrictions of the court's control which will be dealt with infra E.II.

dd) The criminal procedure in the requesting state is evaluated by clauses like Art. 3 of the 2nd Additional Protocol to the ECE concerning trials *in absentia*.[120] It is not an obstacle according to the Finnish Supreme Court that undercover operations have been used against the individual.[121]

Also the prohibition in case of the threat of torture should be mentioned here. Imminent violation of the freedom from self-incrimination in the requesting state has been reported not to preclude extradition in one specific case.[122]

ee) Persecution clauses, like Art. 3 para. 2 ECE, meanwhile are widespread.[123] Section 14 of the Hungarian Law explicitly provides that "extradition of *refugees* shall be refused [...]."[124]

ff) Special hardship clauses which take into account the personal situation of the extraditee (e.g., age, health, mental capacity) are known in the Netherlands, where it is only the executive, not the judiciary, which decides on their merits.[125] In Portugal, there exists an optional hardship clause (Art. 18 of the Portuguese Law).[126] In Germany, such cases may be decided only on the basis of sec. 73 LIACM (GER), i.e., by applying national law.

120 *Lagodny/Schomburg*, German report, ch. 7 E.III. See also *Tallgren*, Finnish report, ch. 7 E.III.: the Finnish Supreme Court denied extradition in an *absentia* case concerning Switzerland.

121 *Tallgren*, Finnish report, ch. 7 E.III.

122 *Lagodny/Schomburg*, German report, ch. 7 E.III.

123 See also sec. 10 para. 2 LIACM (GER) or the "bad faith" exception reported by *Gilbert*, Transnational Fugitive Offenders in International Law 1998, pp. 191-193.

124 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters = Council of Europe Document PC-OC/inf. 26, p. 4.

125 *Swart*, Dutch report, ch. 7 E.V. See also sec. 22 LECCM (A) with a general hardship clause and sec. 21 LECCM (A) which explicitly prohibits extradition of children.

126 See also Art. 4 LICCM (CH).

In Finland, a hardship clause exists, but it is rarely applied as a ground for refusal. However, a case of an Estonian national domiciled in Finland has been one such case.[127]

gg) In the EU context, the non-extradition of nationals will be abolished or at least reduced.[128] The Netherlands changed its law as early as 1985: Extradition of nationals is possible if the person is returned to the Netherlands for execution of a sentence.[129]

hh) In some states, the (constitutional?) necessity of the double criminality requirement is considered to be part of the *nulla poena sine lege* rule.[130] There are tendencies to make the thresholds even higher: An extension of double criminality to the issue of whether the requested state would have jurisdiction under such circumstances can be observed in the U.S.[131] On the other hand, the ECE[132] seems to reduce the impact of double criminality in cases of preparing a crime/conspiracy, but only within a very small dimension.

Surprisingly, the U.S. report stated that double criminality has been reduced to "bare meaninglessness" in U.S. judicial interpretation.[133]

In the Netherlands, double criminality is understood only *in abstracto*,[134] whereas in Germany or in Austria,[135] it is understood *in concreto*. The question of whether the defendant's insanity may be considered has been explicitly rejected in the Netherlands.[136] Article 35 sentence 2 LICCM (CH) provides that neither "besondere Schuldformen" nor "Strafbarkeitsbedingungen" are taken into account. These terms are difficult to translate. Roughly speaking, the idea is that only the *actus reus*, general *mens rea* and grounds of justification are checked. Questions of guilt and of objective elements for which no *mens rea* is required are not checked.[137]

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127 *Tallgren*, Finnish report, ch. 7 E.IV. - As an example to the contrary, i.e., where extradition had been refused on the basis of hardship considerations by the Fürstlicher Liechtensteinischer Oberster Gerichtshof (High Court of Liechtenstein) which caused a fierce discussion on the merits of the case, see: Fürstlich Liechtensteinischer Oberster Gerichtshof, decision of 2 July 1998 - 8 Rs 35/98-75 and commentaries by *Schwaighofer* and *Schomburg*, Jus & News, Issue 3, 1999, 260-265 (decision), 266-269 (Schomburg), 270-274 (Schwaighofer).

128 See Art. 7 of the Convention of 27 September 1995 drawn up on the basis of Art. K.3 TEU, relating to extradition between the Member States of the European Union (OJ C 313, 23.10.1996, p. 11): *Gleß*, EU report, part 2 ch. 7 E.VII.

129 *Swart*, Dutch report, ch. 7 E.VII.

130 *Parisi*, Italian report, ch. 7 E.VII.; *Lagodny/Schomburg*, German report, ch. 7 E.VIII.

131 *Blakesley*, U.S. report, ch. 7 VIII.2.c.

132 Convention of 27 September 1995 drawn up on the basis of Art. K.3 TEU, relating to extradition between the Member States of the European Union, OJ C 313, 23.10.1996, p. 11. Article 3 only concerns conspiracy and comparable crimes. For details see *Gleß*, EU report, part 2 ch. 7 E.VII.

133 *Blakesley*, U.S. report, ch 7 E.VIII.

134 *Swart*, Dutch report, ch. 7 E.VIII.

135 See *Schwaighofer*, Auslieferung und internationales Strafrecht 1988, p. 96.

136 *Swart*, Dutch report, ch. 7 E.VIII.

137 See *Zimmermann*, La coopération judiciaire internationale en matière pénale 1999, p. 274 (n. 353); *Breitenmoser*, Internationale Rechtshilfe 1995, part B.IV.1.2 at footnote 472.

If we look at *Swart's* arguments in favor of the double criminality requirement[138] and at its development from a 19th-century-"positive"-list of extraditable and at the same time in both countries punishable offenses to the present non-list approach as, e.g., Art. 2 para. 1 ECE, we should think about a negative list approach, within which a country could stipulate in a treaty or convention or admit the following by the way of reservation:[139]

- Double criminality is not required for extradition (or other forms of cooperation).
- But state X will neither extradite for the following specified crimes (...),
- nor will it extradite for crimes which would be unconstitutional (or against the *ordre public*) under the laws of state X.[140]

This approach would create the possibility for each state to preserve its cultural specialities. Furthermore, it would be much more effective than trying to harmonize the entire existing substantive criminal law which even on the European level is simply impossible. On a worldwide level, it is not worthy of discussion outside an ivory tower.

ii) The waiver of requirements is developing as far as speciality is concerned;[141] new trends seem to accept the individual as being capable - albeit not without the state's consent - to waive speciality. The individual alone cannot waive speciality, the consent of the requested state is still required.[142] The Swiss approach in Art. 38 para. 2 lit. a LICCM (CH) radically differs in this regard: it allows speciality to be waived by the individual alone.

*b) Hierarchy problems (international and national basic rights vs. treaty requirements)*

aa) Human rights issues cause problems in the requested state if there is no treaty provision on the relevant matter, i.e., with regard to the question: Is there a duty under public international law to extradite?[143] On the treaty level, albeit with some hesitancy, explicit human rights clauses are becoming more and more the rule. On the level of purely national law, especially with regard to national extradition laws, such clauses are much more common nowadays. However, there is still a gap between the treaties which - in the absence of a specific human rights clause - stipulate a duty to extradite in that specific human rights question and various national laws (including especially national basic rights) governing the "power to extradite," which require the state *not* to extradite.[144] In the 1980s and 1990s, national courts tried to bridge this gap by what could be called "emergency brake decisions."[145] These decisions either referred to an *international* minimum standard of

138 *Swart*, in: Eser/Lagodny (eds.), Principles and Procedures for a New Transnational Criminal Law 1992, pp.. 505-534.

139 See recently the draft proposal of a framework decision of the EU Commission: Commission proposal on European arrest warrant (COM [2001] 522, 19 Sept. 2001; OJ 2001 C 332 E/305).

140 As to the necessity of such an exception see *Lagodny*, in: Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen 1998, ann. 2 to para. 3 LIACM (GER). In addition, without such a constitutional or *ordre public* clause, it would be impossible for a state to exhaustively determine the cases of non-extradition.

141 *Lagodny/Schomburg*, German report, ch. 7 E.IX., X.

142 For Europe, see Arts. 9 and 12 of the Convention on Simplified Extradition Procedure between the Member States of the European Union.

143 See supra A.II.

144 See supra A.II.

145 See *Lagodny/Reisner*, 3 Finnish Yearbook of International Law 237-297 (1992); 65 RIDP 543-596 (1994). See also the judgments reported by *Breitenmoser*, Internationale Rechtshilfe 1995, part D.III.2.2.1

human rights or/and a *national* standard of human rights protection in order to declare extradition inadmissible, albeit that there would be no provision to do so on the basis of the relevant treaty.

bb) Applying national basic rights in this manner may cause special problems of hierarchy, first on the level of public international law. Thus, the question is raised: Does the extradition treaty prevail over international human rights instruments/international human rights minimum standards or *vice versa*? To what extent does *jus cogens* (as reflected in Arts. 53, 64 of the Vienna Convention on the Law of Treaties) prevail over the extradition treaty? Second, on the level of national law: Does the extradition treaty prevail over national constitutional law (according to Art. 27 of the Vienna Convention on the Law of Treaties)? The "emergency brake" decisions mentioned above tried to avoid these delicate questions by either referring to a superior international minimum standard or to a superior national minimum standard.

In France, however, the *national ordre public*, i.e., human rights concepts, are applied in treaty-based cases without any hesitation. There is not even any discussion of whether a legal construction might exist to allow this in the absence of a treaty clause for the national *ordre public*. A prominent example of the French concept of national *ordre public* in this arena is the non-extradition in cases of the potential for imminent application of the death penalty.[146]

cc) There is no hierarchy of norms on the level of international law.[147] The answer to these questions is based on the rank of international public law in the national legal order. The U.S. legal order is "aggressively dualistic."[148] Interestingly, but with regard to the political situation not surprising, in the U.S. national (constitutional) law has priority to international law,[149] but "treaties are the supreme law of the land." In other states, there is a superiority[150] or at least the same rank[151] of international law.[152]

146 *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, pp. 372 and 219, 220 (death penalty).

147 *Breitenmoser*, Internationale Rechtshilfe 1995, part D.III.1.

148 *Blakesley*, U.S. report, ch. 1 A.I.

149 *Blakesley*, U.S. report, ch. 1 A.I.

150 *Parisi*, Italian report, ch. 1 C. and E.

151 As to customary international law and constitutional law in Italy: *Parisi*, Italian report, ch. 1 C.III. In Germany, the "general rules of international law" rank between parliamentary law and constitutional law, *Lagodny/Schomburg*, German report, ch. 1 E.I.

152 In Finland, there seem to be a lot of unsolved questions (*Tallgren*, Finnish report, ch. 1 C.IV.) as to the relation between customary international law and the general principles.

dd) The relation between international human rights conventions and extradition treaties is important. Meanwhile, this point of importance has been emphasized in the Netherlands[153] and in Italy,[154] where human rights conventions have priority even though the principle of priority or of a more specific regulation might indicate the contrary. In the Netherlands, priority is not general but depends on a balance in the concrete case, unless torture is at issue, inasmuch as the prohibition of torture is absolute.[155]

U.S. extradition treaties do not need implementation by Congress as they are held to be self-executing, although the U.S. does have a long-standing extradition law, which incidentally provides that an extradition treaty is required before the U.S. will extradite to another country, but allows it to the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda.[156] Human rights conventions, on the other hand, are not self-executing and have no direct impact domestically in the U.S. To that extent they have no priority over extradition treaties.[157] It is an aspiration, perhaps, that they might have an impact in interpretation of extradition treaties.

In Germany, extradition treaties have to be enacted by Parliament. Theoretically, human rights conventions have the same rank (of parliamentary law) as extradition treaties/conventions. However, the German Federal Constitutional Court takes the ECHR into account when interpreting national basic rights.[158]

Finland makes a differentiation: If an agreement affects basic rights, Parliament must adopt a blanket act passed through a special process for constitutional amendments. If the agreement is not in conflict with national Finnish law, it is the government (without the Parliament) that is to issue a blanket decree.[159]

ee) Although the U.S. Supreme Court has noted that international law is part of U.S. law, customary international law is not applicable per se in the U.S, unless no judicial, legislative, or executive ruling exists on the treaty issue.[160] Whereas in Italy, it has the same rank as constitutional law.[161] In Germany - roughly speaking -, most customary international law ranks above parliamentary law, but under constitutional law. In the Netherlands, international

153 *Swart*, Dutch report, ch. 1 E.II.

154 *Parisi*, Italian report, ch. 1.E.

155 Cf. *Swart*, Dutch report, ch. 1 E.II. See also *Breitenmoser*, Internationale Rechtshilfe 1995, part D.III. 1.2. who argues that there is a general superiority of international human rights conventions.

156 *Blakesley*, U.S. report, ch. 1 C.II.

157 *Blakesley*, U.S. report, ch. 1 C.II.

158 *Lagodny/Schomburg*, German report, ch. 1 E.III.

159 *Tallgren*, Finnish report, ch. 1 C.IV.; see also *Traeskman*, 65 RIDP 251-287 (1994), part II 265-269.

160 *Blakesley*, U.S. report, ch. 1 B.III. As to the consequences: See, the Paquete Habana, The Lola, 175 U.S. 677 (1900); *Blakesley* et al., The International Legal System 2001, pp. 8-41. The impact of this is significant, inasmuch as the President, the Congress, or the judiciary have the power and authority to obstruct the application of customary international law in the U.S. Currently, this issue is hotly debated and the debate is reflected in *Blakesley's* report. Also, much of the legislation and executive regulation on anti-terrorism, immigration, asylum, etc., including incarceration and secret trial, conviction and capital execution in a military commission set up by Presidential Executive Order to Allow Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism flies in the face of customary international law, as well as *jus cogens* principles and, indeed, many treaties to which the U.S. is a party. At this writing, the U.S. domestic and the international residue of this possibility remains to be seen. Moreover, on a different executive order, the U.S. has seen some 1,000 or more aliens secretly incarcerated, most without a hearing or even counsel.

161 *Parisi*, Italian report, ch. 1 E.

law becomes part of the national legal order without any transforming act.[162] On the contrary, the Netherlands even takes into consideration the "soft law" of the Council of Europe, especially its recommendations.[163]

ff) The concept of *jus cogens* has played a role in Dutch foreign policy as argument for the superiority of human rights conventions over extradition treaties.[164] In the U.S., it is not considered being a part of formal U.S. law, at least it is often misunderstood by the courts, the legislature, and the executive branches.[165] The reason might be the strictly dualistic approach of the U.S. legal order, or the disdain with which many in the U.S. government hold international law.[166]

gg) There is divergence as to the constitutional control of international treaties: In the U.S.[167] and in Germany[168] it is possible, whereas in the Netherlands,[169] only other *international* instruments such as human rights conventions may be a barrier to extradition treaties.

A very interesting feature with regard to "treaties" aiming to implement, e.g., the Schengen Agreement or the Treaty on the European Union of 1992 may be observed in the Netherlands: The Dutch government has to inform Parliament of any draft decision to implement any such treaties that, if accepted, would be binding on the Netherlands, before the government - on the EU level - casts its vote on that decision.[170] This is of great importance in the European context because such implementing treaties often are drafted and brought to a binding decision on the intergovernmental level even before public realizes what is going on.

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162 *Swart*, Dutch report, ch. 1 C.II.

163 *Swart*, Dutch report, ch. 1 C.I.

164 *Swart*, Dutch report, ch. 1 E.II. See also the intensive discussions in Finland (*Tallgren*, Finnish report, ch. 1 E.) and - in general - *Breitenmoser*, Internationale Rechtshilfe 1995, part D.III.1.3.

165 *Blakesley*, U.S. report, ch. 1 B III 2.

166 See *Blakesley* et al., The International Legal System, pp. 531, 585-569; *Blakesley*, 91 Journal of Criminal Law & Criminology 1-97 (2000). See in detail also *Breitenmoser*, Internationale Rechtshilfe 1995, part D.III.2.2.1.f. concerning Australia.

167 *Blakesley*, U.S. report, ch. 1 C.II.

168 *Lagodny/Schomburg*, German report, ch. 1 A.

169 *Swart*, Dutch report, ch. 1 E.III.

170 *Swart*, Dutch report, ch. 1 C.II.

## *II. Cooperation in criminal matters*

### *1. Proceedings in the requested state*

a) Proceedings in all forms of international cooperation other than extradition in principle are shaped around and according to extradition procedures: Most states recognize and apply a differentiation between administrative (granting) and judicial proceedings. The major difference to extradition proceedings is that there is no general obligatory court control for these other procedures. Judicial proceedings are activated in the *requested* state only if it comes to coercive measures as search and seizure. Like in national proceedings without any international assistance, a judge (or other authority) is required to give his approval to such measures.

An important exception to this can be seen in Switzerland, where there is no granting procedure. The individual against whom proceedings are conducted in the requesting state may appeal against decisions of granting or executing a request (Art. 21 para. 3 LICCM [CH]). E contrario one may conclude that other persons may not appeal.

b) The granting procedure is - like in extradition proceedings in most states under consideration - considered to be an administrative procedure.[171] The granting authority is - in most cases - an authority subordinate to the ministry of justice or an authority to which this ministry has delegated (the execution of) the power to decide. Often it is the authority which also executes the request, e.g., by interrogating a witness. This makes it difficult sometimes to trace the structures of proceedings.

The request for assistance is forwarded by the granting authority to those authorities which have to continue proceedings. Already at this very early stage of the proceedings, the granting authority determines the admissibility of the request and the political will to grant cooperation, of course subject to further approval by courts where necessary.[172]

c) We can observe the same problem in extradition proceedings as far as *fair trial rights* in the granting procedure are concerned: Even though the granting procedure is a formal procedure, there are no explicit rules to be applied to it. On the other hand, other forms of (domestic) administrative procedure are codified or controlled by (some) rules. Thus, only a few fair trial rights can be found. The same is true for the German situation.[173]

In the Netherlands and in Germany, however, such rules as to guarantee the fair trial rights mentioned in the questionnaire would certainly obtain, if the laws ruling administrative procedure in general were applicable. If this were applied consistently, fair trial problems would be reduced.[174]

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171 *Parisi*, Italian report, ch. 4 A.; *Lagodny/Schomburg*, German report, ch. 2 before A.; ch. 4 B., C.I.

172 *Parisi*, Italian report, ch. 4 A., referring to Art. 723 of the Italian Code of Criminal Procedure (I-CCP); *Lagodny/Schomburg*, German report, ch. 7 A.

173 *Lagodny/Schomburg*, German report, ch. 7 B. before I.; ch. 4 B. before I. as to consequences with regard to the protection of privacy, see p. 26. We have proposed the applicability of the Federal Law Concerning Administrative Procedure (BVwVfG).

174 *Swart*, Dutch report, ch. 4 C.I.

In Finland, it seems to be difficult to differentiate between the granting procedure and a judicial procedure, at least it seems to be "difficult to assess" the fair trial rights, i.e., presumption of innocence, the right to be heard, the right to counsel, or the right to be informed of the charges or of the proceedings to take place. Fair trial rights seem to apply to international cooperation procedures as well, at least "where appropriate."[175] Of course, the crucial question, then, is where is it appropriate?

In Switzerland, fair trial rights are generally guaranteed. This might be due to the different approach generally taken by Switzerland.

d) In the Netherlands, also, a different approach may be observed:[176] According to Art. 552o Dutch CCP, fair trial rights are provided if an examining magistrate *(rechter commissaris)* is indicated to execute a request. If this is so, the request "shall have the same consequences in law as an application for the opening of a preliminary judicial examination insofar as it concerns [coercive measures]." Thus, the individual shall have all the guarantees including the privilege against self-incrimination, the right to be heard, the right to counsel, the right to look into the file, the right to be informed about the decision, etc.[177] Thus, the decisive factor in the Netherlands seems to be whether the action of the examining magistrate is necessary. However, *Swart* shows the consequences caused by this in his discussion of the principles of administrative procedure.[178]

Still another approach can be observed in Israel with regard to third parties'□ rights: The new Israeli "International Legal Assistance Law 5758-1998" which entered into force on 7 February 1999[179] in sec. 30 explicitly provides for a court hearing on the transmittal of an article of evidence. This is meant to protect third parties.

e) The right of the individual to be informed is not guaranteed. In Germany, neither that right nor a right to be informed about the final decision, i.e., the granting of assistance is provided.[180] The German approach is clearly not an expression of an "object" approach as long as assistance concerns investigative proceedings in which, even in purely national proceedings, the individual as a defendant would not be informed.

f) The Swiss law explicitly guarantees a right of parties to look into the file. The right, however, may be restricted (Art. 80b LICCM [CH]). Anyhow, the right to look into the file - if guaranteed as such - involves a fairly new problem. Article 7 of the EU-Mutual Assistance Convention (EU-MAC)[181] allows for information to be disclosed spontaneously, i.e., without a request. This legalizes a general practice. In the debates over this provision it was proposed by the European Parliament to explicitly require a duty to lay down in the file from whom

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175 *Tallgren*, Finnish report, ch. 4 C.V (concerning hearings).

