

Contents

A.	Introduction	3
B.	Interim result: new questions - few answers	6
	I. Administrative cooperation	6
	II. Granting procedure	7
	III. Applicability of fair trial rights = Inconsistencies with "normal" criminal proceedings	7
	IV. The scope of human rights	7
C.	(In-)Consistency with standards of proceedings	8
	I. Reasons for the involvement of courts	8
	II. (Non-)Application of national standards of criminal proceedings	11
	III. (Non-)Application of national standards of administrative proceedings	14
	IV. International standards of proceedings are applied/not applied	18
D.	Scope of protection by national basic rights	18
	I. Extraterritorial expansion or territorial restriction?	18
	II. Procedural restrictions: standard of proof for human rights violations	19
	III. Check of the constitutionality of treaties	20
E.	Relation between the legislator, the executive and the judiciary	20
	I. Treaty requirement	21
	II. Restricted scope of court's control	22
	III. Rationale of the granting procedure	26
F.	Relation between the requesting and the requested states: original responsibility and shift of responsibility and vice versa	26
G.	Conclusions	26

Otto Lagodny

The Individual as Subject of International Cooperation in Criminal Matters

A Comparative Study

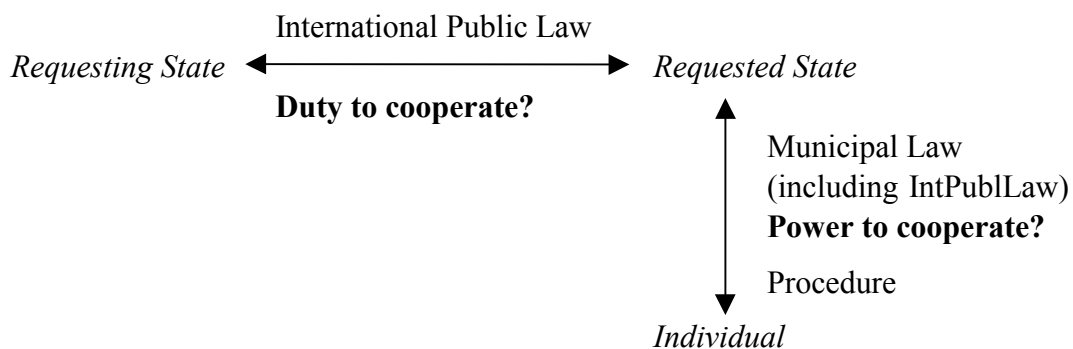
A. Introduction

In national criminal proceedings, it is well-accepted that the individual as a suspect, as an accused or in any other role is no longer regarded as the mere "object" of the proceedings having no individual or personal subjective rights at all. It is rather commonplace that especially fair trial rights have to be observed. The individual's position as a "subject," however, is not at all clear as soon as domestic criminal proceedings need international cooperation in some way, be it extradition, mutual assistance or some other form of cooperation. As these areas are covered essentially, but not comprehensively, by international treaties, one common argument is the following: International treaties are made only for the benefit of the states as parties to the treaty. Thus, from this perspective, the individual is the mere object of such treaties.

This and other patterns were analyzed in the project. If the individual is recognized as having his or her own subjective rights - be it through international treaties or conventions or through purely municipal law, especially through constitutional guarantees, the legal relations between the two states are no longer two-dimensional, but three-dimensional. 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 for doing so are a matter of municipal law which may include international public law. The power or authority to cooperate refers to the (national) principle of legality. It concerns questions, such as whether the relevant act of cooperation is allowed or "legal" 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 Criminal Matters (LIACM) in Germany. In the former, the question was 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 in the requested state to cooperate. This power to cooperate does not necessarily create a duty to cooperate.

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 will be 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. The (municipal) balance (and separation) of powers between the executive, the judiciary and the legislature will be of great importance: the more power is reserved to the executive, and the more the judiciary is precluded concomitantly from subject matters to be decided, the more this procedural approach can be characterized as "two-dimensional" or the "object" approach.

In cooperation proceedings we recognize a distinction 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 or focus.

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

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 about the nature and cause of the accusation 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 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 im-

posed 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 issues are governed mainly by municipal law. The project, thus, focussed mainly (but not exclusively) on national procedures and the impact of the rule of international and national human rights law to a fair trial. General trends in the national reports 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 their national laws, systems, and procedures. This is the most crucial question. The details of the reports 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 a few answers (infra B.).

We can structure the 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, these issues will be analyzed within the context of 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 will be analyzed, considering their division of responsibility and the impact of that cooperation on national proceedings (infra F.). A final chapter will try to draw some conclusions (infra G.).

