

Extradition and Human Rights:

A look at the EU – US and Germany – US extradition agreements and their consistency with each other and with Human Rights

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Abbreviations

Area of Freedom, Security and Justice - AFSJ

EAW – European Arrest Warrant

ECHR – European Convention on Human Rights

EU – European Union

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UK – United Kingdom

US – United States (of America)

1. Introduction

This study will analyze extradition agreements between the United States of America (USA) and the European Union (EU) as well as between Germany and the US in order to assess how consistent they are among each other and with Human Rights. The general problem which arises when looking at these agreements is the fact that Germany is a member state and therefore obliged to comply with EU rules and regulations. Nevertheless, the state has its own extradition agreement with the US which results in the question of how consistent they are and more importantly how the relationship of the two agreements is regulated i.e. do the agreements maybe state that the German - US agreement will only be used in cases which are not mentioned under the EU – US agreement? Another main problem arises when one looks at extradition agreements and their relationship with Human Rights. Dugard and Van de Wyngaert¹ point out that international crime has increased and thus states are more involved in extradition in order to stop this development. In doing so, the responsible parties (e.g. Germany, the EU and the US) often leave out Human Rights concerns and hence the development of extradition agreements “fails to provide a proper legal framework for the balancing of the human rights of the fugitive and the interest of states in the suppression of transnational crime”¹. Because of this, the second general problem this thesis will deal with is the question to what degree the two chosen agreements are in line with Human Rights concerns.

At this point, it is crucial to not only understand what the main problems of extradition are but also why extradition has evolved and where its importance stems from. The practice of surrendering fugitives dates back to Antiquity² but the practice of extradition as described in this study dates back to the decades before 1914 and the beginning of World War I⁴. Crime and law enforcement both become more internationalized due to new technologies that allow better communication and easier travel from one country to another which in turn allow more organized crime and easier evasion of criminal prosecution⁴. Especially Western countries have tried to overcome this problem by concluding extradition agreements which enable one state to ask another one to extradite a suspect without setting the grounds for that every time an extradition request is issued as they have been set in the agreements³.

John Bassett Moore⁴ already pointed out this reason when he explained why states get involved in extradition in 1896 when he wrote that in earlier years, one state did not get involved in the punishment of foreign criminals and by that granted them asylum on its territory unless the principle of double criminality was applicable i.e. one state would only get involved in extradition matters with another state if the fugitive committed a crime which was also punishable according to their criminal law system. The change from the policy of safeguarding the rights of fugitives to a policy of extradition among states is, according to Moore⁴, mostly based on modern development: “The present century has been characterized by a wonderful improvement in facilities of travel and by vast

¹ Dugard J., Van de Wyngaert C.(1998). "Reconciling Extradition with Human Rights." The American Journal of International Law **92**(2): 187-212

² Blakesly, C. L. (1981). "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History." 4.B.C. Int'l & Comp. L. Rev. **39** (1981).

³ Andreas P, Nadelmann A. (2006). Policing the Globe - Criminalization and Crime Control in International Relations. Oxford, Oxford University Press.

⁴ Moore, J. B. (1896). "Extradition." The American Law Register and Review **44**(12).

movements of population. And as flight from justice has become more easy and more frequent, the necessity to check it has become more apparent”⁴. Even though this text is more than a hundred years old, this line of reasoning still holds true.

Another reason why extradition is important is the rise of terrorism. In the 19th century, it was mostly political terrorism against the existing monarchies in Europe which required extradition while today states like the US make it their priority to capture extremists and therefore stop terrorism coming from the Islamic world^{3,5}.

After understanding the general problems of extradition and why the practice of extraditing fugitives has evolved in the first place, it is now important to point out why it is interesting to look at these two agreements in particular. First of all, the agreement between the EU and the US is of importance as it is the first of its kind (although it has to be noted that of 2009, it is no longer the only one as in that year, the EU signed an extradition agreement with Japan). Usually, only states have bilateral agreements on extradition among each other but the EU is not a state but an intergovernmental institution. Given these special circumstances, it makes sense to look at an agreement the US has with a member state of the EU to compare them and therefore get an understanding about how the EU handles its competence to conclude agreements with other states even if this state already has a similar agreement with one or more member states of the EU. Germany, in this thesis, is chosen from the 27 member states for two reasons: first of all, it is a founding member of the EU and hence has had an influence on the integration process that led to the attribution of competences in criminal law for the EU. Secondly, the German Federal Republic has a strong tradition and constitutional jurisprudence in relation to human rights protection.

Last but not least, it is important to understand where the EU draws the competences from to conclude an extradition agreement with a third state in relation to criminal matters. As the agreement was signed in 2003, it will first be described under which competences it was done back then and afterwards, the current situation will be described. First of all, it has to be noted why the EU and the US were willing to enter into negotiations and ultimately agree on an extradition agreement. After 9/11, the USA started their “war on terror” and even though they made it clear that they were in charge, they also knew that they could not act alone. Therefore, they greatly involved the EU which was more than willing to enter into more advanced transatlantic cooperation despite the quarrel between the US, France and Germany about the war in Iraq³. Transatlantic cooperation was first focused on counterterrorism only but soon the scope got wider when the EU pointed out that cooperation on counterterrorism cannot work without cooperation in extradition and criminal matters⁶. The extradition agreement was then signed under the old third pillar and more specifically on the basis of article 24 TEU (Treaty on the European Union) which gives the EU the necessary competences to conclude international agreements with third states⁷.

⁵ In fact, most treaties especially between the US and other states involve a clause nowadays which makes political offences non-extraditable: see 2 Determining the lawfulness of extradition agreements

⁶ Fetcher, et al(2008). EU Criminal Law and Justice. Cheltenham, Edward Elgar Publishing Limited.

⁷ See Article 24 TEU: “1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency. 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions. 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a

Since then, the Lisbon treaty has entered into force: the “third pillar” has been abrogated and EU criminal law competences are to be found in the TFEU (Treaty on the Functioning of the European Union). Indeed, with the signing of the Treaty of Lisbon, the third pillar disappeared and matters which belonged to Justice and Home Affairs under the Treaty of Amsterdam are now matters under the Area of Freedom, Security and Justice (AFSJ). The latter falls under the shared competences of the EU as laid out under Article 4 TFEU⁸. Granting the EU competences, however, is not enough when the EU wants to sign an extradition agreement with a third state. Therefore, the TFEU also states exactly under which circumstances the EU can take which steps and what limitations there are to EU involvement in bilateral agreements with third states. This can be found under Articles 216 to 218 of the TFEU⁹.

All in all, this section introduced extradition by explaining its origins, the main problems which accompany it and which competences the EU has on the matter in external relations. It is most crucial to understand that extradition touches on relationship between sovereign states and this brings certain problems along, for example the problem that most states refuse to extradite its own nationals in order to protect their rights they have under the sovereign state¹⁰. Nevertheless, states conclude extradition agreements because international and cross-border crime pose a great threat on the way the world and states work. At this point, it is important to understand what extradition actually is and how it works, therefore a definition will be given in the next section.

1.1 Concepts

qualified majority in accordance with Article 23(2). 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34 (3). 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally. 6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.”

⁸See Article 4 TFEU 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: [...] (j) area of freedom, security and justice [...].

⁹See Articles 216 to 218 TFEU:” *Article 216* 1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. *Article 217* (ex Article 310 TEC) The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure. *Article 218* (ex Article 300 TEC) 1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.”

¹⁰ Gui-ying, Y. (2007). "On the Non-Extradition of Nationals Principle in the Criminal Legal Globalization Era." *Science of Law: Journal of Northwest University of Political Science and Law* **2007** - 5.

This section explains the three most important legal issues related to extradition: extradition, human rights and the death penalty. One might argue that concerns related to the death penalty and the question how lawful it is are in fact concerns about human rights. Nevertheless, the two concepts are dealt with separately in this study for two reasons: first of all, as will be explained in more detail below, abolishing or allowing the death penalty is not part of most Human Rights charters and neither is it a violation of Human Rights to sentence someone to death¹¹. In addition, the topic of the death penalty in relation with extradition is such a vast topic that it would not justify the issue when it was incorporated into Human Rights concerns. This section however starts with explaining what extradition is and how it is executed.

Extradition

In general terms, extradition is set in an agreement between states which regulates how and when one state sends a person “who is absent from a state pending a criminal trial or following the imposition of a criminal sentence to another state to be tried there in front of a court to that state, in order to serve the sentence or to appear at the criminal trial”¹². The Council of Europe took first actions in extraditions matters in 1957 when the Council of Europe Convention on extradition entered into force and until now, all EU member states have signed this convention. Nowadays, extradition within the EU is regulated by the European Arrest Warrant (EAW) which will be described in more detail later. No matter how extradition is manifested and regulated, though, the basic procedure is always the same. The requesting state (the state where the fugitive has either been sentenced or has to appear in court) demands the extradition of a fugitive from another state (the requested state) where the person sought is residing¹². Of course, an extradition request cannot be made for every single crime committed and usually agreements entail a list of extraditable offences.