176 *Swart*, Dutch report, ch. 4 C.II.

177 *Swart*, Dutch report, ch. 4 B.; *Blakesley*, U.S. report, ch. 4 A., mentioning the U.S. - Swiss treaty.

178 Cf. *Swart*, Dutch report, ch. 4 C.I where he shows the consequences which would derive from the assumption that the relevant Chapters 2 to 4 of the 1992 General Act on administrative procedure were applicable.

179 See Council of Europe Document PC-OC/INF 29 of 23 February 1999.

180 *Lagodny/Schomburg*, German report, ch. 7 A. as to extradition; the same applies to judicial assistance.

181 Convention established by the Council in accordance with Art. 34 TEU, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Official Journal of the European Communities 12.7.2000 EN C 197/3 (EU-MAC).

and when such information was given.[182] This would be of importance for the defense. Such an obligation, however, has not been promulgated. The Swiss law - in Art. 67a para. 6 LICCM (CH) - makes a note in the files mandatory.

g) The right to counsel is of interest with regard to counsel's participation in the interrogation of witnesses or in situations in which the defendant in the requesting state wants to argue through his counsel against the performance of the request by the requested state. Such a right seems to be guaranteed in continental states.[183]

In the U.S., however, there appears to be no right to counsel when the defendant is abroad like in the situations described, unless the defendant can take advantage of local rules. The background is the territorial restriction of constitutional guarantees.[184] The Swiss approach is juxtaposed: Art. 21 LICCM (CH) stipulates a comprehensive right to counsel and to appeal.

A rather strange development can be observed when looking at the EU-MAC: It will contain a new provision in Art. 10 on video-live-links of witnesses and also of defendants. In Art. 10 para. 9 it is established that: "Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument." Subsequent to Art. 30 of the Convention there is a "Council Declaration on Art. 10(9): When considering the adoption of an instrument as referred to in Art. 10(9), the Council shall respect Member States' obligations under the European Convention on Human Rights."

The Council of the European Union is composed of delegués from the governments of the EU Member States. Even though one cannot, according to prevailing view in European law, consider the Council as being the executive of the EU or the EC,[185] it sounds strange that it is the Council that is designated to adopt the rules concerning human rights and, in that respect, are meant to control state activities. This might create a vicious circle.

182 Bericht vom 31. Januar 2000 über den Entwurf eines Rechtsaktes des Rates über die Erstellung des Übereinkommens über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union (9636/1999 - C5-0091/1999 sowie SN 5060/1999 - C5-0331/1999 - 1999/0809 [CNS]), Ausschuss für die Freiheiten und Rechte der Bürger, Justiz und innere Angelegenheiten, EP-Sitzungsdokument A5-0019/2000; RR\403243DE.doc; PE 232.057, pp. 5-46, at 17 and subs.

183 *Parisi*, Italian report, ch. 4 C.III.; *Swart*, Dutch report, ch. 4 B. (investigating judge) *Lagodny/ Schomburg*, German report, ch. 4 C.II. (no explicit rule but based on the "Rechtsstaatsprinzip"); *Tallgren*, Finnish report, ch. 4 C.III.

184 See in detail infra D.I.

185 The background is that the traditional concept of division of powers (i.e., legislative/executive/judicial power) may not be transferred to the EU/EC, cf. *Schweitzer/Hummer*, Europarecht 1996, margins 923 ff., 925.

h) In Italy there is no right to a hearing before a court. This is considered to present a problem there.[186] Moreover, the fact that the defendant has no right to appeal is hotly debated in Italy.[187]

The Italian report mentions that the right of the defendant to be heard is not guaranteed in cases in which Italy is requested to execute a letter rogatory.[188] The situation at issue could be that a person's right to be heard on the taking of evidence in the requested state may be compromised or non-existent.

i) In the Netherlands, the authorities are always entitled to impose conditions like the rule of speciality.[189] Thus, in the Netherlands, there seems to be a right of the individual to have conditions imposed by the court as soon as human rights are implicated.[190] In Finland, however, there seems to be no subjective right of the individual to have the granting authorities impose conditions on the requesting state.[191]

j) A speedy decision of the granting authority seems not to be discussed in the field of judicial assistance. Maybe this is due to the fact that there is no extradition detention pending in such situations, which is one of the main reasons for the necessity of a speedy decision in extradition proceedings.[192] From the individual's perspective, the acceleration of proceedings in judicial assistance is important only to the extent that the granting is in his interest.

However, the right to a speedy court decision would be guaranteed in the Netherlands according to the 1992 General Act if this Act were applicable to these proceedings. The Finnish report points out that in this respect, there is "no clear position" in Finland as to the applicability of Arts. 5 IV and 6 ECHR.[193]

k) As to the right to have a decision reviewed, two questions have to be decided:[194]

- May the performance of the request be prepared (i.e., executed) in the requested state? I.e., may the documents be seized in the requested state (power of execution)?
- May the results of the execution, i.e., the seized documents, be transferred to the requesting state (power of performance)?

These questions/rules apply to documents as well as to physical evidence.

186 *Parisi*, Italian report, ch. 4 B.V.

187 *Parisi*, Italian report, ch. 4 B.X.

188 *Parisi*, Italian report, ch. 4 B.I.

189 *Swart*, Dutch report, ch. 4 C.VII. See also Art. 80p LICCM (CH).

190 *Swart*, Dutch report, ch. 4 C.VII.

191 *Tallgren*, Finnish report, ch. 4 B.VI.

192 Cf. *Lagodny/Schomburg*, German report, ch. 4 C.VII.

193 *Tallgren*, Finnish report, ch. 4 B.VII.

194 *Lagodny/Schomburg*, German report, ch. 4 C.I.

In Germany, this differentiation stems from constitutional deliberations. Discussion, however, is useful for the analysis of other legal orders, even if the constitutional background is different. In extradition proceedings, the two points or issues are - and have been for a long period of time - kept separate. First, the power of execution concerns extradition detention; second, the power of performance concerns the granting of extradition, including the physical surrender of the individual.

The "decision" in the sense proposed by the questionnaire and to be discussed here is the (imminent) granting of any form of judicial assistance. The Netherlands, e.g., provides only a review of the decision of the investigating judge, not a general court control. The Dutch 1992 General Act on Administrative Procedure is not applicable; the only remedy, therefore, seems to be an injunction on the basis of the New Civil Code.[195]

In Germany, the approach is different on the basis of Art. 19 para. 4 BL which guarantees a judicial decision with regard to any act of state organs which affect basic rights. The power of performance, i.e., the admissibility or appropriateness of the granting, has to be controlled by the court authorized to control the executing authority (integration solution). This legal construction is necessary because in Germany, like in the Netherlands, the Code of Judicial Control of Administrative Matters is not applied. In Finland, the situation is different yet again, because there is no general judicial review of administrative decisions, but only internal administrative control.[196] If coercive measures are at issue, there is judicial control,[197] but only with regard to the power of execution, not to the power of performance.

l) A different question is whether there is judicial review of the granting of judicial assistance as such. The answer to this depends on whether and, if so, to what extent there is already judicial control of the granting *prior* to the granting decision.[198] In Switzerland, no court decision occurs, but it is clearly stipulated that the granting decision may be appealed against (Art. 80f LICCM [CH]), like in extradition cases. And again: It is the administrative court which decides. The right to appeal is not reserved to the prosecuted person but is extended to third persons whose legally protected interests are affected by the request (Art. 21 para. 3 LICCM [CH]).

It is important to note that the Swiss system provides for judicial review of executive discretion. Therefore, Art. 80i LICCM (CH) explicitly states that the misuse or abuse of discretion may be the basis of appeal.[199]

In the Netherlands as well as in Germany, judicial review of the execution of a request causes problems as to which court is entitled to hear the case. There is a question, however, as to whether this is to go to the ordinary courts or to the administrative courts.[200] In Finland, there is no right to appeal on a decision granting assistance.[201]

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195 *Swart*, Dutch report, ch. 4 C.XI.

196 *Tallgren*, Finnish report, ch. 4 C.X.

197 *Tallgren*, Finnish report, ch. 4 C.X.

198 See supra at the beginning of II.

199 As to the control of executive discretion by courts in Great Britain, see *Gilbert*, Transnational Fugitive Offenders in International Law 1998, pp. 153-155.

200 *Swart*, Dutch report, ch. 4 C.X.

201 *Tallgren*, Finnish report, ch. 4 C.X.

m) Compensation in the U.S. is to a large extent an open question and depends on the extent of the negligence and immunity of the authorities of the requested state.[202] In the Netherlands, the New Civil Code is applicable as far as the granting is concerned.[203] In Germany, there is no practice.

n) The reports show that the right to correct data and/or information is not a specific question of international cooperation; it rather is a general question which has arisen domestically in the states in recent years. Therefore, general laws on data protection including the right to correction have been passed in most of the states, even though in the U.S., the right to correct data seems to be "minimal, if any."[204] This becomes even more crucial if we consider "secret" agreements (or even secret trials in the U.S.) in the field of investigating terrorism.[205]

o) If cooperation will be granted, the method or means of execution may be of interest for the individual, especially the question which law will be applied. Following the traditional rule of *locus regit actum*, the law of the requested state applies. There are, however, tendencies to open this approach towards the application of the law of the requesting state.[206] Article 4 para. 1 EU-MAC provides a recent example:

> "Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State."

Also Art. 552k Dutch CCP ("every effort shall be made to comply with a request based on a treaty") opens the opportunity for treaty-based requests, as long as the request is not in conflict with Dutch law.[207] In other states, also non-treaty-based requests are dealt with in that way as long as the application of the law of the requesting state is not in conflict with the legal system of the requested state.[208] This trend attempts to ensure that assistance is really an assistance and not a superfluous gesture because of the application of procedural rules of the requested state which affect the use of evidence in the requesting state.

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202 *Blakesley*, U.S. report, ch. 5 B.III.; ch. 4 B.IX.

203 *Swart*, Dutch report, ch. 4 C.XI.

204 *Blakesley*, U.S. report, ch. 2 B.VIII.

205 See *Lagodny/Schomburg*, German report, ch. 2 before A.: "grey area" of police cooperation. In the U.S., as noted above, this is quite troublesome, especially in terms of the potential of mass secret trials before Military Commissions, under the *Bush* executive order on prosecuting terrorists.

206 *Parisi*, Italian report, ch. 4 A.; *Lagodny/Schomburg*, German report, ch. 4 A.; *Tallgren*, Finnish report, ch. 4 A. See also sec. 58 sentence 1 and sec. 59 LECCM (A).

207 *Swart*, Dutch report, ch. 4 B. See also Art. 65 LICCM (CH).

208 *Tallgren*, Finnish report, ch. 4 A. See also sec. 64 para. 1 of the Hungarian "Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters" Hungary (English translation: Council of Europe, PC-OC/INF 26). See also Art. 19 LICCM (CH).

A broad approach with regard to the right to refuse to testify may be observed in Finland, where such rights of both the requesting and the requesting states' legal systems are applicable.[209]

The collection of information, discreet surveillance or controlled deliveries or other "modern" methods of investigation of foreign officials on Dutch soil have been strongly regulated in the Netherlands.[210]

*2. Proceedings in the requesting state*

a) Interests of the individual, at first glance, seem not to be affected when we look at the situation in the requesting state. However, there are some situations to be identified in which the individual may have a (legally protected) interest that a request should be made (infra aa.) resp. or not be made (infra bb.).

The following example, however, may illustrate a *general* requirement for a request to be made: The Dutch authority (here: the prosecutor) needs authorization by a Dutch *court* to request the search of a dwelling. Without such an authorization, evidence obtained thereby and provided for by the requested state must be returned. The underlying rationale was that only a court may decide - just as in purely national cases - whether such a search is justified in the given circumstances. In Germany, e.g., a seizure order or a comparable declaration is necessary for cooperation with another state with which no treaty exists. It must show that the requirements for a seizure would exist if the objects were located in the requesting state (sec. 66 LIACM [GER]). This requirement runs parallel to the extradition procedure, where a warrant of arrest from the requesting state is a standard requirement of a request.

b) The Third Report of the ILA Committee on Extradition and Human Rights points out that many mutual assistance treaties, such as the treaty between the U.S. and the U.K. or between the U.S. and Canada seriously violate human rights norms by extending the benefits of assistance to the prosecution only. "Such a practice violates the principle of equality of arms which is a fundamental feature of a fair trial."[211]
The Resolution of the 16th Congress of the International Penal Law Association 1999 in Budapest points out in No. 5b:

209 *Tallgren*, Finnish report, ch. 4 D.IX. See also the Swiss provision in Art. 9 LICCM (CH) which stipulates that the protection of secrets runs parallel to the right to refuse testimony. Article 65a para. 9 LICCM (CH) provides that the presence of persons involved in the proceedings of the requesting state may not have as effect that they get secret information before the granting decision of the request.

210 *Swart*, Dutch report, ch. 4 D.VIII.

211 General Report by *Dugard/Van den Wyngaert*, in: ILA, Report of the Sixty-Eighth Conference Taipei 1998, p. 141.

> "[...] - The minimum rights of an individual involved in international criminal proceedings in the requesting state should include the right to obtain evidence abroad and the right to be informed about the exchange of evidence in his case."[212]

This does not allow, however, that the individual him or herself may directly make a request to another state. In the U.S., he is dependent on the discretion of the executive as to whether or not a letter rogatory will be made. The same can be said for the other states in this study. In Germany, the individual has an indirect possibility to force the judicial authorities to make a request: On the basis of the official duty to collect evidence, the individual has - to a certain extent - a right to have evidence collected abroad.[213] This concerns the situation of the requested state.

c) The states seem to have free discretion in terms of which cases they may implicate to make a request; at least there are no statutory limitations.[214] However, *Swart* is right when he raises (and answers in the negative) the question whether a state may request assistance from another state for the purpose of carrying out investigations that its own law would not permit it to carry out.[215] In Belgium, on the other hand, this is possible as long as the procedure in the requested state is in conformity with Art. 8 para. 2 ECHR.[216] This leads to quite a wide range of possibilities which will allow circumvention of the requirements of the national law of the requesting state.

This may not be confused with the situation in a requested state in which the execution of a request is only possible to the extent that the same methods and techniques of investigation as are allowed in domestic cases of the requested state are applied.[217]

d) Accordingly, the individual seems to have no right to review a request that has been made by the courts of the requesting state. At least, it is unclear whether he has a right to block or stop a request[218] or whether this may be provided for only indirectly.

e) The adherence to conditions imposed by the requesting state is guaranteed by explicit legal norms in Italy (Art. 729 CCP) and in Germany (sec. 72 LIACM [GER]), whereas the Netherlands and Finland do not recognize such a norm in the field of forms of cooperation other than extradition.

f) The question of a transnational exclusionary rule still is unresolved: Under which conditions may evidence taken abroad be used in the requesting state and when, if ever, may it be excluded? The Dutch report proposes to call for and distinguish three types of violations which should be eligible for a transnational exclusionary rule:[219]

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212 15 International Enforcement Law Reporter (1999), 502-507, at 506.

213 *Lagodny/Schomburg*, German report, ch. 5 A.

214 *Swart*, Dutch report, ch. 5 A.

215 *Swart*, Dutch report, ch. 5 A.

216 *Van den Wyngaert*, 65 RIDP 197 (1992).

217 Cf. sec 59 para. 3 LIACM (GER).

218 *Swart*, Dutch report, ch. 5 A.

219 *Swart*, Dutch report, ch. 5 B.I. (referring to *Gane/Mackarel*). Recently see the discussion by *Currie*, 11 Criminal Law Forum, 177-181 (2000).

Where the rules of the state in which the trial takes place might have been violated (i.e., in the requesting state, if there was a request at all); example: to use evidence from abroad which would not have been obtainable in purely national proceedings.

Where the rules of the state in which the evidence has been collected (i.e., the requested state, if there was a request at all); here we see a double test (testing the admissibility in both states).

In cases which infringe upon rules of international law; example: Statements of witnesses who have been tortured abroad are not to be used in internal proceedings.

The general situation seems to be quite different from this approach, especially on the basis of the rule *locus regit actum*. In Italy, however, the judge is required to assess the evidence collected abroad and to decide on the question of whether or not to make use of the evidence.[220]

A special argumentation can be found in the U.S.: Illegally obtained evidence from abroad can be used in the case of search and seizure as the scope of 4th Amendment does not cover foreigners abroad.[221] The basis of this reasoning is the "silver platter doctrine" which allows officials of one jurisdiction to receive evidence from an external illegal source without also receiving the taint - as if the evidence had been handed over "on a silver platter."[222] This "silver platter doctrine" has long been discredited in the U.S. in relation to state government handing over evidence to the federal government and *vice versa*, but it seems that the authorities believe somehow that it is acceptable when a foreign element is involved.

220 *Parisi*, Italian report, ch. 5 B.I.

221 *Blakesley*, U.S. report, ch. 1 A.II.3. It is clear that at least the Warrant Clause of the 4th Amendment stops at the border. The issuance of the Executive Order in November 2001 and the 2001 "Patriot Act" provide for secret trials before military commissions (the Executive Order) and allow for lengthy detention, monitoring of attorney-client discussions (if the foreigner is allowed an attorney at all) among many other egregious elements issued in the name of "fighting terrorism." ("Thus, spoke the Beast" warns Milton). These laws are prompting a vigorous and vitriolic debate in the U.S. See, H.R.3162, short title: "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." These instruments would not allow of virtually any type for non-U.S. nationals and will certainly erode rights of U.S. nationals.

222 Cf. *Bentley*, 27 Vanderbilt Journal of Transnational Law, 374 and 403 (1994), referring to the basic decision *Lustig v. United States*, 338 U.S. 74 (1949).

*3. Requirements and bars/limitations with human rights aspects*

a) There is a very new trend in which, due to new technical possibilities, no substantive requirements will be required at all: The state which needs evidence does not at all have to make a request, because that state may act without the assistance of the other as the latter can intercept telecommunications fully on its own (Arts. 17 to 22 EU-MAC). The background is that satellite cellular phones may be tapped from state A even though they are used in state B. In addition, these technical possibilities enable the authorities of state A to locate the exact place from which the person in possession of a cellular phone actually is making the call.

b) Finland (sec. 12 para. 2 of the Finnish law)[223] and Italy have a general human rights clause. In Germany, the constitutional principle of proportionality has the function of such clauses. In the Netherlands and in Switzerland, the ordre public takes this function.[224] Austrian law[225] and the new law of Liechtenstein prohibit cooperation if the procedure in the requesting state runs contrary to Art. 3 or 6 ECHR.[226]

c) Opposition to the death penalty seems not to reach the level of being a bar to judicial assistance.[227]
d) In the light of international law (see Art. 3 of the United Nations Convention against Torture) the Supreme Court held that statements of witnesses may not be used as evidence if obtained by foreign authorities by the use of torture.[228] In general, the question of evidence gathered contrary to public international law is a topic which is still under debate.[229]

e) In some countries, imminent discrimination for political, ethnical, etc. reasons is a bar to judicial assistance.[230] Even here, Italy presents an interesting example, as the defendant may waive this bar through his consent.[231]

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223 International Legal Assistance in Criminal Matters Act of 5 January 1994, Council of Europe, PC-OC/INF 15 of 2 February 1998.

224 *Swart*, Dutch report, ch. 4 D.I.; *Breitenmoser*, Internationale Rechtshilfe 1995, part D.I.3.2.2.