B. Interim result: new questions - few answers

The project is mainly comprised of national reports from the European Union (*Gleß*), Finland (*Tallgren*), Germany (*Lagodny/Schomburg*), Italy (*Parisi*), the Netherlands (*Swart*), and the United States of America (*Blakesley*). These reports have revealed that many of the questions in the outline, even if they were considered as "core questions," have not yet been answered by the national systems. As general features and questions, the following points have to be highlighted:

I. Administrative cooperation

Administrative cooperation has not yet become a well-developed area of research and legal theory. Nor has it become well developed legally within the various systems. 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 the impact that each has on the other. That is, each discipline considers that cooperation falls in-between and fails to appreciate such "in-betweens."

II. 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 from any regulations. A general exception exists in the Netherlands.

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 only the object of the process and had standing only on a derivative basis. The decision to extradite or not was considered to be only a 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 the general, continental, approach was that courts had and have to be - see Belgium - integrated into the process at all.

These sorts of 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.

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

Another general feature is that fair trial rights which are considered as being basic in the context of national criminal proceedings, but either seem to vanish as soon as it comes to international cooperation, or they are applied even though it is not convincing conceptually 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.).

IV. The scope of human rights

The scope of human rights also is a more general question. 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.

C. (In-)Consistency with standards of proceedings

In all areas of international assistance, we can distinguish administrative granting proceedings from 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 matters of extradition. In the field of judicial cooperation, courts are involved at least if coercive measures are at stake. In administrative cooperation, however, courts will decide on the initiative of the individual only 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. 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. In Germany, the possibility of a court's control is mandatory in general according to Art. 19 para 4. German Basic Law (BL) as soon as a possibility of an infringement on basic rights exists.

If we trace back the evolution of extradition procedure, we find - in some circumstances and amongst many other arguments - the widespread idea that the court is more a servant to the executive, a "collaboratrice d'une autorité administrative:" 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."

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?

b) The constitutional reasons, however, do not necessarily require a court's decision *prior* to the decision of the granting authority, but they do provide the drudge

argument. And the exact reverse situation causes irritations: where 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 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 (i.e., exclusion of hearsay evidence, etc.) are not applicable. The result is violations of human rights, but a pretence of protection. 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 practised in Switzerland. There, the courts are installed in extradition proceedings as *administrative* courts, not as criminal courts. The Executive Branch (Secretary of State) in the U.S. has virtually never decided to extradite a fugitive after a court has held that the person should not be extradited. The authority to do this, however, exists. The Swiss model might work even in the U.S., if the regular courts sat as a review to any decision of the executive. A more efficient system for the U.S. might be to require a judicial decision always (with an application of all human rights protections) before a person is extradited from the U.S. This could be combined with a rule that the executive could not contravene a decision not to extradite, but could decide to perform "mercy" and not extradite a fugitive, even when a court has held the person extraditable.

c) 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* reviews only these two criteria.

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 wherein it, nevertheless, reviews the decision of the *Chambre d'Accusation*. 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 labour 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. These are reviewed by the *Conseil d'État* only.

The *Conseil d'État* gave interesting reasons for its competence: in the *Astudillo* and in the *Croissant* 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. 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. 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. A major problem, of course, is that the U.S. has not developed a full-fledged system of administrative courts, such as in France or elsewhere on the continent. That difference in superstructure may be a significant reason for difficulties in convergence, harmonization, and comparison.

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*. This is a clear example for the difficulties which the preview system in extradition procedure brings about.

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. 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 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: 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 ARHG) and the new legislation of Liechtenstein 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, in turn, raises additional questions if compared to the situation of a purely national case where the objects remain within the same national jurisdiction. Only if this is the case, is there any comprehensive protection by courts. The German national report is the only one revealing such differentiations in national practice.

It is rare to find a judicial decision 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 stake. 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?

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

1. *The principle of legality*

In the European Union, i.e., the third pillar instruments, we observe quite a questionable development. This arises in relation to the general principle of legality, not the principle of *nulla poena sine lege* but the requirement that there be a legal basis for state actions. The problem that arises 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. In this regard, a similarity to the history of federalism in the U.S. may be enlightening. Hence, the ongoing "struggle" within the EC/EU over which entity is to determine or produce the law brings about 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* (or probable cause in the case of the U.S.) 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." A parallel, therefore, is drawn between preliminary hearings in criminal procedure and extradition hearings. The preliminary hearing, of course, is where the accused person is "bound over" for trial. 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 the 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."