Human Rights

Human Rights are a vast topic with different resources such as the UN charter on Human Rights, different national constitutions and the European Convention on Human Rights (ECHR). The EU is based on Human Rights protection due to Article 6 TEU¹³ which states that the EU is founded on several principles such as liberty, democracy and respect for fundamental and human rights. Even though the ECHR is not an actual part¹⁴ of the article as intended after the first Intergovernmental Conference which introduced the Constitutional treaty¹⁵ concluded its meeting, it is the main source of Human Rights¹⁶ alongside the Charter of Fundamental Rights of the European Union and the general principles of EU law¹². As this thesis mainly deals with the EU and how extradition is handled in its external relations, the main source of reference for Human Rights will be the ECHR as well as the EU charter of Human Rights.

¹¹ See 1.1 Concepts *Death Penalty*

¹² Peers, S. (2011). *EU Justice and Home Affairs*. Oxford, Oxford University Press.

¹³ See Article 6 TEU: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”

¹⁴ The EU recognizes the ECHR but does not mention it explicitly in the TEU or TFEU

¹⁵ later amended into the Treaty of Lisbon

¹⁶ Its significance to the EU and Human Rights will be explained later in the study when the CASE OF SOERING v. THE UNITED KINGDOM (*Application no. 14038/88*) is introduced and explained

Defining Human Rights is a difficult task, as different groups see different ways to use them. Some see Human Rights as insurance that everyone is treated with respect and dignity while others see Human Rights as an instrument to protect terrorists and criminals while ignoring the overall well-being of society¹⁷. This thesis will not attempt to judge which view is right or whether there is a different one. In order to have an understanding of Human Rights in this case, the thesis will be based on the actual texts and Clapham's argument that Human Rights nowadays are usually meant in a legal, not philosophical way. Therefore, the very broad definition used is the following: "the content of Human Rights is usually understood by reference to the legal catalogue of human rights developed through international texts"¹⁷.

Death Penalty

In general, it can be observed that only the ECHR, but no other source of Human Rights, state that the death penalty is illegal and has to be abolished and therefore, international law does not prohibit it. This can be found under Protocol 6 which states that the Council of Europe incorporates the abolishing of the death penalty because most European states have taken measures to do so before¹⁸. The first article of the protocol is already the article which explicitly states that the death penalty is to be abolished¹⁹.

Despite the clear statement in the ECHR, the death penalty is not a reason to withhold extradition: "as international law does not prohibit the death penalty, the fact that the fugitive will be executed if returned to the requested state cannot per se obstruct extradition. The manner of execution however, may constitute cruel or inhuman punishment and if that is the case extradition should be refused [...]"¹. The manner of execution, however, is not the only ground for refusing extradition of the suspect faces capital punishment in the requesting state as the Soering case proves: "the unanimous judgment of the European Court of Human Rights in the Soering case handed down on July 7, 1989, hold that Great Britain's extradition of the applicant to the United State to stand trial for capital murder, an offence punishable under the applicable Virginia law by "death, or imprisonment for life" would violate the prohibition against "inhuman or degrading treatment or punishment in the European Convention on Human Rights"²⁰. Soering was a German citizen who resided in the United States and was wanted by the US law enforcement for the murder of his girlfriend's parents. Before he could have been arrested, he fled to the United Kingdom and was arrested there for another felony shortly after that. The United States sought his extradition and the British government was inclined to follow the request. Soering tried to evade his extradition by pointing out that the death penalty was not be sentenced on European citizens and the subsequent US American court guaranteed that he would only be sentenced to life if the highest punishment were to be executed.

¹⁷ Clapham, A. (2007). Human Rights - A Very Short Introduction. Oxford, Oxford University Press

¹⁸ See Protocol 6 ECHR: "Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty"

¹⁹ See Article 1 Protocol 6 ECHR: "Abolition of the death penalty: The death penalty shall be abolished. No one shall be condemned to such penalty or executed". Nowadays, the death penalty is abolished in all member states of the EU and its abolishment is a pre-condition for accession to the Union (EEAS, 2012). In the Charter on Fundamental Rights, Article 19 explicitly states that extradition will not be granted if the fugitive is expected to face a death sentence: "Article 19 Protection in the event of removal, expulsion or extradition 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

²⁰ Lillich, R. B. (1991). "The Soering Case." The American Journal of International Law **85**(1): 128-149.

Soering then went to the European Court on Human Rights and “argued [...] that the particular circumstances in his case, especially the exceptional delay in the carrying out of the death sentence that he was likely to undergo in Virginia – exposing him to the “death row phenomenon” – would constitute inhuman or degrading treatment or punishment [...]”²⁰. In this case, the European Court of Human Rights ruled that not the death penalty itself was a Human Rights violation but it violated the article against torture²¹ if the suspect could expect to await the enforcement of the death sentence for a long time.

Since the Soering case, it has become common practice that a suspect is only extradited if the sufficient law enforcement agencies in the US guarantee beforehand that the death penalty will not be sentenced even if that would be the punishment if the suspect were of US-American nationality. Nevertheless, the requested state can never be sure that this promise will not be broken as has been pointed out by Soering²². As it is, however, most extradition agreements around the world which involve a party which still sentences suspects to death and a party that has abolished capital punishment, involve an article which explicitly states that extradition will only be executed if the requesting state will not sentence the suspect to death²³. As this has become common practice, it is unlikely that the US will guarantee for example the Italian government that the to be extradited suspect will not be facing capital punishment and then turn on them by breaking that promise and sentencing the suspect to death after all.

Concluding, it has to be mentioned that neither the ECHR nor the Charter of Fundamental Rights allow for extradition in the case of capital punishment in the US. This point is not mentioned in either document but it still is implied because of two reasons. First of all, the ECHR prohibits the death penalty and inhuman and degrading treatment²⁴. A suspect facing extradition to the US and possible capital punishment can use these two articles to defend himself against the surrender to the US American officials²⁵. The Charter of Fundamental Rights does not explicitly prohibit the death penalty but since it is part of the EU, it can be taken for granted that the Charter cannot be used to justify extradition if the suspect will face capital punishment. This is because the EU prohibits the death penalty completely and even denies accession of countries which still practice it.

After introducing the different concepts used in this study, the next section will focus on the EU and the surrender of suspects between member states. This is important in order to understand from where the EU takes the competences in its internal structures to regulate extradition and surrender.

1.2 General rules of extradition in the European Union

²¹See Article 3 ECHR: “Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

²² Johnston, J. G. (2011). “The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11.” *International Criminal Law Review* **11**: 1-48.

²³ See Articles 13 of the EU – US agreement and Article 12 of the Germany – US agreement on Capital punishment

²⁴ See Article 3 and Protocol 6 of the ECHR

²⁵ The Soering case is an example of this even though the case is several years old

At this point, the thesis will turn to explaining how the EU handles the surrender of suspects within its borders. Extradition within the EU is called surrender of suspects and it is regulated by the European Arrest Warrant (EAW). The EAW is part of the EU's efforts to diminish cross-border crime within the Union and therefore, it is part of the judicial cooperation in criminal matters. This kind of cooperation has its legal basis in the TFEU, namely in Chapter 4 of the treaty which exclusively deals with judicial cooperation in criminal matters. For the EAW, two articles of Chapter 4 TFEU are important: Articles 82²⁶ and 83²⁷. The first one allows the Union to take measures that foster

²⁶See Article 82 of the TFEU: "*Article 82 (ex Article 31 TEU)*: 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; (b) prevent and settle conflicts of jurisdiction between Member States; (c) support the training of the judiciary and judicial staff; (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals. 3. Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply."

²⁷ See Article 83 of the TFEU: "*Article 83 (ex Article 31 TEU)*: 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament. 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonization measures in question, without prejudice to Article 76. 3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

cooperation among member states in order to diminish criminal activity and to facilitate the recognition of one member state's judicial decisions and judgments by other member states. Article 83 allows the Union to set minimum standards for definitions of and sanctions against serious crimes with a cross-border dimension. Article 82 therefore sets the main principles of surrender within the EU: mutual recognition and mutual trust. The Commission explains mutual trust as follows: "not only trust in the adequacy of one's partners' rules but also that these rules are correctly applied"⁶. The "adequacy of one's partners' rules" is ensured by mutual recognition within the EU: "while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results are accepted as equivalent to decisions of one's own state"⁶. The turn towards this principle was initiated by the 9/11 terror attacks and the subsequent decision to implement the EAW. The principle was revolutionary as it means that one state's judicial and police authorities will have to enforce another state's court judgments³. Before the introduction of the principle of mutual recognition, extradition agreements between member states were based on the principle of double criminality and surrender of suspects by one state was only granted if the governmental authorities of the requested state, such as the Ministry of Justice, approved of it. Despite the two principles of mutual trust and mutual recognition, which at first sight seem to signalize that surrender of suspects between EU member states happens under any circumstances, the framework decision on the EAW²⁸ entails a list of reasons why one state shall not extradite a fugitive to another member state. This list can be found under Article 3 of the framework decision and Article 4²⁹ then states optional grounds

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply".