225 Section 51 LECCM (A).

226 Article 51 para. 1 no. 2 and Art. 19 nos. 1 and 2 of the Law on International Assistance in Criminal Matters of 15 September 2000, Liechtensteinisches Landesgesetzblatt (Law Gazette of Liechtenstein) 2000, No. 215 of 6 November 2000 (p. 351, 1-42) in force since 6 November 2000.

227 Cf., however, recently: Bundesgerichtshof (Federal High Court), decision of 7 July 1999 - 1 StR 311/99 = NStZ 1999, 634 where the Federal High Court argues that Art. 102 (abolition of the death penalty) and Art. 2 para. 2 (right to life) BL create a constitutional bar to rendering mutual assistance if the death penalty is at stake.

228 *Swart*, Dutch report, ch. 5 B.I.

229 See *Breitenmoser*, Internationale Rechtshilfe 1995, part D.I.3.2.2.2.

230 *Swart*, Dutch report, ch. 4 D.IV. In Germany, the question is under discussion: *Lagodny/Schomburg*, German report, ch. 4 D.IV. *Bannermann*, 65 RIDP 146, 147 (1994).

231 *Parisi*, Italian report, ch. 5 D.X.

f) Contrary to the law of extradition, the Netherlands does not have a hardship clause for forms of cooperation other than extradition,[232] whereas in Germany, sec. 73 LIACM (GER) serves also as an emergency brake here. The same is true in Switzerland on the basis of the principle of proportionality or ordre public. As *Breitenmoser* points out, the principle of proportionality is provided for in national laws, but not in treaties or conventions.[233] This could be a remnant of an approach that is still two-dimensional.

g) If at all,[234] double criminality is required for special situations, e.g., cooperation under a special bilateral treaty.[235] The Dutch and the German approach is to require double criminality if coercive measures are to be applied.[236] Here again, we see the feature that coercive measures are dealt with in a manner that is different from requests involving other or no form of execution. Double criminality thus seems not to play an important role in judicial assistance.[237] For non-treaty-based requests, the Austrian law requires double criminality in general (sec. 51 para. 1 no. 1 LECCM [A]).

A new trend seems to be not to require double criminality even for coercive measures, "if such measures aim at procuring or producing evidence to the effect of excluding the responsibility of the person against whom the criminal proceedings run" (Art. 147 para. 1 of the Portuguese Law on International Judicial Cooperation in Criminal Matters).[238] This shows a tendency to reduce requirements which were meant to protect also state interests as soon as these interests would hamper the realization of individual interests.[239]

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232 *Swart*, Dutch report, ch. 4 D.V.

233 *Breitenmoser*, Internationale Rechtshilfe 1995, part C.I.2.3.2.

234 In Finland, double criminality is not required anymore by national law, see *Tallgren*, Finnish report, ch. 4 D.VII. In Austria, double criminality is still required according to sec. 51 para. 1 no. 1 LECCM (A).

235 *Blakesley*, U.S. report, ch. 4 D.VII.

236 *Swart*, Dutch report, ch. 4 D.VII (Art. 552o Dutch CCP); see also *Breitenmoser*, Internationale Rechtshilfe 1995, part C.III.3.1. in this respect

237 See *Tallgren*, Finnish report, ch. 4 D.VII., who mentions that Finland has withdrawn its reservation to the ECMACM; the U.S. do not require double criminality in the U.S. - Swiss MLAT as far as organized crime is concerned, *Blakesley*, U.S. report, ch. 4 D.VII.

238 Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000). See also Art. 63 para. 5 LICCM (CH) which allows mutual assistance in favor of the individual even if there are bars.

239 As to the contrary, see Hungarian "Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters" Hungary (English translation: Council of Europe, PC-OC/INF 26), sec. 62 in connection with sec. 5 para. 1, which allows waiver of the double criminality requirement if reciprocity is guaranteed. This is a clear-cut example for a two-dimensional view.

From the individual's point of view it is very interesting that according to Italian law, the individual can waive the double criminality requirement as well as the bar of discriminatory treatment.[240]

h) "Earmarking:" In the U.S., evidence obtained from abroad seems to be under no restrictions, i.e., it may be used also for every other purpose. The only exception is established by the U.S. - Swiss MLAT.[241] In some other states, there is an explicit restriction.[242] To the contrary, Art. 67 LICCM (CH) requires a strict speciality principle for mutual assistance.

i) Confidentiality from the individual's perspective is not at risk when the proceedings shall be confidential insofar as they shall not be communicated to the defendant in order not to endanger investigation. An example of circumstances that could impact vital individual interests, rather, could be to prevent business secrets from being revealed in the requesting state. Some states provide the example of restricting judicial assistance if confidentiality is not assured by the requesting state[243] or if rendering assistance would imply the revelation of a secret which has to be kept secret even vis-à-vis courts.[244]
A special confidentiality problem relates to information obtained from criminal records. Here, the same restrictions apply as in national proceedings.[245] The same is true in general for Germany, although there was a case concerning a request for information on a certain investigation, where information from the criminal records which was in the file was not taken out and thus transferred to the requesting state without the permission of the criminal record's authority, which is the only authority to decide on the transfer of criminal records to a foreign state.[246]

j) In Switzerland, cooperation which is intended to favor the individual is possible on the basis of Art. 63 para. 5 LICCM (CH) even if a political offense is at issue, or the case concerns *minima*, or if concurring Swiss jurisdiction exists. Moreover, double criminality (Art. 64 LICCM [CH]) is not necessary in such cases nor is *ne bis in idem* an obstacle (Art. 66 LICCM [CH]).

k) A problem which may not play a very important role in practice reveals a clear-cut two-dimensional vision of the process: This is seen in that the temporary transfer of a person in custody in the requested state to another state is possible without that person's consent, if he

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240 *Parisi*, Italian report, ch. 5 D.X.

241 *Blakesley*, U.S. report, ch. 4 D.IX.

242 Article 148 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20. See also para. 10 of the International Legal Assistance Law 5758-1998 (Israel), in force since 7 February 1999, Council of Europe Document PC-OC/INF 29 of 23 February 1999.

243 *Tallgren*, Finnish report, ch. 4 C.IX., D.X. In Germany, the problem is still under discussion, see *Lagodny/Schomburg*, German report, ch. 4 D.IX. The problem arises in Germany, as sec. 30 of the Federal Law Concerning Administrative Procedure (confidentiality clause) is not considered to be applicable. See also para. 1 of the International Legal Assistance Law 5758-1998 (Israel), in force since 7 February 1999, Council of Europe Document PC-OC/INF 29 of 23 February 1999 as well as Art. 11 of the Portuguese Law on International Judicial Cooperation in Criminal Matters (Law No. 144/99 of 31 August 1999), English translation by *Candido Cunha*, Council of Europe Document: Consult/ICC (2000) 20.

244 See sec. 51 para. 1 no. 3 LECCM (A).

245 See *Tallgren*, Finnish report, ch. 4 C.IX.

246 *Lagodny/Schomburg*, German report, ch. 4 D.IX.

or she is going to testify, or shall be confronted or inspected by the court in the requested state. Article 9 EU-MAC does not make the consent of that person mandatory, like Art. 11 para. 1 lit. a ECMACM or the Israeli law in sec. 22 para. (2) and sec. 24. This clearly contrasts with the situation of a person in liberty who has no duty to appear in a foreign court. In our view, this differentiation is inconsistent with all concepts of equality. There is no justification at all to create such a duty to appear only because the person is at the "factual disposal" of the requested state.

### *III. Administrative cooperation*

This chapter turned out to be the most difficult one for the national reports, especially as far as the example of cooperation in tax matters is concerned. The reasons might be manifold. The general observation that can be drawn from the national reports is that the borderline between administrative cooperation in tax matters and cooperation in criminal tax matters is a grey area even insofar as it concerns legal discussion.

A second observation must be made: The cooperation of police authorities is dealt with in European states as being part of the criminal procedure and thus belonging to judicial cooperation.[247] In the U.S., the picture presents such an expansive variety that no general rules can be observed.[248]

This involves a third general feature: In the U.S., there is a great generosity to use information and evidence which have been gathered by means of administrative cooperation even in criminal procedure. According to a Supreme Court decision, it is allowed to make use of information gathered in administrative tax proceedings also in criminal proceedings.[249] In the EU/EC sphere in order to avoid, if not circumvent, the lack of competence for criminal law, the development in the EU/EC is to speak of "administrative cooperation" even when in substance the matters turn out to be - at least also - cooperation in criminal matters.[250] As an example: if results of OLAF investigations are used in criminal proceedings.

One should argue that the procedure in the requesting state is irrelevant insofar as the authorities of the requested state are required to decide on their own about the applicability of standards of criminal procedure.[251] If they do not do so, the danger of circumvention caused by the requesting state will appear.[252] A major problem behind the tendency to use administrative cooperation procedure is the dangerous impact it may have on the right to remain silent, i.e., the privilege against self-incrimination, which seems to vanish.[253]

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247 *Swart*, Dutch report, ch. 4 A.; *Lagodny/Schomburg*, German report, ch. 2 before A. Article 351 *quinquies* LICCM (CH) expressly stipulates that exchange of data of police falls under the scope of this law.

248 *Blakesley*, U.S. report, ch. 2 A.

249 *Blakesley*, U.S. report, ch. 1 A.II.3.

250 *Swart*, Dutch report, ch. 1 D. See also *Gleß*, EU report, part 2 chs. 2/3 before A.

251 *Breitenmoser*, Internationale Rechtshilfe 1995, part A.I.4.2 and 4.3. See also *Nagel*, Beweisaufnahme im Ausland 1988, p. 55, who points out that police cooperation might not be taken out of the régime of international cooperation in criminal matters just by calling it police cooperation.

252 See in this respect *Gleß*, EU report, part 2 chs. 4/5 B.VI.1.b.

253 In detail, see infra III.2.

*1. Proceedings*

*a) Proceedings in the requested state*

aa) In the Netherlands, the 1992 General Act on Administrative Procedure (hereinafter: 1992 General Act) applies to the granting of international cooperation in administrative matters.[254] However, the 1992 General Act does not seem to apply a request by Dutch authorities "since such requests cannot be said to amount to decisions that create legal relationships between an administrative authority and a particular person within the meaning of the Act."[255] However, the individual seems to have, at least theoretically, a legal possibility of stopping a request according to the New Civil Code in the Netherlands.[256]

bb) In the Netherlands,[257] there is - in general - a right to be informed about the granting procedure in administrative tax matters, i.e., the person has the right to be informed of the fact that there is a request from abroad which is being dealt with by Dutch tax authorities. He also has a right to be informed about the right to counsel. He may be refused information, if to divulge it would be detrimental to proceedings. If the person has a right to be informed, he also has a right to a speedy decision. Information about a decision after it has been taken is mandatory in some, but not in other cases. In Germany, there is no such right at all according to a recent decision. It was held to be sufficient that the individual is informed of the final decision which stipulates the sum of taxes to be paid.[258] On the EC level there is no right to information as far as exchange of data or spontaneous information is concerned.[259]

cc) In most states, information is granted under the condition that it be used only for the purposes for which it has been requested. In relation to information obtained by coercion, *Swart* argues that the individual has a right that the condition be made.[260]

dd) In the Netherlands - like in Germany -, judicial review of acts of cooperation in administrative matters follows the patterns of purely national situations; appeal against the granting decision of the Ministry of Finance is possible.[261] This is quite remarkable, as the same question is under vivid discussion as far as extradition and other forms of cooperation are concerned.[262] Here again, we face the problem of having different rules for the same factual problem.

254 *Swart*, Dutch report, ch. 2 B.

255 *Swart*, Dutch report, ch. 3 A.

256 *Swart*, Dutch report, ch. 3 A.

257 *Swart*, Dutch report, ch. 2 B., C.

258 *Lagodny/Schomburg*, German report, ch. 2 B.II.

259 *Gleß*, EU report, part 2 chs. 4/5 B.I.

260 *Swart*, Dutch report, ch. 2 C.V.

261 *Swart*, Dutch report, ch. 2 D.

262 See infra C.III.3.

ee) Compensation in the narrow sense is possible in the Netherlands only on the basis of the New Civil Code. In the area of automatic data processing and exchange of data, compensation includes also - if not foremost - the correction of incorrectly stored data. This is interesting insofar as in the Netherlands, the 1988 Data Protection Act applies also to international assistance in administrative matters, whereas in Germany, this is not the case. This is of importance, as instruments on the European level refer to the national law as far as data protection is concerned.[263]

*b) Proceedings in the requesting state*

The lawfulness of the procedure in the requested state seems not to play a role. In the Netherlands, it would be taken into consideration only under exceptional circumstances.[264]

As to the adherence to conditions imposed by the requested state there are no explicit rules in the Netherlands.[265]

*2. Requirements and bars/limitations with human rights aspects*

a) Little can be said about human rights requirements for the rendering of assistance.
One of the crucial points, however, is the privilege against self-incrimination when administrative and judicial activities converge: The major problem concerns the use of answers compulsorily obtained in a non-judicial investigation (e.g., administrative tax investigation) to incriminate the individual. Tax secrecy is a paramount example: In administrative tax matters the person who has to pay taxes must give information about his income. The question is, to what extent this information may be used in criminal proceedings against that very person who was required by the tax administration to provide it. The answers for purely national proceedings vary. When it comes to international cooperation - be it in criminal or in administrative matters - the problems increase. For example, is cooperation illegal when the threshold of protection in the requested state is higher than in the requesting state? Solutions, however, may be reduced to general considerations: Are constitutional protections which are valid for national proceedings taken into account when it comes to transnational cooperation?

The Dutch report refers to the decision of the European Court of Human Rights in the case of *Saunders v. the United Kingdom* (17 December 1996) which restricts the use of compulsorily gathered information in non-judicial proceedings in criminal proceedings.[266] *Ruegenberg* in a recent profound German elaboration proposes to apply the national basic rights via the *ordre public* clause to be found in the relevant conventions,[267] thereby adopting a solution based on the principle of proportionality. In general, these important questions have gained only little attention in national discussions.

263 *Gleß*, EU report, part 2 chs. 4/5 B.IX.

264 *Swart*, Dutch report, ch. 3 B.

265 *Swart*, Dutch report, ch. 3 B.

266 *Swart*, Dutch report, ch. 2 E.II. As to the same approach in Germany: see *Lagodny/Schomburg*, German report, ch. 2 D.II.

267 *Ruegenberg*, Das nationale und internationale Steuergeheimnis 2001, pp. 297-366.

However, the right that the purpose of the transfer of information be maintained in the sense of speciality requires that the individual have knowledge of the transfer, which he often does not have. The same point can be made for compensation.[268] Article 39 para. 2 Schengen-II-Agreement provides for a prohibition of the use of exchanged police data, but this data may be used in criminal proceedings *if the judicial authority* of the other state consents.

b) Closely connected with the aforementioned problem of the privilege against self-incrimination are the questions of speciality and confidentiality. Speciality as known from the law of extradition traditionally has not cared about the concerns of the individual (except derivatively through the state). However, if we look at speciality from the perspective of the individual, the main idea is to confine international cooperation to certain *purposes*: Extradition should be limited to certain offenses or to certain facts for which the individual is prosecuted. In administrative cooperation, the interest is to shield the information against being used in criminal proceedings. Thus, we can conclude, in *Swart's* words: "Speciality is an important device to maintain a separation between administrative cooperation and cooperation in criminal matters,"[269] which is on the "decline" in the Netherlands.[270] Confidentiality is another or an additional aspect of speciality, because it is the basis for maintaining speciality. In the EU sphere even more of such decline can be observed, e.g., EC Regulation 515/97 and the EU Convention on Cooperation in Customs Matters. This may be criticized on the basis of the *Saunders* decision.[271]

c) The decisive point, therefore, is to limit the application to certain purposes. In the field of data protection, this limitation is generally known. It is also - at least in German law and in the practice of the European Court of Human Rights - a general principle of (constitutional/conventional) legitimizing the interference with protected rights. Such interference may only be justified for certain limited and specified purposes (i.e., see the purposes laid down in Art. 8 sec. 2 or Art. 10 sec. 2 ECHR).

When it comes to international cooperation, the restriction to certain purposes must - in general - be maintained. Therefore, speciality in general may be considered as being a transnational restriction to certain purposes. This is, however, not consequently followed. As an example: Cross-border policing in Art. 41 Schengen-II-Agreement does not contain restrictions like those in other provisions of this Agreement, i.e., Art. 40 para. 1 (cross-border observation); Art. 39 sec. 2 (exchange of information on the police level).[272]

268 *Gleß*, EU report, part 2 chs. 4/5 B.IX.

269 *Swart*, Dutch report, ch. 2 E.I.

270 *Swart*, Dutch report, ch. 2 E.I.

271 See *Swart*, Dutch report, ch. 2 E.I.

272 *Gleß*, EU report, part 2 chs. 4/5 A.I.; VI.1.a.

This approach directly links us with the question to what extent the right to privacy as guaranteed in Art. 8 ECHR requires transborder restrictions to certain purposes. Maybe, this also opens the way to a transnational exclusionary rule as proposed by *Blakesley*.[273] In the U.S., such questions seem to be asked only very rarely.

## *IV. Choice of the forum*

### *1. Transnational ne bis in idem*

In the European arena, the problem of a transnational *ne bis in idem* has gained great importance in the last few years. One of the "motors" for this momentum surely is Art. 54 Schengen-II-Agreement,[274] the first international source within the countries of the European Union[275] to provide for international recognition of foreign decisions. This point is underlined by – amongst others – a Greek initiative and other new developments.[276]

The necessity of such steps becomes clear when one realizes that only the Netherlands[277] and Finland,[278] but neither Germany nor the U.S. provide for a unilateral recognition of foreign final judgments, i.e., a recognition provided for by national law in the absence of an international treaty or convention.

In extradition cases, *ne bis in idem* bars extradition only rarely if the judgment is rendered in a third state. Section 17 para. 2 LECCM (A) is such an example.

However, the *ne bis in idem* question seems to be only the tip of the iceberg. Especially within the framework of Europol, e.g., there exist multiple possibilities to pre-determine the state which will be able to exercise its jurisdiction simply by coordination of police actions on the level of Europol. This coordination is not at all controlled by courts: The state in which the suspect is apprehended (by transnational police coordination) will exercise its jurisdiction and probably block all other states via international *ne bis in idem*. Or it will make extradition superfluous. If the place of apprehension is due to chance and not to coordination, it is this chance which pre-determines the relevant jurisdiction and especially the national legal order. Neither possibility - uncontrolled coordination or chance - is convincing legal criteria to decide on questions like the relevant legal order. Both of them, however, are the basis for an international *ne bis in idem* which - if abused - leads to the principle of "first come, first service." This is not a proper legal guideline.

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273 *Blakesley*, U.S. report, ch. 5 B.I.

274 See in detail *Gleß*, EU report, part 2 ch. 6 A.4.

275 The Schengen-II-Agreement has meanwhile been transferred into Community law which changes its legal status from international treaty law into supranational law.

276 See Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‚ne bis in idem' principle – Official Journal C 100, 26/04/2003, p. 24; *Biehler/Kniebühler/Lelieur-Fischer/Stein*, Freiburg proposal on concurrent jurisdictions and the prohibition of multple prosecutions in the European Union, Freiburg 2003.

277 *Swart*, Dutch report, ch. 6 B.

278 *Tallgren*, Finnish report, ch. 6 A.

A possible solution to this problem could be a reduction of cases of multiple jurisdictions and a decision on which state should be the *one* state to exercise jurisdiction. This decision should be based on a principle of the jurisdiction of "best quality." The criteria for the "quality" are not at all confined to the principles of jurisdiction (territoriality, personality, etc.) but - also if not mainly - include the interests of the prosecution (e.g., in which state is the most important evidence?) and those of the individual (e.g., where is the domicile?). The decision could be made by (trans-)national prosecutors. However, there must be a possibility for the individual to address a court. This is legally possible (and from the view of human rights urgently needed) at the national and international legal level.[279] The political will, on the other hand, seems to be lacking everywhere.

### *2. Transfer of proceedings*

The instrument of transfer of proceedings seems to have a broader practical relevance only in the Netherlands.[280] In Finland, it plays a role only within the Nordic countries.