In addition to this criminal procedure approach in general, due to evidentiary requirements, i.e., procedure and form for the taking of evidence to be used for the *prima facie* requirement, is a major reason that problems for continental states requesting extradition arise. The rules on the exclusion of hearsay evidence especially cause important problems. These problems, however, seem to be reduced in extradition proceedings. 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.

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

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

a) One could discuss 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 offence 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 order his release from detention.

- The federal competence to grant extradition and to deny the competence of the Laender which have the competence for the administration of justice ("Rechtspflege").
- With regard to the European Convention on Human Rights (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 a "civil rights," thereby excluding the protections of Art. 6 ECHR. In Finland, a constitutional guarantee (sec. 16) is comparable to Art. 6 but covers all decisions by public authorities, including administrative decisions.

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.

A more pragmatic approach seems to prevail in Finland: the Finnish solution is that fair trial rights guaranteed in national Finnish criminal procedure seem to apply to international cooperation procedures as well, at least "where appropriate."

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, then 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 stake 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 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 has "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 - amongst 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?).

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

The (non-)application of national standards of administrative proceedings also presents 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 and important implications for the individual

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.

In the U.S., such deliberations seem to be beyond consideration. First, rules of administrative procedure are much less protective of the individual. Also, 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 principle, i.e., there might be extradition on the basis of a law comparable to the LIACM 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 "fight crime," as it sees the problem, finds ways to erode personal liberties, such as by seizing many of the mechanisms that could improve international cooperation, including extradition. The tendency is to abuse what might be valuable cooperative measures as a means to avoid protections of accused persons. Thus, in reaction to that insidious tendency, a countervailing tendency exists that generally tries to obstruct streamlining due to lack of trust in the executive branch.

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. The general tendency in the German pro-

cedure 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 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 stake, because the constitutional protections are tailored only for this kind of proceedings.

In states in which a court decision on extradition takes place *prior* to the final granting decision, e.g., Germany, Italy, the Netherlands 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 fields 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 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.

3. *Abolition of the granting procedure?*

a) One could ask now: if we apply general rules on administrative procedure to the granting procedure, will not the entire process of cooperation be expanded to an unbearable extent? In Germany, e.g., a visible 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 procedure 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. 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. 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. 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 Schengen Information System (SIS) 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.

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 dependant 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 so decisive 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 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 by many, especially since 11 September 2001, as neither protecting at least illegal "resident aliens," i.e., foreigners illegally 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. nationals abroad under some circumstances. The same might be true for the protection against self-incrimination (5th Amendment). 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. 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 wishes to prosecute. Other reports do not contain any comparable restrictions to national basic rights, e.g., in Germany the opposite view is prevailing.

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. 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.

The opposite development can be observed in France where French notions of basic rights are enforced via the *ordre public*. 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). 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? Or do we need a "real risk?" 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.

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 the rules of 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. Other states make a comparable kind of restrictive inquiry.

In the U.S., there was 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 (i.e., 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."

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.

On the other hand, there are clear examples of judicial scepticism about foreign treatment of the individual: In the *Venezia* case, 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 fulfilment 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.

III. Check of the constitutionality of treaties

A characteristic of the Dutch legal order is that there the courts may not control the constitutionality of national laws or international treaties according to Art. 120 Dutch Constitution. However, Dutch courts may check whether national laws are compatible with international treaties/conventions (Art. 94 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 recommendation of the Council of Europe

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. We see that this 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. 552 n No. 1 Dutch CCP). 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 have trust in the legal system of the other state. The trustworthiness is evaluated

- 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*. 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.

However, the trustworthiness argument seems to vanish at least to some extent under these circumstances. The ECHR may be an obstacle to cooperation even on the basis of the trustworthiness 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., in the case of the death row phenomenon, it will be presumed that the fugitive's human rights will be violated, unless and until the country in question rebuts this presumption with a reliable promise that the violation will not occur. In Finland as well as in other states the opposite 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."

II. Restricted scope of court's 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 stake (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 offence exception, 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 behaviour.

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. According to the Supreme Court indicia of a non-justiciable political question, we see amongst others: "lack of judicially discoverable and manageable standards for resolving it." This criterion obviously is not relevant with regard to human rights standards.

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."

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

"[...] 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. 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.: "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 marshalled 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.

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." 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.

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

2. *Restrictions in the Netherlands*

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

- the persecution clause, or
- hardship clauses, or
- the reliability of an assurance not to execute the death penalty. On the other hand, Dutch courts check this by determining whether the requesting state guarantees a fair trial.