²⁸ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

²⁹ See Article 3 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA): "Grounds for mandatory non-execution of the European arrest warrant: The judicial authority of the Member State of execution (hereinafter .executing judicial authority.) shall refuse to execute the European arrest warrant in the following cases: 1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law; 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; 3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State. *Article 4:* Grounds for optional non-execution of the European arrest warrant The executing judicial authority may refuse to execute the European arrest warrant: 1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State; 2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; 4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law; 5. if the executing judicial authority is

for refusal but neither includes Human Rights explicitly. Nevertheless, in the recitals of the framework decision, fundamental rights are mentioned as it states that the framework decision respects fundamental rights and is in line with the human rights basis of the European Union³⁰.

All in all, it can be noted that the EAW does not mention the protection of Human Rights as an explicit goal nor is the violation of human rights in the requesting state a reason for refusing surrender. Nevertheless, the EAW is clearly in line with the EU's stance on human rights as Article 1 paragraph 3 of the Framework Decision on the EAW³¹ clearly shows. The article states that the EAW is not to change or alter any obligations related to the fundamental rights and legal principles mentioned in Article 6 TEU¹³. As a result, even though the protection of human rights is not mentioned as a provision and neither is their violation ground for refusal of surrender, the framework decision still takes human rights into account. Therefore, no article or obligation in the framework decision can violate fundamental rights³² in any way and this guarantees that the fundamental and human rights principles set out by the EU will be protected when the EAW is used to surrender suspects within the EU.

This section has introduced the general topic of extradition, the legal basis for the EU to conclude extradition agreements with third countries, the topics of human rights, extradition and the death penalty and the surrender of suspects within the EU which is regulated by the EAW. These topics provide the general knowledge needed to analyze the agreements which will be done in the following chapters. Before this can be done, however, one needs at least one research question. This study requires several research questions which will be introduced in the next section.

informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country; 6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

³⁰ See recital of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA): "(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

³¹ See Article 1 paragraph of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA): Definition of the European arrest warrant and obligation to execute it: 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

³² As the article prohibits any modification of Article 6 TEU, it is of course also forbidden to alter the framework decision on the EAW so that it grants more or different human rights protection. This however, is very theoretical and of no importance to this thesis as it deals with the protection of human rights, not their improvement.

1.3 Research question

A research question always builds the basis for an analysis and one question often is not enough to provide for a solid basis which captures all aspects of the topic. Hence, this study will deal with one main research question and several sub-questions.

The main research question is a descriptive one which aims at finding an answer about the consistency between the agreements and their consistency with Human Rights:

To what extent are the agreements on extradition between the USA and Germany and between the USA and the EU consistent especially in relation to Human Rights?

This research question leads to sub-questions which will be used to clarify the aim of the study and give more detailed answers in the conclusion:

Do the different agreements mention the death penalty and if they do, how do they deal with the different opinions on the matter in the EU and the USA?

What is the relationship between the agreements in light of current treaty framework?

The last two questions will be answered in the next section which describes the two agreements in detail and in addition has a look at what the different agreements state about how they fit into the current treaty framework.

2 Determining the lawfulness of an extradition agreement

In order to see how coherent the agreements are among each other, one has to compare their structure and content. Therefore, it will be paid attention to their beginning, the number of articles each agreement has, what these articles state in particular and what their main focus is e.g. it could be the case that one agreement mostly states extraditable offences and another puts more emphasis on how to deal with the movement procedures of the fugitive from the requested to the requesting state. It is more difficult, though, to analysis the agreements' coherence with human rights. As a result, this part describes when an agreement is a lawful one in terms of human rights protection. First of all, the agreement has to actually refer to human rights and make their protection a priority and in the best case scenario, the agreement even states that concerns about human rights protection in the requesting state are a reason to refuse extradition. Human rights have already been discussed above but at this point, it will be described which articles will be crucial for this study and why that is the case.

As this study deals with extradition, it is important to emphasize that human rights provisions applicable to our field of enquiry are mostly, but not only, stemming from human rights standards developed in relations to criminal law and criminal procedure. To analyze them, this study will use four articles of the ECHR and three articles from the Charter of Fundamental Rights of the European Union for reference as they are all connected to extradition and criminal trials. The first articles

which are of importance are Article 3 ECHR²¹ and Article 4 of the EU Charter³³ which prohibit torture of any kind. The second set of crucial articles consists of Article 6 ECHR³⁴ and Article 47 of the EU Charter³⁵ which grants every suspect the right to a fair trial and which states explicitly which minimum rights every suspect has to be granted in order to ensure a fair trial. The third article from the ECHR is the most basic one as Article 7 ECHR states that there shall not be any punishment without laws that make the deed for which someone is punished illegal³⁶. A last set of articles which is crucial to understand how extradition and Human Rights belong together are Article 14 ECHR³⁷ and Article 21 of the Charter on Fundamental Rights³⁸ which abolish any discrimination – not only in criminal trials or extradition cases. The ECHR also states how the death penalty has to be handled within the EU but this matter will be discussed in more detail below.

These articles are of great importance as they belong to the “core human rights”¹. The refusal of extradition because of concerns that the requesting state might torture the fugitive or expose them

³³ See Article 4 Charter of Fundamental Rights of the European Union: “Prohibition of torture and inhuman or degrading treatment or punishment: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

³⁴ See Article 6 ECHR: “Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

³⁵ See Article 47 Charter of Fundamental Rights of the European Union: “Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

³⁶ See Article 7 ECHR: “No punishment without law: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations”.

³⁷ See Article 14 ECHR: “Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

³⁸ See Article 21 Charter of Fundamental Rights of the European Union: “Non-discrimination: 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”

to inhuman or degrading treatment is, however, not only based on Human Rights. Many states forbid torture in their constitution and as a result, their citizens would not be subject to any inhuman treatment under their criminal law system. Extraditing those states' citizens to states where torture is common practice would mean to expose them to a criminal law system with much lower standards¹.

The right to a fair trial is not only part of Human Rights conventions but is so deeply rooted in democracy and civil rights that no crime justifies its violation. Nevertheless, it is not easy to see beforehand whether a trial will be fair or not. It is easy when a state refuses any kind of trial and only requests extradition in order to put suspect into prison. It only gets tricky when a trial is happening. Proving its unfairness before the trial is actually happening is virtually impossible as no court or judge or public defense lawyer will state that their intention is to get a suspect convicted in an unfair trial. As a result, principles have been set which indicate a fair or unfair trial. Examples of these principles are: the right to legal counsel which is a pre-trial right, the right to a public hearing which belongs to the set of rights a suspect has during the hearing and the right to appeal after the trial. If these principles and rights are granted and protected by the law enforcement, it is likely that the trial will be fair³⁹. Given, however, that the right to a fair trial is one of the core elements of democracy, requested states have to be careful when there is any ground for believing that the trial to which the fugitive will be subject to in the requesting state might be unfair.

Granting a fugitive's request of not being extradited because they may be subject to unfair treatment in the requesting state is a difficult task. This problem is also relevant in relation to anti-discriminatory standards. While it might be more obvious when a state systematically uses torture on its accused or convicts, it is not as easily detected when a state is following a discriminatory policy towards a certain group of convicts because of their ethnicity, religious beliefs or gender. The reason for that is, of course, that nowadays discrimination policies are very often hidden and not manifest, as it was the case during the apartheid regime in South Africa. Therefore "only" the use of the laws, punishment, and treatment in jail or prison can be discriminatory and proving that this will be the case beforehand is nearly impossible. Nevertheless, when the requested state has reason to believe that a suspect will be subject to discrimination after their extradition, it is ground for a refusal¹.

Another important aspect which has to be mentioned by extradition agreements is the possibility that fugitives extradited to the US may face capital punishment. As already mentioned before⁴⁰, most extradition agreements between a state which still enforces the death penalty and a state which has abolished it deal with these differences by incorporating an article which states that a fugitive will only be extradited if the state still enforcing capital punishment guarantees that it will not be used on the fugitive. If this article is also featured in the two agreements, they apply the best feasible way of dealing with the issue and neither Germany nor the EU let their citizens be subject to a punishment they would not face if they were tried on EU soil. It is the best feasible way as extradition, as explained above⁴¹, is crucial to fight international crime and the practice of evading prosecution by fleeing the country. Therefore, neither Germany nor the EU can refuse to sign an extradition agreement with the US on basis of the possibility that the death penalty will be imposed on extradited fugitives/suspects. As a result, the practice of seeking a guarantee that it will not be

³⁹ Lawyers Committee for Human Rights. (2000). "What Is A Fair Trial? A Basic Guide to Legal Standards and Practice." Lawyers Committee for Human Rights.

⁴⁰ See 1.1 Concepts *Death penalty*

⁴¹ See 1 Introduction

imposed is the best way to ensure that an extradition agreement gets signed but also that the EU upholds its principle of not making suspects subjects of capital punishment.

After explaining in detail when an extradition agreement is lawful, the next section will deal with the analysis of the two extradition agreements. A first step of the analysis is to describe the legal relationship between the EU – US agreement and the Germany – US agreement. A second step will describe and compare the two agreements with each other. After that has been done, it will be determined how consistent the agreements are with human rights. In order to do so, the here mentioned articles of the ECHR and the Charter on Fundamental Rights will be used.