### *3. Abusive ways of the choice of the forum including circumvention of extradition*

Germany[281] as well as, e.g., Austria[282] know explicit rules for extradition proceedings having priority to expulsion or other mechanisms without removing problems.[283] On the contrary, in the U.S., the "Alvarez-Machain thinking" seems to prevail:[284] As long as there is no explicit treaty clause prohibiting, e.g., abduction, there is no jurisdictional obstacle for such practices.

Contrary to the law in the books, in the Netherlands as well as in Germany, abusive ways circumventing extradition exist and are not sanctioned by the courts, albeit such practices are criticized to a large extent by theory. In Finland, on the other hand, the abduction problem obviously has not yet arisen.[285] *Swart* is perfectly right when stating that the best protection against abuse would be to make extradition proceedings work more easily.[286]

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279 See in detail *Lagodny*, Empfiehlt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen? 2001, download under: http://www.sbg.ac.at/ssk/home.htm. See also *Swart*, The Choice of the Forum 2000, p. 96. See also the in-depth analysis of *Thomas*, Vom nationalen zum internationalen ne bis in idem 2002 (in print); *Vander Beken*, Forumkeuze in het internationaal strafrecht 1999.

280 *Swart*, Dutch report, ch. 6 C.

281 *Lagodny/Schomburg*, German report, ch. 6 D.I.

282 See sec. 13 LECCM (A)

283 See *Swart*, Dutch report, ch. 6 E.2.

284 *Blakesley*, U.S. report, ch. 6 D.

285 *Tallgren*, Finnish report, ch. 6.D.

286 *Swart*, Dutch report, ch. 6 E.V.

## *V. Cross-border enforcement*

The national reports showed differing approaches to the questions, so it will be difficult to compare them. They also showed that there do not seem to be that many problems with regard to the legal position of the individual on this subject.

The main feature seems to be that the legal mechanisms are extremely difficult from their structural point of view and their practicality.

It is therefore suggested that the reader consult the national reports separately as far as cross-border enforcement is concerned.

## *VI. Interim result: new questions - few answers*

This stock-taking, so far, has revealed that many of the questions in the outline, even if they were considered as "core questions" have not yet been answered.

### *1. Administrative cooperation*

Administrative cooperation has not yet become a well-developed area of research and legal theory. The linkage between administrative and criminal procedure is especially underdeveloped. The reason for this might be that neither administrative law nor criminal law theory appreciates such "in-betweens."

### *2. Granting procedure*

The granting procedure is not governed by explicit rules because it is still regarded as a remnant of classical governmental decision-making, which seems to be immune against any regulations. A general exception seems to exist in the Netherlands which, on the other hand, curtails the criminal court's power to decide some specified questions.

One solution could be to apply fair trial rights to the granting procedure as well. Another could be to abolish a granting decision altogether: Why does a granting authority, i.e., a non-judicial authority, decide at all? The traditional view of extradition immediately would have considered the suggested approach a sacrilege. Extradition was traditionally considered as being of relevance only between the two states involved. The individual was the object of the process and had standing only on a derivative basis. The decision to extradite or not was considered to be a mere question of foreign relations. Thus, only the executive had the authority to decide. An exception to this rule has been the U.S., where the courts have always been involved to some extent. The consequence of this approach was that courts had and have to be - see Belgium - integrated into the processus at all.

These questions will also lead us to problems which have to be analyzed in general: the division of power between the legislator, the executive and the judiciary.[287]

287 See infra E.

*3. Applicability of fair trial rights = Inconsistencies with "normal" criminal proceedings*

Another general feature is that fair trial rights, which are considered being basic in the context of national criminal proceedings, either seem to vanish as soon as it comes to international cooperation or they are applied even though it is not convincing to transfer them to international cooperation. An example can be found with regard to the common law *prima facie* requirement as seen from continental law's perspective. Thus, we will have to consider such inconsistencies (infra C.II. and III.).

*4. The scope of human rights*

The scope of human rights also is a more general question. As we have seen, e.g., in the U.S., the territorial scope is reduced as soon as the person is abroad. In European states, this is no longer an issue. There discussion turns around the conflict between treaty obligations and national or international human rights guarantees. These divergent trends must be examined more closely.[288]

## C. (In-)Consistency with Standards of Proceedings

In all areas of international assistance, we can distinguish administrative granting proceedings and judicial court proceedings. This chapter inquires to what extent national standards of criminal proceedings (infra II.), national standards of administrative proceedings (infra III.) and international standards of proceedings (infra IV.) are applied either to the granting proceedings or to the judicial court proceedings. Before we can discuss this, however, we have to ask why courts are involved in the whole area at all (infra I.).

### *I. Reasons for the involvement of courts*

*1. Extradition*

a) It is nowadays common state practice that courts must decide[289] matters of extradition. In the field of judicial cooperation, courts are involved at least if coercive measures are at issue. In administrative cooperation, courts will decide on the initiative of the individual if the national law provides for such a possibility.

There are different reasons given for the necessity of a court's decision in extradition proceedings. Article 55 para. 3 of the new Constitution of Poland explicitly rules that a court has to decide on the admissibility of extradition.[290] In the U.S, the extradition hearing is considered to implicate aspects of criminal proceedings, so a judicial hearing is deemed necessary because the fugitive's liberty is in jeopardy.[291] In Germany, the possibility of a court control is mandatory in general according to Art. 19 para. 4 BL as soon as a possibility of an infringement on basic rights exists.[292]

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288 Infra D.

289 Exception: Belgium (only advice).

290 *Płachta*, 6 European Journal of Crime, Criminal Law and Criminal Justice 95 f. (1998).

291 *Blakesley*, U.S. report, ch. 7 A.II.4. This might - in part - be due to the fact that extradition detention in the U.S. is mandatory.

292 *Lagodny/Schomburg*, German report, ch. 4 C.I.; ch. 7 C.I.1.

If we trace back the evolution of extradition procedure, we find - in some circumstances and among a lot of other arguments - the widespread idea that the court is more a servant to the executive, a "collaboratrice d'une autorité administrative."[293] As such a drudge it has to back the executive against diplomatic problems if extradition has to be denied. With the background of a negative court decision, the granting ministry may argue vis-à-vis the requesting state: We wanted to extradite, but our court said "no."[294]

In sum, a court decision is considered mandatory due to constitutional reasons, but these reasons differ in substance. A different and very important question is the "quality" of the court decision. The decisive question is: Are there subject matters which the court is not allowed to deal with?[295]

b) The constitutional reasons, however, do not necessarily require a court's decision *prior* to the decision of the granting authority, but provide the drudge argument. And exactly the reversal causes irritations: that a court decides *before* the final decision of the state authority which is to be controlled. Just to give an example: *Blakesley* points out that in the U.S., the extradition hearing is considered as having aspects and impacts of criminal procedure and he argues that it ought to be fully considered to be and applied as a matter of criminal procedure. However, many standards of U.S. criminal procedure (e.g., exclusion of hearsay evidence, etc.) are not applicable.[296] The quiet "red line" in the U.S. legal order, thus, seems to be: Fair trial rights, guaranteed in criminal proceedings are not available in administrative proceedings. "Fairness" in criminal versus administrative procedure connotes a different standard. Thus, in order to guarantee a fair procedure at least in parts of extradition proceedings, these parts should be considered as being "criminal proceedings."

This assessment probably could be changed if the reversal were reversed, i.e., if the court's control followed the final decision of the ministry to grant extradition. This is the model practiced in Switzerland. There, the courts are installed in extradition proceedings as *administrative* courts not as criminal courts. The legal situation in France - which is similar to the Dutch system - clearly shows the problems involved by the system of prior court control. In France, the *Chambre d'Accusation* has - according to sec. 16 of the French Extradition Law of 10 March 1927 - to decide on the request and to give his opinion with reasons ("son avis motivé") whether the requirements of law are fulfilled or whether there is an obvious error (Art. 16 para. 2: « Cet avis est défavorable, si la cour estime que les conditions légales ne sont pas remplies, ou qu'il y a erreur évidente. »). The *Chambre d'Accusation* checks only these two criteria.

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293 Cf. *Laroque* cited according to *Lemontey*, Du rôle de l'autorité judiciaire dans la procédure d'extradition passive 1966, pp. 231 and subs.

294 Cf. also *Lagodny*, Rechtsstellung des Auszuliefernden 1987, pp. 270-280.

295 See infra E.II.

296 *Blakesley*, U.S. report, ch. 7 C.V. See also *Gilbert*, Transnational Fugitive Offenders in International Law 1998, pp. 132-137.

Although the wording of the law excludes an appeal against the decision of the *Chambre d'Accusation*, the French High Court in criminal matters, the *Cour de Cassation* has developed an approach to review the decision of the *Chambre d'Accusation*.[297] Thus, the *Cour de Cassation* decides before the granting authority has decided on the request. In addition, there is an appeal against the granting decision which goes to the highest French Court in administrative matters, i.e., the *Conseil d'État*. The division of labor concerning the questions for decision runs along the following line: The *Cour de Cassation* does not decide on the political nature of the crime, the duration or amount of the penalty, statute of limitations, place of the crime, *ne bis in idem*, qualification of the act.[298] These are reviewed by the *Conseil d'État* only.

The *Conseil d'État* gave interesting reasons for its competence: In the *Astudillo*[299] and in the *Croissant*[300] decisions the court argued that the *Chambre d'Accusation* only renders an *avis*, i.e., a legal opinion, not a decision. This argument is based on the wording of sec. 16 para. 1: The court "donne son avis motivé," i.e., the court renders his legal opinion with explaining reasons. The *Chambre d'Accusation* only has a function in administrative matters.[301] In general, the procedure before the *Chambre d'Accusation* has more in common with administrative procedures than with criminal procedure, the rules of which are applied only partially.[302] Here we observe an irritating development when contrasting this to the situation in the U.S., where standards of criminal procedure are applied even where they do not - at least from a continental view - make sense.

Even though there are clear distinctions as to the matters of substance to be reviewed by the *Cour de Cassation* and the *Conseil d'État* respectively, one has to bear in mind that the *Cour de Cassation* decides before the granting authority, the *Conseil d'État* afterwards.[303] This is a clear example for the difficulties which the preview system in extradition procedure brings about.[304]

A quite unusual development can be reported from France: In 1993, the *Conseil d'État* reviewed the rejection of an extradition request after the *Chambre d'Accusation* had approved the extradition.[305] This is remarkable because one would expect that only the granting would be open to review. But in the 1993 case, the requesting state successfully applied to the *Conseil d'État* in order to review the negative decision of the granting authority. In this

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297 See *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, pp. 131-138 referring especially to the *Doré* decision: "Cass. crim. 15 mai 1984, Bull. crim. 1984, No. 183," where the *Cour de Cassation* argued that as a result from general principles of law that the exclusion of appeal does not prevent a decision of *cassation* which is founded on a violation of law, which - if proved - would take away from the decision the essential basis of its legal existence, cited according to *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, p. 133 with footnote 385.

298 Id., pp. 135-136.

299 *Conseil d'État*, decision of 24 June 1977, Dalloz 77, II, 695, quoted according to *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, p. 134 footnote 388.

300 *Conseil d'État*, decision of 7 July 1978, Gazette du Palais 1979, 1, 34, quoted according to *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, p. 134 footnote 389.

301 Id., pp. 134 and 150 with further references.

302 Id., pp. 57 with footnote 35.

303 See id., p. 136.

304 See id., p. 137 as to the criticism in France.

305 Id., pp. 112, 152 referring to the *Saniman* decision of the *Conseil d'État* (15 October 1993, Revue française de droit administratif 1993, at 1193).

decision, the *Conseil d'État* argued that the granting authority's decision on extradition can be separated from the exercise of diplomatic relations.

In addition and quite remarkably, the French Minister of Justice publicly declared what are the criteria for deciding on an extradition request:[306] the political and judicial system of the requesting state, the political character of the crime, the political aim behind the request as well as the risk of the fugitive's situation being worsened because of his political opinion or actions, his race or his religion.

In Austria, we find such criteria even in the law: The Austrian Extradition Law (sec. 34 para. 1 LECCM [A]) and the new legislation of Liechtenstein[307] provide substantive criteria for the government's decision on extradition, inter alia the observance of asylum and human dignity. This decision is made only after a court's decision.

*2. Other forms of cooperation*

In judicial cooperation, coercive measures require a court decision. In this regard, national standards are applied to cooperation as well. The reason for this obviously is that actions such as search and seizure in order to obtain documents have the same character as an infringement on basic rights, whether it is done for domestic criminal procedures or for foreign criminal procedures. Like in extradition, therefore, the "quality" of the court decision is important. Does the court which decides on the validity of the search and seizure, e.g., also decide on the transfer of the objects to another state? This raises additional questions if compared to the situation of a purely national case where the objects remain within the same national jurisdiction. Only if these additional questions are checked by the court, is there any comprehensive protection by courts. Only the Dutch and the German national reports have revealed such differentiations in national practice.

A judicial decision is rare, for forms of cooperation other than those requiring coercive measures for the execution of a request. This might be due to the fact that only Germany recognizes a comprehensive right of access to a court, i.e., also when non-coercive measures or administrative matters are at issue. Finland and the U.S. do not generally recognize such a right. If this is so, does it not seem at least consequent within the municipal sphere not to extend court control to the question of transfer?

306 Id., p. 141 quoting Le Monde of 2 July 1987.

307 Law on International Assistance in Criminal Matters of 15 September 2000, Liechtensteinisches Landesgesetzblatt (Law Gazette of Liechtenstein) 2000, No. 215 of 6 November 2000 (pp. 351, 1-42) in force since 6 November 2000.

## *II. (Non-)Application of national standards of criminal proceedings*

### *1. The principle of legality*

In the European Union, i.e., the third pillar instruments,[308] a quite questionable development can be observed. This arises in relation to the general principle of legality; not the principle of *nulla poena sine lege*, but the requirement of a legal basis for state actions. The problem is due to the "chaos" of norms, i.e., the variety and proliferation of different conventions covering the same subject of cooperation. It is a very difficult task even to determine the relevant applicable law. The main reason for this may be seen in the fact that neither the European Communities nor the European Union is a federal state. Hence, the ongoing "struggle" within the EC/EU about which entity is to determine or produce the law brings about a confusion. Nevertheless, as cumbersome as this legal situation may be, at least one could argue that this is not a consequence of a two-dimensional approach.

### *2. The prima facie requirement (criminal procedure approach)*

The *prima facie* requirement in common law states is a consequence of the assumption that extradition proceedings of the court are criminal proceedings at least in part. There must be "a case to answer."[309] A parallel, therefore, is drawn between preliminary hearings in criminal procedure and extradition hearings. As *Gilbert* points out for British extradition procedures: They "are designed to reflect, so far as possible, the procedure in normal committal hearings. The traditional procedure, known as a long form committal, had been for an accused only to be sent for trial on indictment before a jury in a domestic prosecution after a *prima facie* case had been proven against him."[310]

In addition to this criminal procedure approach in general, evidentiary requirements, i.e., procedure and form for the taking of evidence to be used for the *prima facie* requirement, are a major reason that problems for continental states requesting extradition arise.[311] The rules on the exclusion of hearsay evidence especially cause important problems. These problems, however, seem to be reduced in extradition proceedings.[312] The same is true for the right to cross-examination which is guaranteed by the U.S. Constitution. There is a split of opinion in the federal circuits over this; only some magistrates allow it.[313]

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308 As to this distinction see *Gleß*, EU report, part 2 ch. 1.

309 See *Gilbert*, Transnational Fugitive Offenders in International Law 1998, pp. 119-145, 123.

310 Id., p. 125.

311 See id., pp. 127-137.

312 See id., pp. 132-137.

313 *Blakesley*, U.S. report, ch. 7 VI.4.b.

In continental states, the *prima facie* requirement is quite an exception, but it exists, as shown by sec. 10 para. 2 LIACM (GER) and other examples.[314] The background of this exceptional continental *prima facie* requirement is that the fear of persecution, e.g., Art. 3 para. 2 ECE, in the requesting state is at issue.

*3. Fair trial rights of criminal procedure in extradition proceedings in general*

a) We could discuss now the question whether the common law assumption that extradition procedures are criminal procedures is right or wrong - at least from a continental law approach. We would, however, realize that this question seems to prejudice other problems of fair trial rights:

In Germany, the presumption that extradition procedures are not criminal procedures is intended to argue:

- The non-applicability of Art. 104 para. 3 BL. It guarantees a person provisionally detained on suspicion of having committed an offense to be brought, not later than the day following the day of apprehension, before a judge who has either to issue a warrant of arrest or to order his release from detention.[315]

- The federal competence to grant extradition and to deny the competence of the Laender which have the competence for the administration of justice ("Rechtspflege").[316]

With regard to the ECHR and its fair trial guarantee in Art. 6, constant practice in Strasbourg argues that extradition proceedings are neither considered as a "criminal charge" nor as "civil rights," thereby excluding the protections of Art. 6 ECHR.[317] In Finland, a constitutional guarantee (sec. 16) is comparable to Art. 6 but covers all decisions by public authorities, including administrative decisions.[318]

b) The *prima facie* example shows - at least from a continental perspective - that applying standards of criminal procedure to extradition creates an overprotection. A "mini"-trial in the requested state does not make sense. Discussion in the U.S. also shows that the criminal procedure approach creates consequences which are not welcome even in the U.S. There are problems, e.g., to reduce the tough hearsay rules or the right to cross-examination in the extradition hearing, both of which are essentials of U.S. criminal procedure as guaranteed by the Constitution.

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314 *Lagodny/Schomburg*, German report, ch. 7 C.VI.2.

315 *Lagodny/Schomburg*, German report, ch. 7 D.II.

316 *Schomburg/Lagodny*, Internationale Rechtshilfe 1998, Introduction margin 89; *Vogler*, in: Vogler/Wilkitzki, IRG, para. 12 margin 2.

317 No. 10227/82, *H. v. Spain*, Dec. 15 December 1983, 37 Decisions and Reports at 93. This is considered "established case law:" *Ravaud*, Legal cooperation in criminal matters and the rights of the defence, 20 February 1998, Council of Europe Document PC-OC/INF 19, p. 1; in the same sense *Frowein/Peukert*, Europäische Menschenrechtskonvention 1996, Art. 6 ann. 52 footnote 199. See in detail *Breitenmoser*, Internationale Rechtshilfe 1995, part C.V.4.4. See also *Gilbert*, Transnational Fugitive Offenders in International Law 1998, pp. 171-173.

318 *Tallgren*, Finnish report, ch. 1 A.

A more pragmatic approach seems to prevail in Finland: Fair trial rights guaranteed in national Finnish criminal procedure seem to apply to international cooperation procedures as well, at least "where appropriate."[319]

On the other hand, the U.S. approach shows features which seem to be clearly three-dimensional. The right to a hearing requirement seems especially to support this. But the right to a hearing is worth only as much as the court is authorized to decide upon. If the courts are deaf with regard to certain questions, the right to a hearing is purely and merely formal. U.S. courts, however, have to hear *prima facie* arguments. From an European perspective, the *prima facie* question is not that much a human rights issue. Only in exceptional cases, is the *prima facie* argument relevant, because these states generally trust in the other state that there is either probable cause or that the individual will be released if it turns out not to be the case.

c) There is no way of coordinating these juxtaposed solutions. It should be the rule, however, to ask for the underlying questions. Do we need procedural protections which are guaranteed in criminal proceedings also in extradition or other cooperation proceedings as the underlying rationale is at stake in both? If we consider the confrontation clause: As long as there is no evidence-taking on the subject matter, a confrontation does not make sense, regardless whether the extradition hearing is called a criminal procedure or not. However, the U.S. position would be that evidence must be taken. On the other hand: The presence of the individual in the extradition hearing is necessary because of general principles of procedure. The one whose interests are at issue has a right to be present at court, whether the matter be one of criminal or some other nature.

d) Last but not least, developments regarding the principle of *ne bis in idem* (or double jeopardy) present strange patterns. We realize that it is well observed in a purely national setting. As soon as it comes to the international dimension of a case, the problem of a transnational *ne bis in idem* arises. Article 54 Schengen-II-Agreement which is now part of the law of the European Communities, makes a new step by creating a European *ne bis in idem*: A final decision in one state blocks other decisions in other states. This problem has been elaborated in the project in a broader concept: the "choice of the forum." Already on the police level a transnational coordination is possible as to the decision in which territory a fugitive shall be apprehended. Such coordination is - even in Europe - beyond any court's control. With the background of Art. 54 Schengen-II-Agreement, such police cooperation finally decides in practice which state may exercise its jurisdiction and - hence - which law will be applicable. Furthermore, it makes extradition proceedings superfluous by simply waiting, until the suspect has fled to the state which the police have "chosen" for him. Or the choice is made by chance which is not a convincing legal criterion for the question of the proper jurisdiction.