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. The Min-

istry's decision, however, may be controlled by a civil court which - de facto - has the function of an administrative court.

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.

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. 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. In the U.S. "administrative discretion is read to be nearly absolute" as far as discretionary clauses are concerned. In Finland, the situation seems to be similar.

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.

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. Relation between the requesting and the requested states: original responsibility and shift of responsibility 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 to addressing this issue: 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. 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. Our purpose here is 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. The project 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 been able to raise a panoply of questions that had not been raised before and which provide a foundation for explaining the developments in this arena.

However, it turned out to be impossible to provide full *answers* at all to the more than 70 core questions of the questionnaire. As stated at the beginning of this brief, it was considered by us not only to be important to find new questions but to get at least a fundament for answers; a fundament which could explain developments. Moreover, the comparative analysis has provided important insight into differences of "legal culture" and attitude that are likely among the primary causes for difficulty in harmonization and cooperation.

As we have seen, the complexity of differing systems and focus within separate systems causes a potential for cacophony of interconnected consequences. Differences could be overcome in the national orders, but one change here could entail several consequences there. Some consequences would be intended; others not. Some would be good; some would be bad. If we take the question of the restricted territorial range of basic rights in the U.S. this project could not reflect consequences of a non-restricted range of basic rights in other areas of law. The same would be true for the question of the extent to which the police, as such, are acting under the scheme of criminal procedure. All these examples show how much just the problems of international cooperation are connected with all the other areas of national law.

The project could not bring about solutions on the level of international law, i.e., a convention, because this is not the proper way to deal with the problems identified. Only a general task could be formulated as the Congress of the Association Internationale de Droit Pénal in 1999 has done. It is for the national orders to take this up and re-adapt their laws in a coordinated and coherent manner.

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 Netherlands and in the U.S., where some legal questions are blocked from being decided by the judiciary.

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 at all confined to criminal procedure but which do apply also in administrative procedure. On the other hand, these protections may be available in the criminal, but not the administrative procedure, in the U.S. 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 can observe that in the U.S. the individual is provided with a full-fledged hearing with many (albeit not enough for our reporter) guarantees, but which are not sufficiently worthwhile because the scope of issues that can be addressed at the hearing, especially in relation to questions of human rights interests and values, are 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. 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.

4. However, 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 rights.

The full text will be published by Nomos, Baden-Baden, in spring 2002.
ISBN 3-7890-7837-9, ca. 810 pages, approximate price € 100,-



INTERDISZIPLINÄRE UNTERSUCHUNGEN AUS STRAFRECHT UND KRIMINOLOGIE

Herausgegeben von Hans-Jörg Albrecht und Albin Eser

Band 3/1

Vincenzo Militello/Letizia Paoli/Jörg Arnold (curatori)

Il crimine organizzato come fenomeno transnazionale

Forme di manifestazione, prevenzione e repressione in Italia,
Germania e Spagna

Freiburg 2000, 480 Seiten. ISBN 3-86113-926-6

€ 31,-

Band 3/2

Vincenzo Militello/Jörg Arnold/Letizia Paoli (Hrsg.)

Organisierte Kriminalität als transnationales Phänomen

Erscheinungsformen, Prävention und Repression
in Italien, Deutschland und Spanien

Freiburg 2000, 445 Seiten. ISBN 3-86113-927-8

€ 31,-

Band 3/3

Vincenzo Militello/Barbara Huber (eds.)

Towards a European Criminal Law Against Organised Crime

Proposals and Summaries of the Joint European Project
to Counter Organised Crime

Freiburg 2001, 302 Seiten. ISBN 3-86113-913-8

€ 17,50

Band 4

Stefanie Mehrens

**Die Kronzeugenregelung als Instrument
zur Bekämpfung organisierter Kriminalität**

Ein Beitrag zur deutsch-italienischen Strafprozeßrechts-
vergleichung

Freiburg 2001, 389 Seiten. ISBN 3-86113-920-0

€ 21,50

Band 5

Sabine Gleß/Rainer Grote/Günter Heine (Hrsg.)

Justitielle Einbindung und Kontrolle von Europol

Rechtsvergleichendes Gutachten im Auftrag
des Bundesministeriums der Justiz

Bd. 5/1: Nationale und europäische Strafverfolgung

Bd. 5/2: Polizeiliche Ermittlungstätigkeit
und Grundrechtsschutz

Freiburg 2001, 2 Teilbände, 694 + 638 Seiten. ISBN 3-86113-917-0

€ 66,50