3 Analysis of the agreements

This section starts by taking a look at the relationship between the EU and the Germany agreement with the EU. By doing so, one can understand how the agreement which the EU concluded fits with the fact that the EU member states have had agreements on extradition beforehand. The agreement between the EU and the US was concluded in 2003 while the first agreement between the US and Germany was already signed in 1978 and entered into force two years later. The latter agreement had been amended twice, once in 1986 and a second time in 2003. The last amendment was done in the light of the EU – US agreement which required certain changes of member state agreements⁴². In a next step, the agreements will be described and compared with each other and finally, both agreements will be compared to the aforementioned articles from the ECHR and the Charter on Fundamental Rights of the EU. This last step will make it possible to understand how coherent the agreements are with human rights and concerns about their violation.

3.1 The EU legal relationship between the EU – US agreement and the Germany – US agreement

As the introduction concludes, it is important to understand how the relationship between an EU agreement and a member state agreement works when they deal with the same topic. In order to understand this, one has to look for articles, provisions or goals set in the different agreements. This section will start with the EU – US agreement and then turn to the Germany – US agreement.

As explained above⁴³, the EU has the competences derived from the TFEU to conclude extradition agreements with third states but so far the agreements between the EU and the US and between the EU and Japan are the only ones. At this point, it is important to also highlight the legal relationship between the EAW and the Union's cooperation on extradition matters with third states. Despite the mentioned articles 216 to 218 TFEU⁹, the EU has implied powers which allow the signing of extradition agreements with non-member states. Delreux explains that "[t]he reasoning behind

⁴²See 3.1 The EU legal relationship between the EU – US agreement and the Germany – US agreement

⁴³ See under 1 Introduction

implied powers is the doctrine of parallelism between internal and external [EU] competences⁴⁴. This means that the EU has external competences if those are also given internally. Implied powers are, thus, bound on the following principles: “first [...] there must be *objectives* of the Community for whose achievement the external action is to be undertaken; second [...] there must be *explicit internal powers* of the Community on the matter on which external action is to be undertaken; and third [...] it must be *necessary* for the Community to act externally for the achievement of the respective objectives. It should be added that [...] an implied external power can even exist without any prior exercise of the corresponding internal powers if the exercise of the external power is necessary for the attaining of a Community objective⁴⁵. As a result, the fact that the EU has the competences to regulate surrender of suspects within the EU based on Articles 82²⁶ and 83²⁷ TFEU gives it the necessary competences to agree on extradition agreements with third states.

The extradition agreement between the EU and the US is seen as an extension and addition to the several agreements member states have with the United States and it is meant to enhance cooperation between member states, the EU and the US³. Fletcher et al conclude that “the emphasis by the EU, from the onset, was placed on *adding value* to the existing treaty relationships of Member States⁶. As a result, Article 3 of the agreement states that the agreement has to be applied in the light of bilateral extradition agreements between the US and EU member states⁴⁶ and the rest of the article explains how different articles of the EU – US agreement have to be understood in relation to the agreements that member states have with the US to facilitate and foster extradition. This leaves the impression that the agreement concluded by the EU is powerless in comparison with agreements member states have with the US. That impression, however, does not hold true if one has a look at the second supplementary⁴⁷ treaty to the Germany – US agreement and Article 3 (2) of the EU – US agreement which states that each member state has to acknowledge the EU – US agreement in their bilateral agreement on extradition with the USA⁴⁸. As a reaction to this, the agreement between Germany and the US was amended by the second supplementary treaty. This amendment led to some articles of the agreement to be changed in order to be in accordance with the EU – US agreement. For example, Article 6 of the EU – US agreement deals with transmissions of request for provisional arrest⁴⁹ and in a last sentence it states that Interpol might be used to achieve the goal set out in the article. This sentence was added to Article 16, paragraph (1) of the Germany – US

⁴⁴ Delreux, T. (2006). "The European Union in international environmental negotiations: a legal perspective on the internal decision-making process." *Int Environ Agreements* 6: 231-248.

⁴⁵ Monar, J. (2004). "The EU as an International Actor in the Domain of Justice and Home Affairs." *European Foreign Affairs Review* 9: 395-415.

⁴⁶ See Article 3 of the EU – US extradition agreement: “The European Union, pursuant to the Treaty on European Union, and the United States of America shall ensure that the provisions of this Agreement are applied in relation to bilateral extradition treaties between the Member States and the United States of America [...].”

⁴⁷ Second Supplementary Treaty to the Treaty between the United States of America and the Federal Republic of Germany concerning Extradition

⁴⁸ See Article 3, Paragraph 2 of the EU – US agreement. (a): The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America.

⁴⁹ See Article 6 of the EU – US agreement: “Requests for provisional arrest may be made directly between the Ministries of Justice of the requesting and requested States, as an alternative to the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may also be used to transmit such a request”.

agreement⁵⁰ as it had been missing before. This amendment then ensures that the two agreements are on the same page when it comes to the transmission of request for provisional arrest.

As a result, it can be concluded that the EU does not prohibit its member states to conclude extradition agreements with the United States but it does set certain standards which have to be either considered when a new agreement is concluded or lead to amendments of existing agreements such as the second supplementary treaty⁸. Here again it has to be noted that the EU has implied powers on this matter which means it has the competence to urge the member states to change their bilateral extradition agreements with the US because it has the competence to change the way extradition is handled internally⁵¹. Because of this, the next section will be ordered as followed: at first, the EU – US agreement will be described as it builds the standard to which the agreement between the Federal Republic of Germany and the US has to live up to.

3.2 Description and comparison of the two agreements on extradition

This part deals with describing the two agreements in regard of their content and composition i.e. the articles of both agreements will be named and described shortly. This is done in order to conclude whether the agreements are consistent with one another. The section starts with describing the EU – US agreement as, as explained above⁵², the German agreement had been altered

⁵⁰ See Article 16 of the Germany – US Agreement from 1978: “Provisional Arrest: 1) In case of urgency either Contracting Party may apply for the provisional arrest of the person sought before the request for extradition has been submitted to the Requested State through the diplomatic channel. The request for provisional arrest may be made either through the diplomatic channel or directly between the United States Department of Justice and the Minister of Justice of the Federal Republic of Germany. (2) The application for provisional arrest shall state that a warrant of arrest as mentioned in paragraph (3)(a) of Article 14, or a judgment as mentioned in paragraph (4) (a) or (b) of Article 14, exists and that it is intended to make a request for extradition. It shall also state the offense for which extradition will be requested and when and where such offense was committed and shall give all available information concerning the description of the person sought and his nationality. The application shall also contain such further information, if any, as would be necessary to justify the issuance of a warrant of arrest in the Requested State had the offense been committed, or the person sought been convicted, in that State. (3) On receipt of an application for provisional arrest the Requested State shall take the necessary steps to secure the arrest of the person sought. (4) Provisional arrest shall be terminated if, within a period of 40 days after the apprehension of the person sought, the Requested State has not received the request for extradition and the documents mentioned in Article 14. This period may be extended, upon the Requesting State’s application, for up to an additional 20 days after the apprehension of the person sought. (5) The termination of provisional arrest pursuant to paragraph (4) shall not prejudice the extradition of the person sought if the extradition request and the supporting documents mentioned in Article 14, insofar as they were not submitted in a timely manner, are later delivered. In this connection, reference may be made to the extradition request and the supporting documents which have already been transmitted to the Requested State.”

⁵¹ Note that the Germany – US agreement is not the only one which has been changed by the entry into force of the EU – US agreement. An example of another agreement is the one between France and the US which has been changed by the “Instrument as contemplated by Article 3, paragraph 2, of the Agreement on Extradition between the United States of American and the European Union signed 25 June 2003 (hereafter “the US – EU extradition agreement), the Governments of the United States of American and the French Republic acknowledge that, in accordance with the provisions of this Instrument, the US – US Extradition Agreement is applied in relation to the bilateral Extradition Treaty between the United States of American and France signed 23 April 1996 (hereafter “the 1996 Treaty on Extradition under the following terms: [...]”

⁵² See 3.1 The EU legal relationship between the EU – US agreement and the Germany – US agreement

because of the EU agreement and thus the latter can be seen as superior in competences and legal matters.