Solutions to this problem could induce reducing multiple national jurisdictions for one case and to look for only one, i.e., the "best" national jurisdiction. Criteria for the "best" jurisdiction should be - among others - not only the principles of territoriality, personality, protection, etc., but also interests of criminal procedure in general (e.g., which state has the best evidence?) and interests of the individual (e.g., where is his or her domicile?).

319 *Tallgren*, Finnish report, ch. 4 B.IV.

### *III. (Non-)Application of national standards of administrative proceedings*

The non-application of national standards of administrative proceedings involves important problems. If we look at the granting procedure as an administrative procedure, we have to ask: Which general rules govern administrative procedure in the state concerned? Are these rules applicable to the granting procedure or not? If not: Why not?

#### *1. General rules for administrative procedures and the granting procedure*

In the Netherlands, we have a clear example that the general administrative rules at least apply in extradition procedure. This has an important influence for the individual, as the general "message" is that the government should behave decently.

In Germany, all problems of fair trial rights would be solved, if the general rules and laws for administrative procedure were applicable. The reasons for not applying these rules are not convincing at all: Except from the statement that the granting procedure is a special procedure nothing can be found.[320]

In the U.S., such deliberations seem to be beyond consideration. One of the central points for the analysis of the U.S. procedure is the unrestricted discretion of the President in foreign affairs. It is the basis for the rule of non-inquiry and the treaty requirement, albeit the latter is not a constitutional one, i.e., there might be extradition on the basis of a law comparable to the LIACM (GER) or other legislation, but in practice, there is no such law, except, since 1996 for surrender to the ICTY or the ICTR.

The President's discretion brings about - at least to an important degree - the territorial restrictions of the scope of U.S. basic rights. One can argue that the curtailment of the judiciary tends to strengthen "classic" judicial issues, such as the *prima facie* question: As the courts may not go into the President's issues, they control even the more those questions which they are "allowed" to control. The "quasi-criminal procedure" approach of the U.S. might be an expression of these aspects: There is no alternative, as the President's discretion may not be controlled. Together with the tendency in the U.S. to allow erosion of rights by application of administrative processes and a - roughly speaking - very lenient attitude of the U.S. legal system with regard to judicial review of administrative decisions, this position seems to be understandable. The problem in the U.S. might be that the executive branch to erode personal liberties seizes many of the mechanisms that could improve international cooperation, including extradition. Thus, in reaction to that insidious tendency, a countervailing tendency exists that generally tries to obstruct streamlining due to a lack of trust in the executive branch.

320 *Lagodny/Schomburg*, German report, ch. 4 B. before I.

The German legal order in this respect can be juxtaposed to that of the U.S.: The overall guarantee of judicial review (Art. 19 para. 4 BL) did not allow for "safe havens" of administrative decisions. The German President is only representing the state in a formal sense. The external power rests with the Federation, i.e., not with the Laender (cf. Art. 32 BL). This does not involve a "firewall" against the applicability of basic rights, as Art. 1 para. 3 BL points out that the basic rights are binding on legislature, executive and judiciary as directly enforceable law. This did not prevent the development of residuaries of what could be compared to the act of state approach which is another feature of the U.S. system. But at least in 1996 the Federal Constitutional Court made a landmark decision on the control of the discretion of the granting authority.[321] The general tendency in the German procedure could be characterized as a fear of "too much" basic rights. This becomes evident in the question of restricting the scope of applicability of basic rights. But if we compare the relatively small influence of basic rights on national substantive criminal law[322] this fear lacks a substantial basis. The German procedure also shows features of the two-dimensional approach.

*2. Judicial control of the granting authority's discretion*

A clear example for a change towards the adoption of standards of administrative proceedings can be seen in Germany, where the Federal Constitutional Court ruled that the decision of the granting authority concerning a wish of a person to have a German sentence enforced abroad, i.e., the question of a request to be made, underlies regular court control. This, however, involves only a check of the court's proper use of discretion. This kind of control of administrative decisions by courts has its foundation in German constitutional law. Thus, the courts do not apply standards of administrative proceedings on the law of cooperation proceedings, rather, original constitutional standards.

In the U.S., applying constitutional standards for proceedings is in most cases only possible if criminal proceedings are at issue, because the constitutional protections are tailored only for this kind of proceedings.[323]

In states in which a court decision on extradition takes place *prior* to the final granting decision, e.g., in Germany, Italy, or the U.S, it is vigorously debated whether there should also be an appeal against the final granting decision. These problems do not arise in the field of administrative cooperation, at least in Germany or in the Netherlands. This, on the other hand, reflects the point that one is more willing to accept the administrative approaches in administrative rather than in criminal cooperation. May be that this is a reflection of a classical unwillingness to apply other rules than those which are "usual" or those to which one has become accustomed.

321 *Lagodny/Schomburg*, German report, ch. 10 II.

322 See *Lagodny*, Strafrecht vor den Schranken der Grundrechte 1996, para. 18 and 19 and *passim*.

323 As to France see supra C.I.

*3. Abolition of the granting procedure?*

a) One could ask now: If we apply general rules on administrative procedure to the granting procedure, will the entire processus of cooperation not be blown up (expanded?) to an unbearable extent? In Germany, e.g., a visible[324] consequence would be that courts must control the discretion which the granting authority exercises after the decision of the court on extradition. We thus would have two court's decisions. It might then be argued that this could be reduced to only one decision. This would be possible under the Swiss and the Portuguese model where the court decides at the end, i.e., after the final decision of the granting authority.

The other general way would be to abolish the granting procure altogether. Under C.I. of this chapter, we have asked, why courts are involved at all in this. The same question must be applied to the granting authorities and the granting procedure. This has been done very recently in the European Union with the proposal of a framework decision on a European warrant of arrest.[325] The traditional rationale has always been that aspects of foreign policy have to be considered when cooperating with another state.

As we have seen in France, a separation between the diplomatic aspects of a case and the judicial aspects of a request is quite possible. This actually happens sometimes in the U.S., as well, at least when the Secretary of State's decision benefits the fugitive in an extradition from the U.S. This shows, in addition, that a new borderline should be drawn between these processes.

b) In some specific areas we can observe that no granting procedure actually remains. Prominent examples are Art. 96 or Art. 41 Schengen-II-Agreement. The Naples-II-Convention which contains rules concerning international cooperation in criminal matters, curtails the granting procedure.[326] We can also observe that applying standards of proceedings goes without saying as soon as there is no granting procedure. This can be observed in the first pillar of the European Union.[327] Here the granting procedure does not exist, because of the supranational character of the first pillar.

If we analyze the mechanism of Arts. 95 and 64 Schengen-II-Agreement, we see that including data into the SIS (Schengen Information System) on a person wanted for arrest for extradition purposes has the effect of a request for provisional arrest under Art. 16 ECE. According to Art. 95 para. 1 Schengen-II-Agreement it is only “the judicial authority” of the requesting Contracting Party which is allowed to include the data into the SIS.

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324 As indicated in the German report, this question is vividly discussed already now, i.e., on the basis of the non-applicability of the Federal Law Concerning Administrative Procedure. The consequences of the decision BVerfGE 96, 100 in this respect are not yet clear.

325 Commission proposal on European arrest warrant (COM [2001] 522, 19 Sept. 2001; OJ 2001 C 332 E/305). Germany did not abolish the granting procedure whereas Austria did so.

326 *Gleß*, EU report, part 2 chs. 2/3 A.

327 *Gleß*, EU report, part 1 C.2.B.V.

Article 16 ECE provides for the classical way of making a request, i.e., by the granting authority of the requesting state. Thus, Art. 95 Schengen-II-Agreement *de jure* abolishes the granting procedure as far as the making of a request is concerned. The judicial authority is no longer dependent on the granting authority in order to forward a request to another state. Thus, we see that the abolition of the granting procedure is not beyond any legal fundament. It must, however, be noted that the Schengen-II-Agreement does not abolish the granting procedure in the requested state, but only in the requesting state. The decisive point is that the essentials of the granting procedure, i.e., foreign affairs, are excluded or are not determinative and may only be taken into account by the judicial authority.

c) This leads us to a second aspect: the relation between the judiciary and the executive in cooperation matters. From a prosecutorial view, the matter that the suspect or evidence is not on this but on the other side of the state's border does not make much difference if we - for the purposes of this argument - leave aside the burdensome extradition mechanisms. Questions of foreign affairs are not essential to prosecutorial interests. The prosecutorial view must, of course, be restricted by the protection of individual rights. These, however, have nothing to do with foreign affairs aspects, either.

### *IV. International standards of proceedings are applied/not applied*

The reports show that international human rights standards[328] play an important role in the European states whereas in the U.S., their role seems to be nearly meaningless, unless they are seen as having some moral impact on given decisions.

## D. Scope of Protection by National Basic Rights

As we analyzed these issues, the substantive scope of national basic rights turned out to be a key criterion for the question of substantive rights of the individual. An individual's rights directly depend on the territorial scope of basic rights (infra I.), the question of standard of proof (infra II.) and of the review and oversight of the constitutionality of treaties (infra III.).

### *I. Extraterritorial expansion or territorial restriction?*

The general scope, perhaps even the nature of constitutional guarantees differs between the U.S. and the European legal orders. In the U.S., the restrictions to search and seizure (4th Amendment) seem now to be considered as neither protecting at least illegal "resident aliens," i.e., foreigners on the territory of the U.S., certainly not foreign nationals outside the U.S. (even if U.S. agents commit acts that would otherwise violate the 4th Amendment), nor, at least under some interpretations of *Verdugo-Urquidez*, U.S. na-tionals abroad under some circumstances.[329] The same might be true for the protection against self-incrimination (5th Amendment).[330] This tendency can be observed in other areas of constitutional law: The *exclusionary rule* which was developed in the U.S. is not applicable on evidence from abroad.[331] The so-called "unlawful combatant detainees" sitting in Guantanamo cages present an additional example of the U.S. government's attempt to eliminate protections for those it

328 See *Breitenmoser*, Internationale Rechtshilfe 1995, part C.III.5.; see also ILA, Report of the Sixty-Eighth Conference Taipei 1998, pp. 132, 140, 153.

329 *Blakesley*, U.S. report, ch. 1 A.II.1.

330 See *Blakesley*, U.S. report, ch. 1 A.II.2. as to the relations between the 14th and the Amendments 1 to 10.

331 See *Schutte*, 65 RIDP 119 (1992).

wishes to prosecute. Other reports do not contain any comparable restrictions to national basic rights.

This contrasts with the extraterritorial range of other U.S. laws, especially those providing the prosecution with power, those governing the scope of extraterritorial jurisdiction to prosecute or to take prosecutorial action, and those found in the field of competition law including its long arm statutes.[332] The scope of the "long arm" of U.S. law is clearly expanding, except for that which protects individuals from the long arm of U.S. law. In addition, the territorial reduction of constitutional guarantees creates a big hole for the individual especially when U.S. officials are acting abroad, e.g., in state X: The U.S. Constitution does not apply as such due to territorial restriction. The constitutional guarantees of state X do not apply because U.S. officials are acting, not officials of state X. This is a vicious circle of arguments.[333]

The opposite development can be observed in France where notions of basic rights are enforced via the *ordre public*.[334] This, in turn, contrasts with an approach in Germany, where the scope of basic rights in extradition cases is reduced with the argument that foreign legal orders should not be discriminated (export ban argument).[335] This feature, however, would be valid for the whole concept of double criminality.

### *II. Procedural restrictions: standard of proof for human rights violations*

If the scope of basic rights, at least in continental states, also covers the consequence which the individual has to face in the requesting state, e.g., torture or the death penalty, the standard and burden of proof become decisive: Is the "mere probability" of treatment contrary to Art. 3 ECHR sufficient to deny extradition?[336] Or do we need a "real risk?"[337] Does the state have to prove that this risk exists (to whatever standard), or does the defendant have to prove it? Possible answers have to be seen in a general context of human rights questions.

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332 As to the problem of long arm statutes, see *Schmidt-Brandt*, Zu den long-arm statutes im "Jurisdiktions-Recht" 1991, *passim*.

333 *Bentley*, 27 Vanderbilt Journal of Transnational Law 351 (1994).

334 See supra C.I.

335 *Lagodny/Schomburg*, German report, ch. 7 E.I.

336 Polish Supreme Court in the *Mandequi* case, see *Plachta*, 6 European Journal of Crime, Criminal Law and Criminal Justice (1998), 100 and subs.

337 See the *Soering* case ECHR, Series A, No. 161 (1989), para. 9 of the decision. See also Draft Recommendation of the Committee on Extradition and Human Rights of the ILA in the General Report of *Dugard/Van den Wyngaert*, in: ILA, Report of the Sixty-Eighth Conference Taipei 1998, pp. 135-138 and 152.

The same tendency may be observed in Germany: The Federal Constitutional Court requires for a human-rights argument that there be concrete indications that the individual may receive treatment contrary to human rights. It is not enough that such treatment cannot be precluded because of a prior event. With a view to states which are internationally recognized as adherent to the rule of law, there must be essential reasons for the considerable possibility of a real danger of treatment contrary to human rights. Only events concerning the prosecuted person personally justify the conclusion that treatment contrary to human rights is a threat. This was meant to exclude reference to general human rights problems in the requesting state.[338] Other states make a comparable kind of restrictive inquiry.[339]

In the U.S., there is a change with regard to the rule of non-inquiry caused by the Supplementary Treaty between the U.S. and the United Kingdom. This treaty contains a persecution clause. It is only the executive (not courts) that has the authority to decide on its requirements. Nevertheless, there are court decisions to restrict the inquiry according to the U.S. - U.K. Supplementary Treaty, namely:

- only specific problems encountered by specific respondents may be looked upon (i.e., not the general human rights situation);
- only problems may be considered establishing that the accused would be "prejudiced" on account of particular factors (e.g., race, nationality, etc.);
-- it is not enough "to show some possibility that performed ideas might exist; rather, under the terms of the supplementary treaty, the bias must rise to the level of prejudicing the accused."[340]

It is interesting that the discretion of the Secretary of State is much higher. The Foreign Affairs Reform and Restructuring Act (FARR Act) provides that the Secretary of State, who is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition, considers incident to the U.S. obligations under Art. 3 of the Convention against Torture the question of whether a person facing extradition from the U.S. is "more likely than not" to be tortured in the requesting state.[341] On the other hand, there are clear examples of judicial scepticism about foreign treatment of the individual: In the *Venezia* case,[342] the Italian Constitutional Court held that federal U.S. assurances not to impose the death penalty were not sufficient to satisfy the Italian Court. This was due to the sense of the Italian Court that the fulfillment of the promise could not be ensured by the promising authorities in the U.S. State. This lack of surety was too great, in light of the absolute right to life as guaranteed by the Italian Constitution. One of the decisive issues of this decision was that the provisions of the Italian Constitution were placed above treaty obligations.

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338 See *Lagodny/Schomburg*, German report, ch. 7 C.VI.4. Recently, the Constitutional Court argrued that it would be contrary to a treaty to distrust the other state's system in human rights questions: Having a treyty with another state involves the presumtion that this stae adhere to human rights. The main argument was that if a treaty contains a human rights clause it would be a sign of distrust to doubt the adherence to human rights: decision of the Federal Constitutional Court of Germany of 24 June 2003 - 2 BvR 685/03 = JZ 2004, 141-145 with critical commentary of *J. Vogel*. This decision is in substance nothing more but the treaty-requirement which is meant to cut all human rights questions short, see infra E I.

339 See also ILA, Report of the Sixty-Eighth Conference Taipei 1998, pp. 132, 134-139.

340 1st Circuit Court of Appeals, see references in *Blakesley*, U.S. report, ch. 7 E.IV., V.

341 *Blakesley*, U.S. report, ch. 1 E.II.2.

342 As to the *Venezia* case, see *Parisi*, Italian report, ch. 7 E.II.; *DeWitt*, 47 Catholic University Law Review 535-589 (1998) with an English translation of the judgment (pp. 591-601); see also *Dugard/Van den Wyngaert*, 92 American Journal of International Law 197. In reality, in the U.S., it is likely that a promise from the proper executive authority will bind the judiciary on an issue impacting life or liberty.

### *III. Check of the constitutionality of treaties*

A characteristic of the Dutch legal order is that the courts may not control the constitutionality of national laws or international treaties according to Art. 120 of the Dutch Constitution.[343] However, Dutch courts may check whether national laws are compatible with international treaties/conventions (Art. 94 of the Dutch Constitution). Therefore, this aspect plays a more important role than in other legal orders, i.e., the German legal order, which knows the constitutional control of national laws. Interestingly, the Dutch legislator is inclined to take into account also "soft" law, like recommendations of the Council of Europe.[344]

## E. Relation between the Legislator, the Executive and the Judiciary

We have seen that a lot of questions end up in the problem of the relation between the legislator, the executive and the judiciary. We will have to examine more thoroughly the treaty requirement (infra I.), restrictions on the court's scope of decision (infra II.) as well as the rationale of the granting procedure (infra III.).

### *I. Treaty requirement*

Under the treaty requirement, states may cooperate with another state only on the basis of a treaty or convention. It is applied in the U.S. (as an example for a common law state) for extradition, but not for other forms of cooperation. In the Netherlands, cooperation in criminal matters needs a treaty basis as soon as coercive measures are to be applied (Art. 552n No. 1 Dutch CCP).[345] This is consequent. In the U.S., the treaty requirement does not apply to other forms of extradition, even if coercive measures are to be applied.

#### *1. Rationale: the trustworthiness argument*

The rationale of the treaty requirement is: Making a treaty with another state involves generally the idea that the parties trust in the legal system of the other state. The trustworthiness is evaluated

343 *Swart*, Dutch report, ch. 1 A.

344 *Swart*, Dutch report, ch. 1 A., concerning wire-tapping.

345 *Swart*, Dutch report, ch. 4 B.

- at the time of the treaty-making,
- by the treaty-making executive, and
- on the basis of a general and abstract analysis of the other state's system.

*2. Effect: reduction of individual-orientated control*

The treaty requirement has the effect that the legislator and the executive restrict the judiciary: Specific arguments of individual's interest are blocked because the integrity of the other state has been checked on an abstract and general level. This could be called a paternalistic approach, because it is "Father State" which is the only power to take care of individuals' interests.

From the view of the individual this causes problems: The least of these is that which arises from detrimental change of circumstances since the treaty has been concluded. This problem could - at least theoretically - be overcome on the level of international law by the *clausula rebus sic stantibus*.[346] However, does an individual have standing at all to raise this question at court? Even if the answer were yes, is it realistic to believe that a court would accept the argument and actually deny extradition? Certainly, only in very severe cases would this seem to be possible.

The fact that it is (only) the executive that evaluates the other state's (judicial) system leads to even tougher questions. If there are economic reasons to have an extradition treaty with a given state, e.g., this might influence or even minimize the evaluation. One might argue that in all states, Parliament must approve any treaty. But the decision available to Parliament is to say "yes" or "no" to the treaty. Moreover, Parliament's decision on this must be made from a general and abstract point of view.

In sum and in general, there seems to be very little possibility for the individual to bring to decision his concrete and individual problems. Although some U.S. federal circuits allow a defendant to raise some points in an extradition treaty, such as the rule of speciality, this is not consistent in the U.S. and rarely available elsewhere when a treaty is required. This is the most crucial point of the treaty requirement. It seems to exclude individual and concrete control of the case. Roughly speaking, the requirement underlies the following pattern: As the treaty-making executive has approved of the other state, there is no reason to check that system again in a concrete case. As the individual is blocked, courts are blocked as well. The decisive borderline runs between the executive on the one side and the individual/courts on the other. This involves a distinction which could be characterized as being two/three-dimensional: It is not for the individual (and/or the courts) to check the other state's reliability, it is only for the executive which has to take care of foreign relations. And it is this concentration on foreign relations with the other state and the exclusion of an individual's argument which justifies this characterization of the "trustworthiness argument" as being two-dimensional in character.

346 See Art. 62 of the Vienna Convention on the Law of Treaties.

However, the trustworthiness argument seems to vanish at least to some extent under these circumstances.[347] The ECHR may be an obstacle to cooperation even on the basis of this argument if there is a flagrant denial of justice or other violations of human rights. By referring to the *Soering* decision, *Swart* points out that the trustworthiness argument now has become a rebuttable presumption; i.e., it will be presumed that the fugitive's human rights will not be violated, unless and until there will be concrete hints to the contrary.[348] In Finland as well as in other states, substantially the same presumption obtains; it is argued that if the requesting state is a partner to the ECHR "the presumption is that no thorough inquiries need to be conducted."[349]

### *II. Restricted scope of court control*

Especially in extradition matters, courts in some countries are not allowed to decide on certain substantive matters. Here, if we collect or combine our analysis of all these areas, we see that it is not only the construction of the rule of non-inquiry that is at issue (infra 1.), but also other important points (infra 2. and subs.). These are issues which are spread over the whole spectrum of laws and legal orders, but which are based on or arise from the same legal problem.

An important counter-example should be mentioned: In Switzerland, only the court, i.e., the *Bundesgericht*, may decide on the political offense exception (Art. 55 para. 2 LICCM [CH]), not the granting authority. The reason for this is to avoid exposing an executive organ to pressure in such questions which involve an evaluation of another state's institutions or behavior.[350]

#### *1. The rule of non-inquiry*

The rule of non-inquiry excludes certain issues from a court's control. In the U.S., it has been developed as a borderline between the executive and the judiciary. The rule of non-inquiry is closely connected to the U.S. rules of act of state.[351] According to the Supreme Court indicia of a non-justiciable political question, we see among others:[352] "lack of judicially discoverable and manageable standards for resolving it." This criterion obviously is not relevant with regard to human rights standards.

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347 *Swart*, Dutch report, ch. 1 E.IV.

348 *Swart*, Dutch report, ch.1 E.IV.

349 *Tallgren*, Finnish report, ch. 11 B.

350 *Zimmermann*, La coopération judiciaire internationale en matière pénale 1999, p. 302 ann. 388.

351 See *Gilbert*, Transnational Fugitive Offenders in International Law 1998, p. 79, referring to *Baker v. Carr* 369 U.S. 186, 7 L. Ed. 2d 663, 82 S.Ct. 691 (1962) which was cited by the 1st Circuit Court of Appeals in *United States v. Lui Kin Hong* 110 F.3d 103 (1997).

352 The other criteria are not relevant: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question."

The background to understanding this position is the U.S. view of the principle of checks and balances in the same sense as mentioned before with regard to the treaty requirement and the unrestricted freedom of the U.S. President who is "the sole organ abroad."[353]

The rationales of the rule of non-inquiry have been condensed in a decision of the 1st Circuit Court of Appeals (U.S.)[354] on one of (the few) exceptions to the rule in the U.S., i.e., Art. 3 of the U.S. - U.K. Supplementary Treaty had to be considered.

> The court held that Art. 3 "requires judges to shun extradition if the accused either establishes that the request has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or if he proves that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted on account of any of these factors. [...] These phrases cannot be brushed aside as a series of scrivener's errors: to the exact contrary, Congress intended the words to authorize inquiry into the attributes of a country's justice system as that system would apply to a given individual. Moreover, Congress evidently knew that its command reversed years of extradition practice forbidding judicial investigation into such areas. [...] Still, the article 3(a) defense, though a refreshing zephyr to persons resisting extradition, is not of hurricane force; its mere invocation will not sweep aside all notions of international comity and deference to the requesting nation's sovereignty. [...] The rule of non-inquiry developed from the assumption that an extradition treaty, by its very existence, constitutes a general acceptance of another country's legal system."

The rule of non-inquiry is closely connected with the treaty requirement.[355] It is based on international comity and the requesting state's sovereignty by a general acceptance of this state's legal system. Today, however, human rights are no longer considered to be a matter of sovereignty.

The consequence of this approach is an enormous field of discretion in the U.S.:[356] "The courts have held that judicial inquiry is limited to:

- whether a valid treaty exists;
- whether the offense charged is extraditable under the treaty;
- and whether the evidence marshaled in favor of extradition was sufficient to meet the probable cause standard. If the magistrate answers these questions in the affirmative, he or she "shall certify" the fugitive's extraditability.

353 *United States v. Curtiss-Wright Export* as quoted by *Bentley*, 27 Vanderbilt Journal of Transnational Law 413 footnotes 388 and 389 (1994) to which *Verdugo* referred.

354 *Blakesley*, U.S. report, ch. 7 E.IV., V.

355 *Swart*, Dutch report, ch. 1 E.IV.

356 *Blakesley*, U.S. report, ch. 7 C.I. (references see there).

Review incident to *habeas corpus* is limited to the following:

- whether the judge below had jurisdiction over the proceeding;
- whether the judge below had jurisdiction over the fugitive;
- whether the offense charged is extraditable under the treaty; and
- whether the evidence was sufficient for probable cause to believe that this fugitive committed the extraditable offense. If the *habeas corpus* action is denied, the Secretary of State is the sole authority to weigh the political or human rights or humanitarian consequences of the extradition and to make the final decision on whether or not to extradite."

Humanitarian reasons, especially, are reserved to the executive; they are considered "not suitable for judicial scrutiny."[357] This contrasts to continental approaches and is objected to by commentators in the U.S.

In the Netherlands, the rule of non-inquiry serves as a means to stick to the terms of an extradition treaty and to examine whether the terms of the treaty have been fulfilled. Here the rule of non-inquiry serves as a rebuttable presumption: The Dutch authorities may assume that the treaty has been fulfilled unless there are explicit hints to the contrary.[358]

The rule of non-inquiry seems to be a (constitutional?)[359] problem only in the U.S., whereas other states do not know it or are even obliged to[360] investigate into the legal and factual situation of another state.

*2. Restrictions in the Netherlands*

The Dutch report points out[361] that it is a remnant of last century's object approach that in the Netherlands, the courts are not allowed to decide on questions like

- the persecution clause, or
- hardship clauses,[362] or
- the reliability of an assurance not to execute the death penalty.[363]

357 *Blakesley*, U.S. report, ch. 7 E.IV., V.

358 *Swart*, Dutch report, ch. 1 E.IV.

359 See *Blakesley*, U.S. report, ch. 7 E.IV, V.

360 *Lagodny/Schomburg*, German report, ch. 7 C.VI.4.

361 *Swart*, Dutch report, ch. 7 A.

362 *Swart*, Dutch report, ch. 7 E.V. See also ss. 11 and 13 of the South African Extradition Act No. 67 of 1962 as amended by the Extradition Amendment Act No. 77 of 1996 = Statutes of the Republic of South Africa - Criminal Law and Procedure, Issue 31 - Supplementary.

363 *Swart*, Dutch report, ch. 7 E.II.; as to the opposite approach in Germany, see *Lagodny/Schomburg*, German report, ch. 7 E.II.

On the other hand, Dutch courts check this by determining whether the requesting state guarantees a fair trial.[364]

In this respect the granting authority, i.e., the Ministry of Justice decides if the individual has to fear persecution on the grounds of his opinion, race, etc.[365] The ministry's decision, however, may be controlled by a civil court which - *de facto* - has the function of an administrative court.[366]

A similar tendency may be reported from France: According to its own traditional practice, the *Chambre d'Accusation* has to present questions of interpretation of a treaty or a convention clause to the Foreign Ministry. Nowadays, this practice has changed; the *Chambre d'Accusation* decides itself on these matters. But the interpretation as such has not been disposed of. The idea as a whole seems to be a remnant of a two-dimensional view.[367]

*3. Discretionary clauses*

Another problem is the question: Who is to decide on treaty clauses which give discretion to the requested state as to the use of bars to extradition? Examples are frequently to be found: Art. 6 ECE (the requested state "may" refuse to extradite its nationals). In the Netherlands, the executive finally decides such clauses. The court only gives advice.[368] In this respect, the Dutch system is comparable to the French system. In Germany, on the other hand, at least for the death penalty clause in Art. 11 ECE it has been pointed out by the Federal High Court that the assurances are to be controlled to full extent by the court.[369] In the U.S., "administrative discretion is read to be nearly absolute"[370] as far as discretionary clauses are concerned. In Finland, the situation seems to be similar.[371]

*4. Summary*

The substantive requirements upon which the court may not decide are left to the decision and discretion of the granting authority. The follow-up question, then, is whether courts may control the decision of the granting authority. To the extent to which there is no judicial control, there is free discretion of the granting authority.

In sum we can see, that in the U.S., there are important areas beyond any court's control. This remnant of judicial lack of control in the area of a ministry's decision may be explained historically, but history alone is not convincing. Maybe this is due to my German approach based on German constitutional law. As *Swart* is critical of the Dutch situation and other reporters are critical about their own legal order, the sensitivity for the problems seems not to be concentrated on a certain national view.

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364 *Swart*, Dutch report, ch. 7 E.III.

365 *Swart*, Dutch report, ch. 7 C.IV.

366 *Swart*, Dutch report, ch. 7 A.; see as an exception *Parisi*, Italian report, ch. 7 B.VII *bis*.

367 *Haas*, Die Auslieferung in Frankreich und Deutschland 2000, p. 112.

368 *Swart*, Dutch report, ch. 7 E.II.

369 *Swart*, Dutch report, ch.7 E.II.

370 *Blakesley*, U.S. report, ch. A.

371 *Tallgren*, Finnish report, ch. 7 A.

These remnants of archaic history reflect the situation in extradition procedure which developed before any courts were introduced into proceedings, i.e., before the beginning of the 19th century. Today, we still have areas where courts are "off-limits." This is clearly a two-dimensional approach - it ought to be abolished.

*III. Rationale of the granting procedure*

We could also turn around the argument of the treaty requirement: If there is a treaty which presupposes that on a general and abstract level the political and other reliability of the other state has been approved of by the treaty-making power, i.e., the executive, of one state, there is no need for a granting procedure which concerns individual and concrete cases.

## F. Original Responsibility and Shift of Responsibility between the Requesting and the Requested State and vice versa

In a more general view, the question of the "three dimensions" becomes apparent if we look at the general distribution of responsibility of the two cooperating states. Is there a clear-cut, and thus divided, responsibility? The analysis of the problem of the scope of the protection afforded by national basic rights has shown that this may lead to significant shortcomings, if one of the cooperating states is restrictive.

We can find a model of a shared responsibility in the field of compensation. There are two opposing approaches: In Finland, in the following case decided by the Supreme Court in 1991, compensation was to be paid by Finnish authorities. In this decision, based on a Norwegian request, A was held in custody in Finland for 48 days pending extradition to Norway. After extradition, A was acquitted in Norway. The relevant Finnish compensation act was applicable even though the taking of A into custody was based on a Norwegian authority, while in Finland, in the domain of Finnish jurisdiction.[372] The German and the U.S. approach would be different and stress the responsibility of only the requesting state.

## G. Conclusions

The following conclusions are not meant to summarize what already has been summarized in this comparative overview or in the national reports. We want to review our purpose and approach to this study.

The starting point of this research was to identify areas in cooperation where standards which are common in domestic cases (and which are considered important in and for the domestic systems of justice) are not applied when it comes to international cooperation and to ask for reasons justifying the difference. This part's summing-up of the foregoing chapters has shown a significant variety of intertwined questions that must be noticed and fully addressed before justifications can be given. In other words, we have raised a panoply of questions that had not been raised before and which provide a foundation for explaining the developments in this arena.

372 See *Tallgren*, Finnish report, ch. 11 A.

Thus, the project in our view turned out to be a refining, re-routing and restructuring of the "core" questions: What are the main differentiations which have to be taken into account when dealing with the questions on a national level?

1. One decisive problem turned out to be *the scope and applicability of basic rights*, not only as a bar to extradition or cooperation in general, but also to certain aspects of procedure. If basic rights are restricted to mere territoriality they do not - from the very outset - envisage problems like that presented in the *Soering* case (death penalty) or in the *Alvarez-Machain* issue (abduction). But even if a legal order does not recognize or allow such categorical solutions, the so-called "export ban" approach serves the same purpose, i.e., to reduce extraterritoriality of basic rights in a more flexible way.

2. Another key problem turned out to be *the existence of a granting procedure as such* which is governed by the executive. This, in turn, brings about two additional sets of questions:

a) The necessity to differentiate questions which are to be decided by the executive as opposed to those to be decided by the judiciary: Who is to decide - the executive or the judiciary? This is an issue that has arisen in the U.S., where some legal questions are blocked from being decided by the judiciary at all and in the Netherlands, where some questions may not be decided by criminal rather than by civil courts.

b) The question of procedural standards: Do administrative standards of the granting procedure influence the criminal procedure standards or vice versa? As examples of this problem, we see: the question of the *prima facie* case or the applicability of fair trial rights which - in continental legal orders - are not confined to criminal procedure but which apply to administrative procedure as well. On the other hand, these protections may be available in the U.S. only in the criminal, but not in the administrative procedure. Maybe one of the most striking results is that answers to this problem in various states are totally contrary: In continental orders the administrative approach prevails whereas in the U.S., the judiciary-and-criminal-procedure approach brings about a threshold, the *prima facie* requirement, which seems to be superfluous from a continental perspective.

On the other hand, we observe that in the U.S., the individual is provided with a full fledged hearing with numerous guarantees; however, these guarantees cannot change the fact that the scope of issues that can be addressed at the hearing, especially in relation to questions of human rights interests and values, is very restricted.

3. With regard to the relation between both the requesting and the requested state, we can observe that *sovereignties* retain a very strict thought process or analytical modality. This is apparent on the subject of compensation. Only in Finland are acts of the requesting state allowed to serve as a basis for compensation.[374] On the other hand, the requirement of a *prima facie* case shows that states retain a considerable distrust of other legal orders. This includes the obligation to take one's own responsibility.

374 *Tallgren*, Finnish report, ch. 11 A.

4. However, the *principle of "mutual recognition"* which actually is favored on the EC/EU level[375] must be critically analyzed: An automatism of recognition would at once eviscerate nearly all individual rights offering protection against illegitimate transfer of either persons or evidence on the national level.

5. The project has shown that international cooperation in criminal matters is far from having integrated the individual as a real subject with his or her own substantive and - especially - procedural rights.

375 See Commission proposal on European arrest warrant (COM [2001] 522, 19 Sept. 2001; OJ 2001 C 332 E/305).

# ABBREVIATIONS

| | |
|---|---|
| al. | alii |
| Art(s). | Article(s) |
| BL/GG | Basic Law/Grundgesetz (Germany) |
| BVerfGE | Entscheidungen des Bundesverfassungsgerichts/Decisions of the Federal Constitutional Court |
| BVwVfG | Bundesverwaltungsverfahrensgesetz/Federal Law Concerning Administrative Procedure |
| CC | Criminal Code |
| CCP | Code of Criminal Procedure |
| cf. | compare |
| ch(s). | chapter(s) |
| EC | European Communities |
| ECE | European Convention on Extradition of 13 December 1957 (ETS-No. 24)/Europäisches Auslieferungsübereinkommen |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS-No. 5) |
| ECMACM | European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS-No. 30) |
| e.g. | for example |
| EU | European Union |
| EU-MAC | Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000, p. 3 |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ICTR | International Criminal Tribunal for Rwanda |
| i.e. | that is |
| ILA | International Law Association |
| LECCM (A)/ARHG | Law on Extradition and Other Forms of Cooperation in Criminal Matters/Auslieferungs- und Rechtshilfegesetz (Austria) |
| LIACM (GER)/IRG | Law on International Assistance in Criminal Matters/Gesetz über die Internationale Rechtshilfe in Strafsachen (Germany) |
| LICCM (CH)/IRSG | Bundesgesetz über internationale Rechtshilfe in Strafsachen vom 20. März 1981/Federal Law on International Assistance in Criminal Matters (Switzerland) |
| MLAT | Mutual Legal Assistance Treaty |
| No. | Number |
| OJ | Official Journal of the European Community |
| OLAF | Office européen de lutte antifraude |
| p(p). | page(s) |
| para(s). | paragraph(s) |
| RHC | Regional High Cour/Oberlandesgericht |
| RIDP | Revue Internationale de Droit Pénal |
| Schengen-II-Agreement | Implementing Convention of the Schengen Accord of 19 June 1990; see Protocol integrating the Schengen Acquis into the European Union (OJ C 340, 10.11.1997, p. 93) |
| sec., ss. | section(s) |
| SIS | Schengen Information System |
| U.S. | United States of America |
| U.K. | United Kingdom |
| UN | United Nations |
| v., vs. | versus |
| V/W | Vogler/Wilkitzki, Kommentar zum Gesetz über die Internationale Rechtshilfe in Strafsachen |

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## Annex I:

## Questionnaire of the Project:

The Individual as Subject of International Cooperation in Criminal Matters

Source:

Eser, Albin/Lagodny, Otto/Blakesley, Christopher L. (eds), The Individual as Subject of International Cooperation in Criminal Matters, A Comparative Study; Baden-Baden, 2002. pp. 1 and subs.

### Preliminary Remarks

The questionnaire was elaborated during two international workshops in 1995 and 1997 (see introduction). The final version of this questionnaire is reproduced here as a first result of the project: It raises questions which are familiar in the area of purely national criminal proceedings but which are not yet commonly raised in the field of international cooperation in criminal matters. The answers to the questions in the national reports (infra part 2) will illustrate this.

In order not to irritate the reader, remarks and references concerning "ad hoc" papers of the workshop have been erased without changing the original content.

### 1. The "red line" of the questionnaire The questionnaire has been divided in the following chapters:

Chapter 1: Sources of law
Chapter 2: Purely administrative cooperation of {your country} as the requested state
Chapter 3: Purely administrative cooperation with {your country} as the requesting state
Chapter 4: Cooperation in criminal matters with {your country} as the requested state
Chapter 5: Cooperation in criminal matters with {your country} as the requesting state
Chapter 6: Choice of the forum
Chapter 7: Extradition from {your country}
Chapter 8: Extradition to {your country}
Chapter 9: Cross-border enforcement of foreign sentences in {your country}
Chapter 10: Cross-border enforcement of {your country's} sanctions in a foreign state
Chapter 11: Summary

A differentiation has been made between the country as the requested and as the requesting state: Chapters 2, 4 and 7 concern the country as the requested state, chapters 3, 5 and 8 as the requesting state. Chapters 9 and 10 require other terminological differentiations because both states may be the requesting or the requested state in the situations of chapters 9 and 10.

Chapters 2, 4, 7 and 9 have a subdivision according to the discussions at the workshop:
A. Granting procedure
B. Judicial preview/review
C. Requirements and bars with human rights aspects

## 2. Core/non-core questions

Very important is the differentiation between core questions and non-core questions

The headings which contain core questions are marked with the following sign at the beginning: "(©)"

a) Core questions had to be dealt with in every national report. Here, the national reporter had to go into details as much as possible and necessary. The answer, however, might also be: there is "nothing relevant" on this point.

b) Non-core questions are left to the discretion of the national reporter. The absolute "minimum answer" was to say nothing, even by leaving out the question (i.e., to report only to point 1 ... and continue with point 5 ..., thereby indicating that there is nothing relevant in point 2, 3 and 4).

## The Original Questionnaire

### Chapter 1: Sources of Law

In this chapter you should mainly give information which will be necessary for the understanding of your observations concerning the legal position of the individual in the chapters that follow. Discuss specific problems only where necessary from the point of view of the legal order of your country. In the footnotes, however, there should be - like in all "information parts" of your report - references which would give the interested reader the possibility to study these questions more thoroughly.
Under the following subdivisions you may follow the order of the chapters.

A. Constitutional Law
Give information especially on:
- the general nature and scope of constitutional guarantees;
- constitutional control of international treaties.