3.2.1 EU – US extradition agreement

The agreement between the EU and the US was concluded on July 19th, 2003⁵³ and it starts with a table of content which lists all articles the treaty entails which is followed by the provisions of the agreement. These provisions read that the contracting parties wish to enhance cooperation and combat crime more efficiently⁵⁴. In addition, the provisions also read that the agreement respects individual rights and the rule of law and, most importantly, it refers to the US American and EU member states' legal systems which guarantee a fair trial. Article 1⁵⁵ sets out the object and the purpose of the agreement which namely are: to foster and enhance cooperation in extradition matters between the US and EU member states. The next article then defines what is meant by the European Union, the United States and "Ministry of Justice"⁵⁶. Article 3 clarifies the relationship between the EU – US agreement and similar agreements between the US and EU member states⁴⁶. The first paragraph states how several articles of the agreement have to be understood when there is a similar article in a member state's agreement or when a similar article is lacking. For example, Article 3, Paragraph 1 (c)⁵⁷ reads that article 6⁶⁰ which deals with the direct transmission of provisional arrest requests has to be applied when a member state's agreement is lacking such an article. Paragraph 2⁴⁸ deals with the obligation of the EU to have its member states incorporate the standards which this agreement offers into their own agreements with the US⁵⁸. The following article

⁵³ See European Union and United States of America (2003). Agreement on extradition between the European Union and the United States of America, Official Journal of the European Union. **L 181/27**

⁵⁴ See the EU – US agreement: "The European Union and The United States Of America DESIRING further to facilitate cooperation between the European Union Member States and the United States of America, DESIRING to combat crime in a more effective way as a means of protecting their respective democratic societies and common values, HAVING DUE REGARD for rights of individuals and the rule of law, MINDFUL of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law, DESIRING to conclude an Agreement relating to the extradition of offenders,

⁵⁵ See Article 1 of the EU – US agreement: "Object and Purpose: The Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation in the context of applicable extradition relations between the Member States and the United States of America governing extradition of offenders."

⁵⁶ See Article 2 of the EU – US agreement: "Definitions: 1. 'Contracting Parties' shall mean the European Union and the United States of America. 2. 'Member State' shall mean a Member State of the European Union. 3. 'Ministry of Justice' shall, for the United States of America, mean the United States Department of Justice; and for a Member State, its Ministry of Justice, except that with respect to a Member State in which functions described in Articles 3, 5, 6, 8 or 12 are carried out by its Prosecutor General, that body may be designated to carry out such function in lieu of the Ministry of Justice in accordance with Article 19, unless the United States and the Member State concerned agree to designate another body."

⁵⁷ See Article 3 Paragraph 1 (c): "1. The European Union, pursuant to the Treaty on European Union, and the United States of America shall ensure that the provisions of this Agreement are applied in relation to bilateral extradition treaties between the Member States and the United States of America, in force at the time of the entry into force of this Agreement, under the following terms: (c) Article 6 shall be applied in the absence of bilateral treaty provisions authorising direct transmission of provisional arrest requests between the United States Department of Justice and the Ministry of Justice of the Member State concerned"

⁵⁸ For a more detailed discussion, see 2 The goodness of an extradition agreement – how can it be determined?

describes offences which are extraditable⁵⁹. In short, every offence is a reason for extradition if it is punishable under both parties' legal systems and the punishment is at least four months in confinement. Articles 5 to 7⁶⁰ deal with the transmission and authentication of documents, transmission of requests for provisional arrest and transmission of documents following provisional arrest. Summarized, these articles explain which channels have to be used when documents are exchanged between the requesting and the requested state relating to the arrest and extradition of a suspect.

Article 8⁶¹ allows the requested state to ask for additional information from the requesting state in case the available information does not seem sufficient enough to fulfill the treaty requirements for

⁵⁹ See Article 4 of the EU – US agreement: “Extraditable offences: An offence shall be an extraditable offence if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. An offence shall also be an extraditable offence if it consists of an attempt or conspiracy to commit, or participation in the commission of, an extraditable offence. Where the request is for enforcement of the sentence of a person convicted of an extraditable offence, the deprivation of liberty remaining to be served must be at least four months. 2. If extradition is granted for an extraditable offence, it shall also be granted for any other offence specified in the request if the latter offence is punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met. 3. For the purposes of this Article, an offence shall be considered an extraditable offence: (a) regardless of whether the laws in the requesting and requested States place the offence within the same category of offences or describe the offence by the same terminology; (b) regardless of whether the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; and (c) in criminal cases relating to taxes, customs duties, currency control and the import or export of commodities, regardless of whether the laws of the requesting and requested States provide for the same kinds of taxes, customs duties, or controls on currency or on the import or export of the same kinds of commodities. 4. If the offence has been committed outside the territory of the requesting State, extradition shall be granted, subject to the other applicable requirements for extradition, if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws of the requested State do not provide for the punishment of an offence committed outside its territory in similar circumstances, the executive authority of the requested State, at its discretion, may grant extradition provided that all other applicable requirements for extradition are met.”

⁶⁰ See Article 5 to 7 of the EU – US agreement: “*Article 5* Transmission and authentication of documents 1. Requests for extradition and supporting documents shall be transmitted through the diplomatic channel, which shall include transmission as provided for in Article 7. 2. Documents that bear the certificate or seal of the Ministry of Justice, or Ministry or Department responsible for foreign affairs, of the requesting State shall be admissible in extradition proceedings in the requested State without further certification, authentication, or other legalisation. *Article 6* Transmission of requests for provisional arrest Requests for provisional arrest may be made directly between the Ministries of Justice of the requesting and requested States, as an alternative to the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may also be used to transmit such a request. *Article 7* Transmission of documents following provisional arrest 1. If the person whose extradition is sought is held under provisional arrest by the requested State, the requesting State may satisfy its obligation to transmit its request for extradition and supporting documents through the diplomatic channel pursuant to Article 5(1), by submitting the request and documents to the Embassy of the requested State located in the requesting State. In that case, the date of receipt of such request by the Embassy shall be considered to be the date of receipt by the requested State for purposes of applying the time limit that must be met under the applicable extradition treaty to enable the person's continued detention. 2. Where a Member State on the date of signature of this Agreement, due to the established jurisprudence of its domestic legal system applicable at such date, cannot apply the measures referred to in paragraph 1, this Article shall not apply to it, until such time as that Member State and the United States of America, by exchange of diplomatic note, agree otherwise.

⁶¹ See Article 8 of the EU – US agreement: “Supplemental information 1. The requested State may require the requesting State to furnish additional information within such reasonable length of time as it specifies, if it

extradition. Article 9⁶² then deals with the question how to proceed if the suspect is already imprisoned in the requested state. The article reads that the requested state may, in such a situation, surrender the suspect temporarily so that they can be prosecuted in the requesting state.

It might also be the case that a suspect is wanted by several states and if this is the case, Article 10 applies⁶³. Paragraphs 1 and 2 clarify that the requested state is to decide whether the suspect is to be extradited at all and if it is decided that, in general, extradition shall be carried out, the state also gets to decide to which state. Paragraph 3 states several factors such as “seriousness of the crime”⁶⁴ for which the suspect is wanted for by the different state. These factors are meant to help the requested state to decide where the suspect is to be extradited to. Article 11⁶⁵ deals with the case that the suspect agrees to their extradition. Then the simplified extradition procedure applies which basically states that the requested state has to agree on the extradition and use the usual ways and channels for it.

considers that the information furnished in support of the request for extradition is not sufficient to fulfil the requirements of the applicable extradition treaty. 2. Such supplementary information may be requested and furnished directly between the Ministries of Justice of the States concerned”.

⁶² See Article 9 of the EU – US agreement: “Temporary surrender: 1. If a request for extradition is granted in the case of a person who is being proceeded against or is serving a sentence in the requested State, the requested State may temporarily surrender the person sought to the requesting State for the purpose of prosecution. 2. The person so surrendered shall be kept in custody in the requesting State and shall be returned to the requested State at the conclusion of the proceedings against that person, in accordance with the conditions to be determined by mutual agreement of the requesting and requested States. The time spent in custody in the territory of the requesting State pending prosecution in that State may be deducted from the time remaining to be served in the requested State.”

⁶³ See Article 10 of the EU – US agreement: “Requests for extradition or surrender made by several States 1. If the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person. 2. If a requested Member State receives an extradition request from the United States of America and a request for surrender pursuant to the European arrest warrant for the same person, either for the same offence or for different offences, the competent authority of the requested Member State shall determine to which State, if any, it will surrender the person. For this purpose, the competent authority shall be the requested Member State's executive authority if, under the bilateral extradition treaty in force between the United States and the Member State, decisions on competing requests are made by that authority; if not so provided in the bilateral extradition treaty, the competent authority shall be designated by the Member State concerned pursuant to Article 19. 3. In making its decision under paragraphs 1 and 2, the requested State shall consider all of the relevant factors, including, but not limited to, factors already set forth in the applicable extradition treaty, and, where not already so set forth, the following: (a) whether the requests were made pursuant to a treaty; (b) the places where each of the offences was committed; (c) the respective interests of the requesting States; (d) the seriousness of the offences; (e) the nationality of the victim; (f) the possibility of any subsequent extradition between the requesting States; and (g) the chronological order in which the requests were received from the requesting States”.

⁶⁴ See Article 10 Paragraph 3 (d) of the EU – US agreement Article: “In making its decision under paragraphs 1 and 2, the requested State shall consider all of the relevant factors, including, but not limited to, factors already set forth in the applicable extradition treaty, and, where not already so set forth, the following:(d) the seriousness of the offences”

⁶⁵ See Article 11 of the EU – US agreement: “Simplified extradition procedures: If the person sought consents to be surrendered to the requesting State, the requested State may, in accordance with the principles and procedures provided for under its legal system, surrender the person as expeditiously as possible without further proceedings. The consent of the person sought may include agreement to waiver of protection of the rule of specialty.”