B. Statutory (Parliamentary) Law
Give only information as far as necessary for the project.

C. International Law

In this part, only information on the position of international law in your country should be given; you need not discuss problems unless absolutely necessary for the topic.

The information should include especially:

- the validity of international law, especially: Under what conditions is international law valid in your country? This may involve an answer to the question of a monistic or dualistic or mixed approach.
- (©) The applicability of international law, i.e., under what conditions is international law applicable (i.e., does the differentiation of self-executing/not self-executing treaties play a role)? Special attention should be drawn to the question: May extradition or other cooperation treaties be enforced also by government blanket decrees - i.e., without parliament - or only by parliamentary acts?

*I. International conventions (multilateral)*

*II. Treaties and international agreements (bilateral)*

*III. General rules of international law*

If necessary in your legal order, you may differentiate between customary international law and treaty law. There may also be a difference between custom and *jus cogens* general principles.

D. Supranational Law

As far as your country is concerned: Information should be given here on special problems of the European Communities/the European Union, including also Europol, O.A.S., NAFTA, etc.

E. (©) Relation/Hierarchy between A.-D.

This part should deal with questions especially important for the legal position of the individual:

1. Is there a tendency in your legal order that international human rights as well as national basic rights today play a much more important role in the field of international cooperation?
2. How is the relationship dealt with in your legal order between human rights conventions and conventions/treaties on international cooperation? Especially: (©) Are human rights conventions always (or never?) superior (if so: why? If not: why not?) or does superiority depend on general principles such as *lex posterior/lex specialis*?
3. National basic rights and treaty obligations: How is the relationship between national basic rights as obstacles to international cooperation and treaty obligations?

   (©) Is control by (national or international) human rights "banned" by the "trustworthiness argument" which means: no human rights control if there is an extradition treaty? If so, are there trends to reduce or to attack this argument?

   (©) Are there tendencies in your national order like the so-called "export ban argument" in Germany which reduces the application of national basic rights? Substantive counterparts may be found in the rule of non-inquiry, even though it is not combined with this.

   (©) Applying national basic rights to extradition or other cases of cooperation may cause a special hierarchy problem if there is a treaty with the requesting state which does not know a national human rights exception. Is this problem relevant in your legal order? If so, how is the problem solved?

4. As far as relevant for your country: Are there rules or practice as to the rank of treaties/conventions covering the same subject, i.e., the relation between the European Convention on Extradition, the Additional Protocols hereto, bilateral treaties facilitating the application of the (basic) convention and the Schengen-II-Agreement?

## Chapter 2: Purely Administrative Cooperation of {your Country} as the Requested State/Cooperation of Non-judicial Organs of {your Country} as the Requested State

At the workshop we saw that police are integrated into criminal proceedings either by function, i.e., one organ acting in different functions (functional approach), or by capacity as specific organs, i.e., one organ integrated into criminal proceedings, another organ integrated in purely administrative tasks (organizational approach). Chapter 2 deals with the police either in their function as purely administrative authorities (i.e., non-prosecutorial/investigative function = protective function) or with police organs which are working only as administrative bodies.

Please choose the appropriate heading according to the integration of the police in your national legal system (functional or organizational approach). Or, if it is a melange, indicate that.

Due to the limited space, you should choose examples for areas of administrative cooperation. As we discussed in October, one very good example could be cooperation in tax matters. You may, of course, also refer to other examples like international cooperation in administrative control of private banks.

### A. (©) Overview of the Proceedings

At the beginning of this chapter you should explain how police are integrated in proceedings (functional/organizational approach). The foreign reader should be enabled to have enough information to understand how this is done and how it works. If possible: make a sketch or a graphic.

Explain the relation between the granting procedure and judicial preview/review, preferably by also making a sketch or a graphic in order to visualize the stages.

According to our discussions, the questionnaire differentiates in this and in chapters 4, 7 and 9 between the (administrative) granting procedure and judicial preview/review.
As we discussed at the workshop, **"granting procedure"** means the executive decision-making process which is done by the ministry/ministries or their deleguee.

**"Preview"** means a decision of a court - which may be mandatory, rendered *before* the final decision on the granting of the request is taken. Judicial control is antecedent to the final granting decision. We often find this kind of preview in extradition proceedings.

**"Review"** means that a court decides only *after* a pre-granting decision or a final granting decision has been made, and - like in Switzerland - only on the initiative of the individual concerned.

(©) One of the hypotheses at our workshop was that judicial review is better structured in purely administrative cooperation than in cooperation in criminal matters/cooperation of judicial organs. Give a statement to this hypothesis.

(©) If your country has "judicial preview" (in the sense described supra) you should address the question: Who is to decide on **discretionary treaty** provisions (e.g., "[...] *may* be refused [...]"): Does the court or the granting authority decide or do both decide? This is a question about the relation between the granting procedure and judicial preview/review.

(©) Here, you should also deal with the possibility - where appropriate - to **apply the law of the requesting state** if necessary for the purposes of the requesting state's procedure, i.e., the right of the individual to refuse to testify in certain situations provided for only according to the law of the requesting state. Is there a general tendency in your country to "open" your law and procedures towards the application of the law of the requesting state, e.g., to accept and apply grounds to refuse to testify which are not known in your country but only in the requesting state?

## B. <u>Granting Procedure</u>

Special procedural rules for the granting procedure most probably do not exist. Therefore, you should delete headings - which have no core question **(©)** - if not relevant for your country without changing the numbering of the headings.

### *I. Right to counsel*

### *II. (©) Right to look into the complete file/to disclosure*

See infra chapter 4 B.III. and C.IV.

### *III. Right to be heard/to submit written statements*

### *IV. Evidence*

For example,
- the subject matter to be covered by the evidence,
- right of the individual to bring evidence,
- standard and burden of proof (including the presumption of innocence).

As to the disclosure of evidence, see supra II.

Note that here you have to deal with the granting procedure, i.e., with the question of whether the granting authority itself (not a court - this has to be dealt with under C.) takes or has to take evidence. Here, a short overview is sufficient if there are relevant provisions at all in your country concerning the granting procedure.

*V. (©) Right to have conditions or limitations inserted in the granting decision*
Provide information on practice which is comparable to the imposition of conditions in extradition cases such as the condition of speciality, or other conditions which are meant to assure the fulfillment of requirements/bars/limitations. One condition could be the requirement that results transmitted to the requesting state may not be used in criminal proceedings.

(©) Is there a subjective right of the individual concerned by the request that the granting authorities of your country be required to impose conditions on the requesting state, i.e., may the individual insist on the insertion of conditions? (Note that the question: Do the individual subjects or third parties have the right to insist on the fulfillment of the condition or does the right depend on the protest of the your state? has to be dealt with in the adverse situation - your country as the requesting state = chapter 3 B.II.)

Do third persons adversely affected by the conditions have any rights?

If such rights exist for individual subjects or third parties: how do they work and how are they implemented?

*VI. (©) Right to require the granting authority render its decision within reasonable time*
(©) Is there a right to a speedy decision of the granting authority? E.g., is there a way to combat or prevent a request concerning information of a big firm from pending for months? Provide information if there are comparable questions in the area of granting administrative assistance.

*VII. (©) Right to be informed about the decision of the granting authority*

*VIII. (©) Right to compensation*

(©) Compensation in terms of awards for errors may be important in the field of administrative assistance. Also, the right to data correction is important. Is this question addressed to in your legal order? How does it work?

*IX. Reform discussion*

Here you should - like in all other parts - inform the reader whether there are reform discussions.

## C. Judicial Preview/Review Including the Right of Access to a Court

### *I. (©) Overview*

Your country may have a **general possibility of judicial review** of administrative action like in Germany (Art. 19 para. 4 Basic Law). Your country may also have judicial review only for certain administrative action; it may also differentiate between review by courts and by superior administrative bodies.

Maybe, it will be helpful to discuss the differentiation between judicial control of the execution (what has to be done in your country) and of the performance of the request (the transmission of the results of the execution to the requesting state, i.e., the surrender of information).

(©) If your country has judicial preview: Is the **individual considered a party** in the judicial proceedings?

If your country has a **fully** or **partially adversatorial system**: Does this ameliorate the legal position of the individual in extradition proceedings? If so, in what way?
As to the possibility of **applying the law of the requesting state**, see supra, beginning of chapter 2 A.

### *II. Right to counsel/mandatory counsel*

### *III. (©) Right to look into the complete file/to disclosure*

See infra chapter 4 B.III. and C.IV. How extensive is this right?

### *IV. Right to a hearing before a court and/or the right to submit written statements*

### *V. Evidence*

As far as evidentiary questions are relevant in your legal order provide the following: In this chapter, a short overview might be sufficient. However, you should compare the procedure here with other procedures, i.e., of international assistance in criminal matters as well as with purely national administrative proceedings. You should also indicate on which questions evidence is taken if relevant.

### *VI. Right to have conditions or limitations imposed by the court*

As to conditions imposed by the granting authority, see supra B.VI. Here, the question is only whether the court itself may force the granting authority to impose conditions.

### *VII. Right to require the court render its decision within reasonable time*

### *VIII. Right to be informed about the court's decision*

*IX. Right to appeal*

*X. Reform discussion*

D. (©) **Requirements and Bars/Limitations with Human Rights Aspects**

The requirements and bars/limitations of "purely" administrative cooperation are very difficult to assess in a general way. Therefore, in this part you are free to decide how to structure the requirements and bars/limitations. I suggest that they should be arranged according to chapters 4 D. and 7 E.I., requirements with the strongest human rights aspect and the closest connection to criminal proceedings should be at the beginning.

(©) You should address here, at any rate, the problem of the privilege against self-incrimination and the principle of speciality. The privilege against self-incrimination may be of importance when administrative proceedings may lead to criminal proceedings, i.e., in tax matters when an individual has an obligation to give information about his earnings in administrative tax proceedings and this information may be used in criminal proceedings. It may be improper or inadmissible to provide this information to another state if this state does not confine the use of this information to administrative proceedings. You should, therefore, address the question of speciality in the sense that results of administrative cooperation must not be used in other proceedings such as criminal proceedings.

Other examples: confidentiality in tax cooperation; right to property with regard to freezing (confiscate) or forfeit proceeds; bank secrecy; professional secrecy. You should also address the question of waiver of requirements.

## Chapter 3: Purely Administrative Cooperation with {Your Country} as the Requesting State/Cooperation with Non-Judicial Organs of {Your Country} as the Requesting State

Please choose the appropriate heading according to the integration of the police in your national legal system (functional or organizational approach).

### A. Judicial Review of the Request Emanating from {Your Country} in {Your Country}

This part concerns the situation of a request "leaving" your country. Give information on:

- Who decides on a request to be made (a judge or the granting authority or both)?
- Does the individual have a legal possibility to influence this decision including the right to stop a request?

## B. Judicial Review of the Legality of the Execution of the Request in {Your Country}

This part concerns the questions arising out of problems in the requested state.

*I. Procedure in the requested state*

Does the fact that the rules of procedure in the requested state have not been observed have impact on the use of the results of a request?

*II. (©) Adherence {in your country} to conditions/limitations imposed by the requested state*

(©) Has the individual a possibility to force the authorities of your state to adhere to conditions imposed by the requested state? If so, how can this be done? Can an individual raise the point to a court and force respect of conditions?

*III. Right to compensation*

Questions of compensation for damage done may arise in this context, e.g., if a request has detrimental effects to the business relations of a firm or a person concerned.

## C. (©) Use of the Results of a Request in Criminal Procedure

(©) The use of the results of a request originating from administrative action in criminal procedure may be blocked by conditions or limitations placed by the requested state (supra B.II.). Give information about national rules in your country which prohibit or prevent the use even in the absence of such conditions, e.g., rules on the protection of data.

# Chapter 4: Cooperation in Criminal Matters with {Your Country} as the Requested State/Cooperation of Judicial Organs of {Your Country} as the Requested State with a Foreign State

Please choose the appropriate heading according to the integration of the police in your national legal system (functional or organizational approach).

## A. (©) Overview of the Proceedings

Explain the **relation** between the granting procedure and judicial preview/review, preferably by also making a sketch.

(©) If your country has "judicial preview" (in the sense described supra) you should address the question: Who is to decide on **discretionary treaty** provisions (e.g., "[...] *may* be refused [...]"): Does the court or the granting authority decide or do both decide?

This is a question about the relation between the granting procedure and judicial preview/review.

As to the possibility to **apply the law of the requesting state**, see supra, beginning of chapter 2 A.

## B. Granting Procedure

Special procedural rules for the granting procedure most probably do not exist. Therefore, you should delete headings - which have no core question - if not relevant for your country without changing the numbering of the headings.

*I. (©) Right to be informed about the nature and cause of the accusation and about the privilege against self-incrimination*

See infra C.

*II. (©)Right to counsel/mandatory counsel*

*III. (©) Right to look into the complete file/to disclosure*
We discussed the difference between disclosure in common law procedure and "Akteneinsichtsrecht", etc., in continental systems. You should indicate how these mechanisms work and how they are used in your country, i.e., the manner how the individual concerned may get information about the actual state of proceedings either by a right to look into the file or by disclosure. At what stage does the right obtain, i.e., how early can one see the file? Are certain files/information excluded? If so: (©) What are the reasons? The latter may especially be relevant for the files of the granting procedure, i.e., the files at the ministry. Can one make copies?

*IV. Right to be heard/to submit written statements*
Explain exactly what the rights mean.

*V. Evidence*
Note that here you have to deal with the granting procedure, i.e., with the question whether the granting authority itself (not a court - this has to be dealt with under C.) takes, has the right to take or even must take evidence. If relevant in your country, follow the subdivisions as indicated or give a short overview on:
- the subject matter to be covered by the evidence
- the right of the individual to bring evidence,
- standard and burden of proof (including the presumption of innocence), i.e., who has the burden of proof? What is the standard of persuasion?

*VI. (©) Right to have conditions or limitations inserted in the granting decision*
Provide information on practice which is comparable to the imposition of conditions in extradition cases, such as the condition of speciality or other conditions which are meant to assure the fulfillment of requirements/bars/limitations. Explain how that practice works.

Is there a subjective right of the individual concerned by the request that the granting authorities of your country be required to impose conditions on the requesting state, i.e., may the individual insist on the insertion of conditions? (Note that the question: Do the individual subjects or third parties have the right to insist on the fulfillment of the condition or does the right depend on the protest of the your state? has to be dealt with in the adverse situation - your country as the requesting state = chapter 5 II.)

(©) Do third persons adversely affected by the conditions have any rights? If there are such rights: how do they work and how are they implemented?

*VII. (©) Right to require the granting authority render its decision within reasonable time*
(©) Is there a right to a speedy decision of the granting authority? E.g., is there a way to combat a request pending for months concerning the search of a firm or a private house?

*VIII.(©) Right to be informed about the decision of the granting authority*
(©) Does the individual have the right to be informed about the final granting decision? If not: Is there discussion about this topic in your country as to the necessity thereof?

*IX. (©) Right to compensation*
The right to compensation may play a role, e.g., if a request was made which turned out to have been unnecessary from the very outset on the one side and - on the other - had detrimental effects on the individual concerned (i.e., by search and seizure in execution of the request).

*X. Reform discussion*

## C. Judicial Preview/Review Including the Right of Access to a Court

*I. (©) Overview*

(©) Is there a **general possibility** of the individual to trigger **judicial review and judicial proceedings** (by a court) or only if a particularly intrusive act of execution of the request is sought, e.g., search and seizure, use of microphones, video tape, x-ray? (©) The necessity of judicial control depends on the extent to which there is already judicial control of the granting and granting procedure *prior* to the granting decision (i.e., preview).

You should analyze the differentiation between judicial control of the execution of what was requested (i.e., what has to be done in your country) and of the performance of the request (the transmission of the results of the execution to the requesting state, i.e., the surrender of information).

If your country has judicial preview: (©) Is the **individual considered a party** to the judicial proceedings?

If your country is a member to the **European Convention on Human Rights**: Special attention should be drawn to the question of whether Arts. 5 and 6 are considered applicable in proceedings.

If your country has a **fully** or **partially adversatorial system**: (©) Does this ameliorate the legal position of the individual in proceedings? In what respect?

As to the possibility of being able to **apply the law of the requesting state**, see supra, beginning of chapter 2 A.

*II. (©) Right to be informed about the nature and cause of the accusation and about the privilege against self-incrimination*

(©) The privilege against self-incrimination may play a role in this chapter. E.g., when it comes to the interrogation of a suspect or of a witness who might possibly be involved in the crime underlying the request, that person may have a right not to be required to talk. The question is: Has the suspect/the witness the possibility or the right to remain silent? Must he be informed by officials about the nature and the cause of the accusation and of the right to be silent? You should give information about this and comparable questions either here (i.e., judicial preview/review) or supra under B. I. (granting procedure).

*III. (©) Right to counsel/mandatory counsel*
(©) Is the right to counsel guaranteed? If yes: What are the criteria for mandatory counsel? Is counsel mandatory if it comes to waiver of conditions by the individual? (As to the possibility of waiver by the individual, see infra D.X.).

*IV. (©) Right to look into the complete file/to disclosure*
See in detail supra chapter 4 B.III. The questions may arise also or only on the level of judicial preview/review.

*V. (©) Right to a hearing before a court or to participation in court action/judicial* action
"Court action/judicial action" means that a judge (and not the police or the prosecution) has to interrogate a witness in order to execute a request.

(©) Does the individual concerned have the possibility to participate in the interrogation of a witness himself or by counsel and ask questions (which includes in practice the right to come from the requesting state to your country)? Such a right may be founded on the confrontation clause in Art. 6 para. 3 lit. d ECHR or the 5th Amendment of the U.S. Constitution. Is there discussion, practice on this topic? Note: This question does not deal with the situation after the results of an interrogation (i.e., the minutes) have been transferred to the requesting state. There, it is a question of "normal" criminal procedure that a defendant may "attack" what the witness in the requested state has said.

*VI. Evidence*

This part concerns the taking of evidence by a court on the admissibility[376] of the execution and performance of a request (not, e.g., the act of interrogating a witness/defendant as requested by the other state). Example: Interrogation of a witness as requested may be inadmissible because the defendant in the requesting state has to face discriminatory treatment or the death penalty. In such a case, the court will have to take evidence on the question of discriminatory treatment.

*1. Overview*

Compare with the taking of evidence in other court procedures (i.e., in purely national administrative or criminal proceedings).

*2. The subject matter to be covered by the evidence*

Requirements of or bars/limitations to international cooperation; question of guilt.

*3. (©) Right of the individual to bring evidence*

Including the admissibility of evidence (especially in human rights cases, see also infra chapter 7 C.VI.).

*4. (©) Standard and burden of proof (including the presumption of innocence).*

See infra chapter 7 C.VI.

*VII. (©) Right to have conditions or limitations imposed by the court*

See supra B.VI. (granting procedure).

*VIII.(©) Right to require the court render its decision within reasonable time*

Here you should address the procedure before a court (in preview or review), not the granting procedure which is dealt with supra B.VII.

*IX. (©) Right to be informed about the court's decision*

Give information: Are there explicit rules regarding when, how, and if this occurs?

*X. (©) Right to appeal*

(©) Does your country recognize appeals by the individual? If not: Do other parties have a right to bring suspensive appeals? If yes to the latter: What is the justification for the differentiation?

376 The terms "admissibility"/"admissible" (in German: "Zulässigkeit"/"zulässig") which I have in mind here might cause misunderstandings in the U.S. where it is a term of art with a special meaning: "allowing" evidence to be admitted at trial. "Inadmissible" in the sense of "unzulässig" in the German legal order covers all situations where either state action or private action is considered as not allowed, e.g., the search of a dwelling may be considered "inadmissible" by a court; a writ may be considered "inadmissible."

(©) Are non-suspensive appeals available to the individual? If not: Do other parties have a right to bring non-suspensive appeals? If yes to the latter: What is the justification for the differentiation?

XI. Reform discussion

## D. Requirements and Bars/Limitations with Human Rights Aspects

In this and in all other chapters, I have deleted the exceptions for political, fiscal and military offenses as well as reciprocity in order to slim the outline because the draft reports have revealed that these requirements show very little human rights elements. You should, however, feel free to report also on them if you consider that according to your legal order's approach there are relevant human rights aspects. If necessary, I suggest to deal with them at the end of this part D.

*I. (©) General human rights clauses relating to the situation in the requesting state*

(©) Does your country have any explicit human rights clauses? How do they read? Is there relevant practice? If your country knows only "ordre public" clauses: Explain whether these are used in any way to incorporate human rights clauses or aspects of them.

*II. (©) Clauses relating to the criminal law in the requesting state*

(©) One of the most relevant examples is the death penalty: It seems not to be accepted as a bar to judicial assistance. A state that is opposed to the death penalty may nonetheless assist a state that will execute the penalty. What is the legal situation in your country?

*III. (©) Clauses relating to criminal procedure in the requesting state*

*IV. (©) Discrimination clause*

Only in some countries, imminent discrimination for political, ethnical, etc., reasons is a bar to judicial assistance. (©) What is the legal situation in your country including how well they function in reality? As to the question of proof, see supra C.VI.

*V. (©) Hardship clauses (including the principle of proportionality)*

(©) Some countries provide special hardship or general proportionality clauses to deny a request. What is the legal situation in your country? What are the criteria for applying such clauses in practice? What impact do they have in reality?

*VI. Concurrent jurisdiction*

*VII. Double criminality*

*VIII.(©) Principle of legality*

(©) The principle of legality raises basic questions under this chapter:

a) The general core question is: To what extent do authorities of your country need a legal basis for rendering judicial assistance? How much "informal" cooperation is allowed? Example: Does the rendering of spontaneous information need an explicit legal basis or is it possible as long as there is no explicit legal rejection of it? If so: What legal basis is required?

b) Are explicit rules necessary for (to justify) investigative measures such as undercover activities? In addition: Is preliminary judicial approval necessary?

c) The "silver platter phenomenon:" May a state request assistance from your state for the purpose of carrying out investigations that its own domestic law would not permit it to carry out? If so: What legal basis allows it? If not: How is its practice punished or sanctioned?

*IX. (©) Speciality (i.e., confidentiality/right of privacy/data protection)*

(©) "Speciality" in the field of international cooperation in criminal matters has different aspects which we addressed at the second workshop. Confidentiality does not concern confidentiality between the two states involved on the one side vis-à-vis the individual on the other side; it rather means, e.g., to "keep" or "maintain" the individual's right to confidentiality (e.g., business secrets) which may be infringed in national proceedings. Your country may have rules which restrict infringement of confidentiality only to certain purposes (e.g., criminal investigation). If this is the case, information passed to the requesting state for the purpose of criminal investigation the question arises whether the requesting state may also use the information in non-criminal proceedings. "Keeping" confidentiality thus means that the requesting state may use the information only for the purpose specifically intended. What measures are available to ensure this?

(©) The same mechanisms may be observed with regard to data protection in general and especially to the transmission of data from criminal records. Examples: Would it be allowed for a prosecutor to transmit a copy of a whole file which contains information from the criminal record when the single transmission of such information would not be allowed by the authority responsible for the criminal records? What about transmission of data in a DNA repository?

*X. (©) Individual's right to waive requirements*

(©) Can requirements such as double criminality and speciality or the bar of discriminatory treatment be waived by the individual alone or does the right to waiver belong only to the requested state (i.e., in this chapter: your country)?

*XI. (©) Reform discussion*

(©) Is the "constitutionalization" of requirements taking place in your country? Or/and: Do national and international requirements and bars/limitations merge from the view of your legal order?

Are there tendencies to abolish classical requirements such as the exception for political, fiscal or military offenses? If so, is there anything to replace them?

## Chapter 5: Cooperation in Criminal Matters with {Your Country} as the Requesting State/Cooperation with Judicial Organs of {Your Country} as the Requesting State

### A. (©) Judicial Review of the Request Emanating from {Your Country} in {Your Country}

Like in chapter 3, this part concerns the situation of a request "leaving" your country. Give information on: Who decides on a request to be made (a judge or the granting authority or both)?

(©)Here, in chapter 5, your report should address especially the following situations:
- Has the defendant[377] the right to force (if necessary: by a court's decision) the authorities of your state to make a request[378] by which the defendant wants to get evidence which is in favor of his position?
- Has the defendant or another individual the right to stop a request from being made, e.g., because a judge's decision is missing or the execution would be very detrimental for the legal interests of the individual?

### B. Judicial Review of the Legality of the Execution of the Request in {Your Country}

This part concerns the questions arising out of problems in the requested state.

*I. (©) Procedure in the requested state*

(©) Does it play a role for the use of results of a request whether the rules of procedure in the requested state have been observed?

(©) Should there be a transnational exclusionary rule? If so: What should that rule be? When and how should it apply?

*II. (©) Adherence to conditions/limitations of the requested state in {your country}*

(©) Has the individual a possibility to force the authorities of your state (i.e., by addressing a court) to adhere to conditions imposed by the requested state?

*III. (©) Right to compensation*

Questions of compensation may arise in this context, e.g., if a request was ill-founded from the very outset, executed however, and then has detrimental effects on the business relations of a firm concerned.

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377 In the situation of chapter 5, it is the defendant of a criminal procedure of your country.

378 You do not need to address the question whether the defendant may make a request to another state himself, because state practice shows that this is not possible.

## Chapter 6: Choice of the Forum

We discussed that the question of a right to a certain forum state becomes, at least in Europe, very decisive especially through the creation of Europol.

### A. (©) International Ne Bis in Idem in {Your Country}

(©) Does your country recognize either an explicit national rule for international ne bis in idem like Art. 54 of the Schengen-II-Agreement on the international level or do your national ne bis in idem rules apply to a decision originating from another state?
If not: Does your country solve the problem that two sanctions are possible? If so: how (e.g., by deducting the part of the sentence already enforced abroad)?

### B. (©) Transfer of Proceedings in Criminal Matters from {Your Country}

(©) Does your country recognize the possibility of transfer of proceedings in criminal matters? If yes: Deal here with the granting procedure, the judicial preview/review and the requirements/bars/limitations like in chapter 4 and focus on the question: Can criteria for finding a forum be provided through the law of transfer of proceedings? Does transfer to another state block or bar proceedings in your country?

### C. Transfer of Proceedings to {Your Country}

If your country recognizes the possibility of transfer of proceedings in criminal matters, deal here with the questions mentioned supra in chapter 5.

### D. (©) Abusive Ways of the Choice of the Forum

(©) Does your country, as the requested state, recognize explicit rules for the priority of extradition proceedings in relation to expulsion/deportation? Are expulsion or deportation used as disguised extradition, when extradition would be impossible or difficult?

Does deception or abduction by your state or by a sending state create a bar to prosecution in your country? Only go into details if there are cases which are in favor of a bar to prosecution, as the prevailing approach (no bar) is well known.

(©) Is there a discussion in your country to facilitate extradition proceedings in order to create better protection against abuse?

## Chapter 7: Extradition from {Your Country}

### A. (©) Overview of the Proceedings

Explain the **relation** between the granting procedure and judicial preview/review,[379] preferably by also making a sketch.

379 As to this differentiation see the explanations supra chapter 2 A.

(©) If your country has "judicial preview" (in the sense described supra), you should address the question: Who is to decide on **discretionary treaty** provisions (e.g., "[...] *may* be refused [...]"): Does the court or the granting authority decide or do both decide? This is a question about the relation between the granting procedure and judicial preview/review.

As to the possibility of **applying the law of the requesting state**, see supra, beginning of chapter 2 A.

## B. Granting Procedure

Special procedural rules for the granting procedure most probably do not exist. Therefore, you should delete headings - which have no core question **(©)** - if not relevant for your country without changing the numbering of the headings.

*I. (©) Right to counsel/mandatory counsel*
(©) Is the right to counsel guaranteed? If yes: What are the criteria for mandatory counsel? Is counsel mandatory if it comes to waiver of conditions?

*II. (©) Right to look into the complete file/to disclosure*
See supra chapter 4 B.III. and C.IV.

*III. Right to be heard/to submit written statements*
As to a hearing see infra C.VI.

*IV. Evidence*
Note that here you have to deal with the granting procedure, i.e., with the question whether the granting authority itself (not a court - this has to be dealt with under C.) takes or has to take evidence. If relevant in your country, follow the subdivisions as indicated or give a short overview on:
- the subject matter to be covered by the evidence,
- right of the individual to bring evidence,
- standard and burden of proof (including the presumption of innocence).

*V. (©) Right to have conditions or limitations inserted in the granting decision*
See the explanations chapter 4 B.VI.

*VI. (©) Right to require the granting authority render its decision within reasonable time*
Concerning countries with judicial preview in extradition cases: see chapter 4 B.VII.
(©) In extradition cases, potential harm may be caused by unnecessary detention. Therefore, the "early check" by the granting authority as to obviously ill-founded requests (i.e., inconsistent request; dubious request) which should not even go to courts becomes very decisive. Also the issue may be addressed to of whether the agency involved shall require the minimum amount of actual evidence required for extradition be presented before any arrest.

*VII. (©) Right to be informed about the decision of the granting authority*
(©) Is the right of the individual to be informed of the final granting decision (not only of a court's decision) guaranteed? If not: Is there discussion about this topic in your country?

*VIII.Reform discussion*
As to compensation see infra D III.

## C. Judicial Preview/Review Including the Right of Access to a Court

*I. Overview*
(©) If your country has judicial preview: Is the **individual considered a party** in the judicial proceedings? What exactly does "being a party" mean? What rights does it entail? May an individual trigger judicial proceedings?
If your country is a member to the **European Convention on Human Rights**: Special attention should be drawn to the question whether Arts. 5 and 6 are considered applicable in proceedings. If not: Is it influenced by the convention and decisions thereunder?
(©) If your country has a **fully** or **partially adversatorial system**: Does this ameliorate the legal position of the individual in extradition proceedings? If so: how?
As to the possibility of **applying the law of the requesting state**, see supra, beginning of chapter 2 A.

*II. (©) Right to be informed about the nature and cause of the accusation and about the privilege against self-incrimination*
In extradition proceedings, the individual should/could be considered as a defendant who has the right to be silent. Therefore, the same questions arises here as in the situation of an interrogation of a defendant. See supra chapter 4 B.II. and C.II.
Give information about explicit rules.

*III. Right to counsel/mandatory counsel*
(©) Is the right to counsel guaranteed? If yes: What is the scope? What are the criteria for mandatory counsel? Is counsel mandatory if it comes to waiver of conditions by the individual? (As to the possibility of waiver by the individual, see infra E.X.)

*IV. (©) Right to look into the complete file/to disclosure*
See supra chapter 4 B.III. and C.IV.

*V. (©) Right to a hearing before a court in the presence of the defendant*

(©) If there is no such right: Does your country recognize a right of the individual to be present before the court if a hearing is at the discretion of the court? If there is unlimited discretion: Has the defendant at least the right to submit written statements?

*VI. Evidence*

*1. Overview*

Compare with the taking of evidence in other court procedures (i.e., purely national administrative or criminal proceedings).

*2. (©) The subject matter to be covered by the evidence*

(©) Requirements of or bars to/limitations on extradition, question of guilt. Is it a constitutional requirement to have the question of guilt be a matter to be proved?

*3. (©) Right of the individual to bring evidence*

Including the question of admissibility of evidence. (©) Especially in human rights cases: Can the individual insist on information given by NGOs as evidence?

*4. (©) Standard and burden of proof (including the presumption of innocence)*

This part not only concerns the question of guilt. It is - for example - also relevant for requirements and for bars/limitations to extradition (i.e., has the individual lost the citizenship of the requested state?)? (©) General rules insofar? E.g., who has the burden of proof? What is the standard of persuasion?

(©) Especially: What are the standards and burdens of proof in human rights cases?

*VII. (©) Right to have conditions or limitations imposed by the court*

*VIII.(©) Right to require the court render its decision within reasonable time*

(©) Are there any express time limits for the court's decision like in the Netherlands or like the “speedy trial guarantee” in Germany?

*IX. Right to be informed about the court's decision*

Are there explicit rules like in the Netherlands?

*X. (©) Right to appeal*

(©) Does your country recognize appeals by the individual? If not: Do other parties have a right to bring suspensive appeals? If yes to the latter: What is the justification for the differentiation?

(©) Are non-suspensive appeals available to the individual? If not: Do other parties have a right to bring non-suspensive appeals? If yes to the latter: What is the justification for the differentiation?

*XI. Reform discussion*
See supra chapter 6 D.

## D. Detention

*I. (©) Mandatory detention*
(©) Is detention mandatory or has the judge the possibility to release a person on remand (see Art. 9 para. 3 of the UN-Covenant)? If yes to the latter: Does it ever happen or even rarely?

*II. (©) Special features of detention procedure*
To what extent do proceedings in extradition detention procedure deviate from constitutional guarantees for detention proceedings in a criminal procedure without any foreign element, i.e., in ordinary criminal cases?

*III. (©) Right to compensation*
(©) What are the criteria for compensation if extradition is denied? If there is no compensation at all: What are the reasons?

## E. Requirements and Bars/Limitations with Human Rights Aspects

Like in chapter 4 D., I have deleted the headings for: extraditable offenses, the principle of legality, the political, fiscal and military offense exception as well as reciprocity. Proceed as indicated supra 4 D.

*I. (©) General human rights clauses relating to the situation in the requesting state*
See supra chapter 4 D.I.

*II. (©) Clauses relating to the criminal law in the requesting state*
Prominent example: the death penalty in the requesting state. Give also information concerning cases where, e.g., excessive penalties have been a bar to extradition.

*III. (©) Clauses relating to criminal procedure in the requesting state*
Prominent examples: judgment in absentia, torture. Give information on relevant practice concerning such clauses as, e.g., Art. 3 of the 2nd Additional Protocol to the ECE on judgments in absentia or cases concerning other relevant clauses.

*IV. Discrimination clause*
Give information on relevant practice.

*V. (©) Hardship clauses (including the principle of proportionality)*
(©) Some countries recognize special hardship or general proportionality clauses to deny a request. What is the legal situation in your country? What are the criteria for applying such clauses in practice?

*VI. Concurrent jurisdiction*
If your country is a member to the Schengen-II-Agreement: Give information on the question whether Art. 54 of the Schengen-II-Agreement is considered also as a bar to extradition. Example: the defendant has already been finally judged in a Schengen state and a third Schengen state requests extradition from your country.

*VII. Non-extradition of nationals*
If relevant for your country: Give information to what extent there are deliberations to abolish the exception and the scope of any potential abolition.

*VIII.(©) Double criminality*
(©) Is double criminality in extradition cases considered as a constitutional necessity with respect to the "nulla poena sine lege" rule?
(©) Is there a tendency to reduce the impact of double criminality?
(©) Does your country make a differentiation between double criminality *in abstracto/in concreto*?
(©) Is insanity of the offender checked in extradition proceedings?

*IX. Speciality*

*X. (©) Individual's right to waive requirements*
See supra chapter 4 D.X.

*XI. (©) Reform discussion*
(©) Is a "constitutionalization" of requirements taking place in your country? Or/and: Do national and international requirements and bars/limitations merge from the view of your legal order?

Are there tendencies to abolish classical requirements such as the exception for political, fiscal or military offenses? What impact does this have? E.g., have those requirements served as "masked" repositories for human rights protections and have the "masked" human rights protections been incorporated elsewhere?

## Chapter 8: Extradition to {Your Country}

### A. (©) Judicial Review of the Request Emanating from {Your Country} in {Your Country}
Does the individual have a possibility to stop a request, e.g., when detention conditions in the requested state would be dangerous to life?

### B. <u>Judicial Review of the Legality of the Execution of the Request in {Your Country}</u>

*I. (©) Procedure in the requested state*
If dealt with under chapter 6 D., make a cross-reference.

*II. (©) Adherence {in your country} to conditions/limitations imposed by the requested state*

(©) Has the individual a possibility to force the authorities of your state to adhere to conditions imposed by the requested state? If so, how can this be done? Can an individual raise the point to a court and force respect of conditions?

*III. (©) Right to compensation*

(©) Example: the request of your country was ill-founded from the very outset. Can the defendant get compensation by your country for extradition detention in the requested state?

## Chapter 9: Cross-Border Enforcement of Foreign Sanctions in {Your Country}

### A. Overview

Give a short overview on the possibilities and procedures.

*I. Custodial sentences*

*II. Forfeiture and confiscation of proceeds*

*1. Tracing and freezing of proceeds*

*2. Third parties' rights*

*3. Asset sharing*

*III. Proceedings*

Remark: the procedure concerns either a convicted person abroad or goods located in your country with regard to which an individual has certain rights (i.e., property, etc.).

### B. Granting Procedure

During the workshop we did not identify core questions. Therefore, a short overview may suffice.

### C. Judicial Preview/Review Including the Right of Access to a Court

During the workshop we did not identify core questions. Therefore, a short overview may suffice.

### D. Requirements and Bars/Limitations with Human Rights Aspects

*I. General human rights clauses relating to the situation in the requesting state*

*II. Clauses relating to the criminal law in the requesting state*

*Give information on such clauses.*

*III. (©) Clauses relating to the criminal procedure in the requesting state*

(©) Is it a bar to enforcement if the judgment was based on proceedings contrary to human rights standards?

(©) Does your national law allow for refusal of confiscation or forfeiture with respect to the way the confiscation is made (e.g., if the manner in which it was confiscated violates your law)?

(©) Does your national law differentiate between enforcement of a confiscation in criminal procedure and of an ordinary civil judgment?

*IV. Discrimination clause*

*V. Hardship clauses (including the principle of proportionality)*

*VI. Conflicting interests of victims and third parties*

E.g., in confiscation cases. What rights - if any - do victims and third parties have? If not: shall they?

*VII. (©) Double criminality*
(©) Explain the function of double criminality in the situation of enforcement in your country.

*VIII.(©) Consent/Individual's right to waive requirements*
(©) Should the consent of a convicted person as a prerequisite be the rule? If yes: Which requirements shall be upheld irrespectively of the person's consent?

*IX. Reform discussion*

**Chapter 10: Cross-Border Enforcement of {Your Country's} Sanctions in a Foreign State**

*I. (©) Right to be informed about cross-border enforcement*
(©) By both, the sentencing and the administering state, or - at least - by one state. Is information given in practice?

*II. (©) Right to initiate cross-border enforcement*
(©) Has the individual the right to initiate a request of your country or at least the right to proper use of discretion and to judicial control thereof?

*III. (©) Consent of the convicted person as a condition to cross-border enforcement*
See supra chapter 9 VIII.

*IV. Influence of your country with regard to amnesty, pardon, conditional release after transfer of execution*

**Chapter 11: Summary**

**A. <u>General Observations</u>**
Here you should summarize your own observations as to the legal position of the individual in all of the circumstances addressed to in your report.

**B. (©) <u>Original Responsibility and Shift of Responsibility between the Requesting and the Requested State and vice versa</u>**

(©) Here you should summarize and present examples which you have found referring to the problem that responsibility is or may be shifted from one to the other state. This is possible because there is not only one national proceeding in which responsibility lies only with that state. There is a cross-current of potential conflicting responsibilities in which the individual may "fall through the cracks." In order to check the legitimacy of a shift, you will have to address the questions:

Where does the original responsibility lie?

If it is shifted to the other state: is this legitimate?

Examples may be found:

- in the use of administrative assistance in a case where criminal assistance is not admissible or in the use of the results of evidence obtained in criminal proceedings conducted against person A in criminal proceedings conducted against person B without additional request;
- in the possible practice of the "silver platter phenomenon" (see supra chapter 4 D.VIII.);
- in the differentiation between requesting states which are bound and those which are not bound by an international instrument like the European Convention on Human Rights and its control mechanisms;
- in Art. 96 of the Schengen-II-Agreement which shifts responsibility for the prima facie admissibility of detention to the state which gives information into the Schengen Information System;
- in the law of extradition detention (mandatory detention seems to shift responsibility to the requesting state);
- in the law of compensation;
- in the hesitancy to adopt a transnational exclusionary rule.

**C. (©) Rule of Non-Inquiry into the Human Rights Situation of the Requesting State**

(©) Are there trends in your country towards or against adherence to the rule of non-inquiry into the human rights situation of the requesting state? Is the tendency to a more inquiring trend or vice versa? What are the reasons in either case?