Article 12⁶⁶ sets that the US may use any EU member state as a transit country for extradition matters between the US and a third state (both by and to the US). The following Article deals with capital punishment⁶⁷. Article 14⁶⁸ then explains how sensitive information relating to extradition cases has to be handled. In short, the requesting state can decide not to forward sensitive information if the requested state cannot give enough reassurance that the information in question will be treated carefully.

Articles 15 to 22⁶⁹ do not deal with the practices of extradition per se but with technical matters related to this specific treaty. Article 15 reads that the contracting parties are expected to consult on

⁶⁶ See Article 12 of the EU – US agreement: “Transit: 1. A Member State may authorise transportation through its territory of a person surrendered to the United States of America by a third State, or by the United States of America to a third State. The United States of America may authorize transportation through its territory of a person surrendered to a Member State by a third State, or by a Member State to a third State. 2. A request for transit shall be made through the diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice of the Member State concerned. The facilities of Interpol may also be used to transmit such a request. The request shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit. 3. Authorisation is not required when air transportation is used and no landing is scheduled on the territory of the transit State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to paragraph 2. All measures necessary to prevent the person from absconding shall be taken until transit is effected, as long as the request for transit is received within 96 hours of the unscheduled landing”.

⁶⁷ See Article 13 of the EU – US agreement: “Capital Punishment: Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied”.

⁶⁸ See Article 14 of the EU – US agreement: “Sensitive information in a request: Where the requesting State contemplates the submission of particularly sensitive information in support of its request for extradition, it may consult the requested State to determine the extent to which the information can be protected by the requested State. If the requested State cannot protect the information in the manner sought by the requesting State, the requesting State shall determine whether the information shall nonetheless be submitted”.

⁶⁹ See Articles 15 to 22 of the EU – US agreement: “Article 15 Consultations The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement. Article 16 Temporal application: 1. This Agreement shall apply to offences committed before as well as after it enters into force. 2. This Agreement shall apply to requests for extradition made after its entry into force. Nevertheless, Articles 4 and 9 shall apply to requests pending in a requested State at the time this Agreement enters into force. Article 17 Non-derogation: 1. This Agreement is without prejudice to the invocation by the requested State of grounds for refusal relating to a matter not governed by this Agreement that is available pursuant to a bilateral extradition treaty in force between a Member State and the United States of America. 2. Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States. Article 18 Future bilateral extradition treaties with Member States This Agreement shall not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement. Article 19 Designation and notification The European Union shall notify the United States of America of any designation pursuant to Article 2(3) and Article 10(2), prior to the exchange of written instruments described in Article 3(2) between the Member States and the United States of America. Article 20 Territorial application: 1. This Agreement shall apply: (a) to the United States of America; (b) in relation to the European Union to: — Member States, — territories for whose external relations a Member State has responsibility, or countries that are not Member States for whom a Member State has other duties with respect to external relations, where agreed upon by exchange of

extradition matters in order to make the agreement more efficient and extradition procedures smoother. The next Article sets then that the agreement is to apply not only to offenses committed after the entry into force but also to offences committed before and Article 17 deals with non-derogation. This refers to the fact that member states may refuse to extradite if the ground for the refusal is stated in their extradition agreement with the US but not in the EU – US agreement. Article 18 states that the conclusion of this agreement is not going to interfere with any future extradition agreements the member states conclude with the US. Article 20 reads that the agreement applies to the territories of the US and the EU, including overseas territory. The last two articles, Article 21 and 22, read that the contracting parties agree to review the agreement five years after its entry into force, which is regulated by Article 22. This review is meant to unveil practical implications and trigger possible new developments. The last article does not only deal with the entry into force but also regulates that one contracting party might terminate the agreement if the other party is notified of it.

In order to compare the agreements and understand how coherent they are with each other, one must also have a look at the agreement between Germany and the US. This will be done in the next section.

3.2.2 Germany – US extradition agreement

Concluded in 1978, this agreement has been amended twice, once in 1986 and for a second time in 2003. The treaty was amended in 1986 in order to drop the appendixes which e.g. stated extraditable in detail and in 2003, it was again amended because the entry into force of the EU – US agreement required changes of the member state agreements with the US on extradition⁷⁰. This part, however,

diplomatic note between the Contracting Parties, duly confirmed by the relevant Member State. 2. The application of this Agreement to any territory or country in respect of which extension has been made in accordance with subparagraph (b) of paragraph 1 may be terminated by either Contracting Party giving six months' written notice to the other Contracting Party through the diplomatic channel, where duly confirmed between the relevant Member State and the United States of America. Article 21 Review The Contracting Parties agree to carry out a common review of this Agreement as necessary, and in any event no later than five years after its entry into force. The review shall address in particular the practical implementation of the Agreement and may also include issues such as the consequences of further development of the European Union relating to the subject matter of this Agreement, including Article 10. Article 22 Entry into force and termination: 1. This Agreement shall enter into force on the first day following the third month after the date on which the Contracting Parties have exchanged instruments indicating that they have completed their internal procedures for this purpose. These instruments shall also indicate that the steps specified in Article 3(2) have been completed. 2. Either Contracting Party may terminate this Agreement at any time by giving written notice to the other Party, and such termination shall be effective six months after the date of such notice.

⁷⁰ See 3.1 The EU legal relationship between the EU – US agreement and the Germany – US agreement and Article 1 of the first supplementary treaty to the Germany – US agreement: ““(1) Extraditable offenses under the Treaty are offenses which are punishable under the laws of both Contracting Parties. In determining what is an extraditable offense it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offense or denominate an offense by the same terminology, or whether dual criminality follows from Federal, State or Laender laws. In particular, dual criminality may include offenses based upon participation in an association whose aims and activities include the commission of extraditable offenses, such as a criminal society under the laws of the Federal Republic of Germany or an association involved in racketeering or criminal enterprise under the laws of the United States.”

will not describe each amendment in detail, it will only be mentioned if an article has been altered by one or both supplementary treaties. As this study uses the English version of the treaty, it starts with a note by former US President Jimmy Carter which reads that this treaty is seen as more up-to-date and therefore it will “terminate and supersede” any former agreement on extradition between Germany and the US. The note also reads that the treaty will make a considerable contribution to the transatlantic cooperation in law enforcement matters. The treaty then proceeds to describing certain articles in more detail in order to clarify them or underline their importance to the entire agreement.

Article 1⁷¹ states that the contracting parties have an obligation to extradite suspects under the provisions of the treaty and in addition, it is now allowed that the requesting state extradites its nationals even if the offence has been committed outside its territory. The following article states which offences are extraditable. Article 2⁶⁶ reads that every offence is, as long as it is punishable under German and US federal and state law and is punishable with a minimum sentence of one year. Article 3⁷² describes the territories of the states to which this agreement applies. In addition, aircrafts are seen as territory of the contracting parties as well and thus any crimes committed there are ground for extradition too.

Articles 4 to 6⁷³ describe how extradition is handled when the offences committed are of fiscal, military or political nature. Article 4 deals with political offences and it is usually the case that states do not extradite suspects which have been involved in political offences as it might be the case that only the requesting but not the requested state see the act as illegal. This article, however, states

⁷¹ See Article 1 of the Germany – US agreement: “Obligation to extradite: (1) The Contracting Parties agree to extradite to each other subject to the provisions described in this Treaty persons found in the territory of one of the Contracting Parties who have been charged with an offense or are wanted by the other Contracting Party for the enforcement of a judicially pronounced penalty or detention order for an offense committed within the territory of the Requesting State. (2) When the offense has been committed outside the territory of the Requesting State, the Requested State shall grant extradition subject to the provisions described in this Treaty if either (a) its laws would provide for the punishment of such an offense committed in similar circumstances, or (b) the person whose extradition is requested is a national of the Requesting State.”

⁷² See Article 3 of the Germany – US agreement: “Territorial obligation: (1) A reference in this Treaty to the territory of a Contracting Party is a reference to all territory under its jurisdiction. (2) A reference in this Treaty to the territory of a Contracting Party shall furthermore include its territorial waters and airspace and vessels and aircraft registered with the competent authority of this Contracting Party if any such vessel is on the high seas or if any such aircraft is in flight when the offense is committed. For the purpose of this Treaty an aircraft shall be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.”

⁷³ See Articles 4 to 6 of the Germany – US agreement: “*Article 4 Political Offences:* (1) Extradition shall not be granted if the offense in respect of which it is requested is regarded by the Requested State as a political offense, an offense of a political character or as an offense connected with such an offense. (2) Extradition also shall not be granted if the Requested State has substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for an offense mentioned in paragraph (1). (3) For the purpose of this Treaty the following offenses shall not be deemed to be offenses within the meaning of paragraph (1): (a) A murder or other willful crime, punishable under the laws of both Contracting Parties by a penalty of at least one year, against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family, including attempts to commit such an offense, except in open combat; (b) An offense which the Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multilateral international agreement. *Article 5 Military Offences:* Extradition shall not be granted if the offense in respect of which it is requested is purely a military offense. *Article 6 Fiscal Offences:* “Extradition may be refused for offenses in connection with taxes, duties, customs and exchange if the competent executive authority of the Requested State determines that extradition for any such offense would be contrary to the public policy or other essential interests of the Requested State.”

some exceptions which allow for political offences to be extraditable if an international agreement has been concluded before which states that e.g. plane hijacking by terrorists is a political offence but nonetheless extraditable. In addition, any crimes committed on politically sensitive persons are extraditable. Article 5 then deals with military offences and states that no offence of military nature is ground for extradition. The next Article deals with fiscal offences and states can refuse the extradition of suspects involved in fiscal offences if the extradition would violate essential interests of the state.

Article 7⁷⁴ reads that neither of the contracting parties is obliged to extradite its nationals unless it appears appropriate and Article 8⁷⁵ states that a suspect cannot be extradited if they have been tried for the exact same offence before. Article 9⁷⁶ then states that extradition will not be granted if time has lapsed in the requesting state. Article 10⁷⁷ grants the requested state's law enforcement primacy i.e. if the suspect is tried in the requested state, extradition for the same offence is not possible. Article 12⁷⁸ deals with capital punishment¹¹. Article 13⁷⁹ prohibits that the extradited suspect are tried before an extraordinary court.

The next articles can be viewed together as Articles 14 to 30 deal with the actual procedures of extradition between Germany and the US. Article 14⁸⁰ states how and which documents are to be

⁷⁴ See Article 7 of the Germany – US agreement: "Extradition of nationals: (1) Neither of the Contracting Parties shall be bound to extradite its own nationals. The competent executive authority of the Requested State, however, shall have the power to grant the extradition of its own nationals if, in its discretion, this is deemed proper to do and provided the law of the Requested State does not so preclude. (2) The Requested State shall undertake all available legal measures to suspend naturalization proceedings in respect of the person sought until a decision on the request for his extradition and, if that request is granted, until his surrender. (3) If the Requested State does not extradite its own national, it shall, at the request of the Requesting State, submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. If the Requested State requires additional documents or evidence, such documents or evidence shall be submitted without charge to that State. The Requesting State shall be informed of the result of its request."

⁷⁵ See Article 8 of the Germany – US agreement: "Prior jeopardy for the same offence: Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for the offense for which his extradition is requested."

⁷⁶ See Article 9 of the Germany – US agreement: "Lapse of time: Extradition shall not be granted if at the time the Requested State receives the request for extradition the prosecution, or the enforcement of the penalty or of the detention order, has become barred by lapse of time under the law of the Requesting State."

⁷⁷ See Article 10 of the Germany – US agreement: "Jurisdiction of the requested state: (1) Extradition may be refused if the person sought is proceeded against in the Requested State for the offense for which extradition is requested. (2) The fact that the competent authorities of the Requested State have decided not to prosecute the person sought for the offense for which extradition is requested or decided to discontinue any criminal proceedings which have been initiated shall not preclude extradition."

⁷⁸ See Article 12 of the Germany – US agreement: "Capital Punishment: Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied"

⁷⁹ See Article 13 of the Germany – US agreement: "Extraordinary courts: (1) An extradited person shall not be tried by an extraordinary court in the territory of the Requesting State. (2) Extradition shall not be granted for the enforcement of a penalty imposed, or detention ordered, by an extraordinary court."

⁸⁰ See Article 14 of the Germany – US agreement: "Channel of communication: (1) The request for extradition, any subsequent documents and all other communications shall be transmitted through the diplomatic channel unless otherwise provided by this Treaty. (2) The request shall be accompanied by:(a) All available information

exchanged between the states in order to get the progress of extradition started. The next article, Article 15⁸¹ states that sensitive information may only be submitted from the requesting to the requested state if the latter can guaranteed that it will be treated with the necessary precautions. Article 16⁸² reads that provisional arrests can be demanded by the requesting state in cases of

concerning the identity and nationality of the person sought; (b) The text of all applicable provisions of law of the Requesting State concerning the definition of the offense, its punishment and the limitation of legal proceedings or the enforcement of penalties; and (c) A statement by a competent authority describing the measure taken, if any, that have interrupted the period of limitation under the law of the Requesting State. (3) A request for the extradition of a person sought for the purpose of prosecution shall be accompanied, in addition to the documents provided for in paragraph (2), by: (a) A warrant of arrest issued by a judge of the Requesting State and such evidence as, according to the law of the Requested State, would justify his arrest and committal for trial if the offense had been committed there, including evidence proving that the person requested is the person to whom the warrant of arrest refers; and (b) A summary statement of the facts of the case unless they appear from the warrant of arrest. (4) A request for the extradition of a person sought by reason of a judgment of guilt for the imposition or enforcement of a penalty or detention order shall be accompanied, in addition to the documents provided for in paragraph (2), by: (a) If the judgment handed down in the territory of the Requesting State contains only a determination of guilt, this judgment, confirmation that the judgment has final and binding effect and a warrant of arrest issued by a competent authority of the Requesting State; (b) If the judgment handed down in the territory of the Requesting State contains the determination of guilt and the sentence imposed, a copy of this judgment of conviction as well as the confirmation that this judgment has final and binding effect and is enforceable and a statement of the portion of the sentence that has not been served. (5) A witness' statement taken down in writing or other evidence, not under oath, shall be admitted in evidence as a statement made or evidence given under oath if it is certified that the person making the statement or giving the evidence was warned by a competent authority that any false, misleading or incomplete declaration would render him liable to punishment."

⁸¹ See Article 15 of the Germany – US agreement amended by the second supplementary treaty: "Sensitive information in a request: Where the Requesting State contemplates the submission of particularly sensitive information in support of its request for extradition, it may consult the Requested State to determine the extent to which the information can be protected by the Requested State. If the Requested State cannot protect the information in the manner sought by the Requesting State, the Requesting State shall determine whether the information shall nonetheless be submitted".

⁸² See Article 16 of the Germany – US agreement amended by the second supplementary treaty: "Provisional Arrest: (1) In case of urgency either Contracting Party may apply for the provisional arrest of the person sought before the request for extradition has been submitted to the Requested State through the diplomatic channel. The request for provisional arrest may be made either through the diplomatic channel or directly between the United States Department of Justice and the Minister of Justice of the Federal Republic of Germany. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request. (2) The application for provisional arrest shall state that a warrant of arrest as mentioned in paragraph (3)(a) of Article 14, or a judgment as mentioned in paragraph (4) (a) or (b) of Article 14, exists and that it is intended to make a request for extradition. It shall also state the offense for which extradition will be requested and when and where such offense was committed and shall give all available information concerning the description of the person sought and his nationality. The application shall also contain such further information, if any, as would be necessary to justify the issuance of a warrant of arrest in the Requested State had the offense been committed, or the person sought been convicted, in that State. (3) On receipt of an application for provisional arrest the Requested State shall take the necessary steps to secure the arrest of the person sought. (4) Provisional arrest shall be terminated if, within a period of 40 days after the apprehension of the person sought, the Requested State has not received the request for extradition and the documents mentioned in Article 14. This period may be extended, upon the Requesting State's application, for up to an additional 20 days after the apprehension of the person sought. (5) The Requesting State may satisfy its obligation to transmit its request for extradition and supporting documents through the diplomatic channel pursuant to Article 14, paragraph (1), by submitting the requesting and documents to the Embassy of the Requested State located in the Requesting State. In that case, the date of receipt of such request by the Embassy shall be considered the date of receipt the Requested State for purposes of applying the time limit must be met under paragraph (4) of the present Article to enable the person's continued detention"

urgency. The following part, Article 17⁸³, deals with the case of several extradition requests by several states for the same suspect. If this happens, the requested state has to decide if and where to extradite the suspect while considering e.g. the seriousness of the offence and the nationality of the suspect. If it should be the case that a suspect agrees to their extradition, Article 18⁸⁴ applies as it states that the simplified extradition rules are to be used. Thus, the suspect has to be extradited using the appropriate channels. Article 19⁸⁵ states how the requesting state has to answer to a request of extradition if a decision has been made and if it is denied, how the refusal has to be justified. If a suspect is already serving a sentence in the requested state, Article 20⁸⁶ states that the suspect may be surrendered in order to be tried in the requesting state. Article 21⁸⁷ lays down the rules for the actual surrender of the suspect and Article 22⁸⁸ states special cases which allow that the

⁸³ See Article 17 of the Germany – US agreement amended by the second supplementary treaty: “Requests for Extradition or Surrender Made by Several States: (1) If the Requested State receives requests from any other State for the extradition of the same person either for the same offence or for different offences, or if the Federal Republic of Germany receives an extradition request from the United States of America and a request for surrender pursuant to the European arrest warrant for the same person, either for the same offence or for different offences, the competent authority of the executive branch of the Requested State shall determine to which State, if any, it will surrender the person. (2) In making its decision under paragraph (1) of this Article, the Requested State shall consider all of the relevant factors, including, but not limited to, the following: (a) whether the requests were made pursuant to a treaty; (b) the places where each of the offences was committed; (c) the respective interests of the requesting States; (d) the seriousness of the offences; (e) the nationality of the victim; (f) the nationality of the person sought; (g) the possibility of any subsequent extradition between the requesting States; and (h) the chronological order in which the requests were received from the requesting States. (3) If the Requested State reaches a decision at the same time upon the extradition to one of the Requesting States and on re-extradition to another Requesting State, it shall communicate its decision on re-extradition to each of the Requesting States”.

⁸⁴ See Article 18 of the Germany – US agreement: “Simplified extradition: If the extradition of a person sought to the Requesting State is not obviously precluded by the laws of the Requested State and provided the person sought irrevocably agrees in writing to his extradition after personally being advised by a judge or competent magistrate of his rights to formal extradition proceedings and the protection afforded by them that he would lose, the Requested State may grant his extradition without a formal extradition proceeding having taken place. In this case Article 22(1) shall not be applicable.

⁸⁵ See Article 19 of the Germany – US agreement: “Decision: (1) The Requested State shall promptly communicate to the Requesting State the decision on the request for extradition. (2) The Requested State shall give the reasons for any complete or partial rejection of the request for extradition.”

⁸⁶ See Article 20 of the Germany – US agreement: “Temporary or Deferred Surrender: The Requested State may, after a decision on the request has been rendered by a competent court, defer the surrender of the person whose extradition is requested, when that person is being proceeded against or is serving a sentence in the territory of the Requested State for a different offense, until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded. In this case the Requested State shall advise the Requesting State.

⁸⁷ Article 21 of the Germany – US agreement: “Surrender of the person sought: (1) If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the laws of the Requested State. If no time period for surrender is prescribed by the laws of the Requested State, surrender shall take place within 30 days from the date on which the Requesting State has been notified that the extradition has been granted. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. (2) If the person sought is not removed from the territory of the Requested State within the time required under paragraph (1), he may be set at liberty. The Requested State may subsequently refuse to extradite the person sought for the same offense. (3) If circumstances beyond its control prevent a Contracting Party from timely surrendering or taking delivery of the person to be extradited, it shall notify the other Contracting Party before the expiration of the time limit. In such a case the competent authorities of the Contracting Parties may agree upon a new date for the surrender.

⁸⁸ Article 22 of the Germany – US agreement: “Rule of specialty: (1) A person who has been extradited under this Treaty shall not be proceeded against, sentenced or detained with a view to carrying out a sentence or detention order for any offense committed prior to his surrender other than that for which he was extradited,

suspect may be tried for another offence in the requesting state as well even though that offence was not part of the extradition request. Such a special case also applies for Article 23⁸⁹ which generally states that a suspect may not be extradited to a third state unless the requested state agrees to it. Article 24⁹⁰ states that the requested state has the right to ask for information about the trial after the extradition has been finalized and Article 25⁹¹ orders the requested state to surrender possible evidence and property of the suspect when extradition is granted. If requested, Article 26⁹²

nor shall he be for any other reason restricted in his personal freedom, except in the following cases: (a) When the State which extradited him consents thereto. A request for consent shall be submitted, accompanied by the documents mentioned in Article 14 and a record established by a judge or competent officer of the statement made by the extradited person in respect of the request for consent. If under the law of the Requesting State the issuance of a warrant of arrest for the offense for which extradition is sought is not possible, the request may instead be accompanied by a statement issued by a judge or competent officer establishing that the person sought is strongly suspected of having committed the offense. (b) When such person, having had the opportunity to leave the territory of the State to which he has been surrendered, has not done so within 45 days of his final discharge or has returned to that territory after leaving it. A discharge under parole or probation without an order restricting the freedom of movement of the extradited person shall be deemed equivalent to a final discharge. (2) The State to which the person has been extradited may, however, take any legal measures necessary under its law, in order to proceed in absentia, to interrupt any lapse of time or to record a statement under paragraph (1)(a). (3) If the offense for which the person sought was extradited is legally altered in the course of proceedings, he shall be prosecuted or sentenced provided the offense under its new legal description is: (a) Based on the same set of facts contained in the extradition request and its supporting documents; and (b) Punishable by the same maximum penalty as, or a lesser maximum penalty than, the offense for which he was extradited.”

⁸⁹ See Article 23 of the Germany – US agreement: “Re-extradition to a third state: (1) Except as provided for in Article 22(1)(b), the Requesting State shall not, without the consent of the Requested State, re-extradite to a third State a person extradited to the Requesting State and sought by the said third State in respect of an offense committed prior to his surrender. (2) A request for consent to re-extradition to a third State shall be accompanied by the documents supporting the request for extradition made by the third State, if the Requested State needs these documents for its decision. These documents shall conform to the documents mentioned in Article 14 of this Treaty.”

⁹⁰ See Article 24 of the Germany – US agreement: “Information on the result of the criminal proceedings: The Requesting State shall upon demand inform the Requested State of the result of the criminal proceedings against the extradited person and send a copy of the final and binding decision to that State.”

⁹¹ See Article 25 of the Germany – US agreement: “Surrender of property: (1) To the extent permitted under the laws of the Requested State and subject to the rights of that State or of third parties, which shall be duly respected, all articles which may serve as evidence, or which have been acquired as a result of an offense, or have been obtained as consideration for such articles, and which at the time of the arrest are found in the possession of the person sought or are discovered subsequently, shall be surrendered if extradition of the person sought is granted. Surrender of such articles shall be possible even without any special request and, if possible, at the same time that the person sought is surrendered. (2) Subject to the conditions provided in paragraph (1), the articles mentioned therein shall be surrendered even if the person sought cannot be surrendered owing to his death or escape. (3) The Requested State may condition the surrender of articles upon a satisfactory assurance from the Requesting State that the articles will be returned to the Requested State as soon as possible. “

⁹² See Article 26 of the Germany – US agreement: “Transit: (1) Transit of a person who is the subject of extradition from a third State through the territory of a Contracting Party to the territory of the other Contracting Party shall be granted on submission of a request, provided that the offense concerned is an extraditable offense under Article 2 and that the Contracting Party requested to grant transit does not consider the offense to be one covered by Articles 4 or 5. (2) Transit of a national of the Requested State may be refused if, in the opinion of that State, it is inadmissible under its law. (3) Subject to the provisions of paragraph (4), the request for transit must be accompanied by a warrant of arrest issued by a judge or competent officer of the Requesting State and by a statement as mentioned in Article 14(3)(b). (4) If air transport is used, the following provisions shall apply: (a) When no intermediate stop is foreseen, the Contracting Party requesting transit shall notify the other Contracting Party, certify that one of the documents mentioned in Article 14, paragraph (3)(a) or paragraph (4) (a) or (b) exists, and state whether the person whose

applies which reads that one contracting state has to agree on becoming a transit country for suspects who are extradited by or to the other contracting to or from a third country. Article 29⁹³ states when and how documents have to be certified, Article 27⁹⁴ states which law applies in which situation and Article 28⁹⁵ reads any document needs to be submitted in English and German. Article 30⁹⁶ states then that expenses of the extradition process are to be burdened on the requesting state, the following article⁹⁷ reads that the treaty applies to offences committed before and after the entry into force of the treaty and Article 32⁹⁸ defines what penalty and detention order mean.

3.2.3 Comparison of the two agreements

After describing the two agreements, one can compare them. This will be done by stating the similarities between certain articles as well as pointing out articles which can be found in only one of the agreements. It will also be concluded where the two agreements each put their emphasize on. Firstly, it has to be noted that some articles of the Germany – US agreement have been altered by the second supplementary treaty. Namely, they are article 12⁷⁸ which deals with capital punishment,

transit is being notified is a national of the Contracting Party over the territory of which the flight is to be made. In the case of an unscheduled landing such notification shall have the effect of a request for provisional arrest as provided for in Article 16; thereafter a formal request for transit shall be made.

(b) When an intermediate stop is planned, the Contracting Party requesting transit shall submit a formal request for transit”.

⁹³ See Article 29 of the Germany – US agreement amended by the second supplementary agreement:

“Certification: Documents that bear the certificate or seal of the Ministry of Justice, or Ministry or Department responsible for foreign affairs, of the Requesting State shall be admissible in extradition proceedings in the Requested State without further certification, authentication, or other legislation. “Ministry of Justice” shall, for the United States of America, mean the United States Department of Justice, and for the Federal Republic of Germany, the Federal Ministry of Justice”.

⁹⁴ See Article 27 of the Germany – US agreement: “Applicable law: Except where this Treaty otherwise provides, the law of the Requested State shall be applicable with respect to provisional arrest, extradition and transit.”

⁹⁵ See Article 28 of the Germany – US agreement: “Language to be used: The documents transmitted in the application of this Treaty shall be in the language of the Requesting State accompanied by a certified translation into the language of the Requested State. The expense of translation shall be borne by the Requesting State.”

⁹⁶ See Article 30 of the Germany – US agreement: “Expenses: Expenses arising from the transportation of a person sought to the Requesting State shall be borne by that State. No other pecuniary claim arising from an extradition or a transit request shall be made by the Requested State against the Requesting State. The appropriate legal officers of the State in which the extradition proceedings take place shall, by all legal means within their power, assist the Requesting State before the competent judges and officers. “

⁹⁷ See Article 31 of the Germany – US agreement: “Scope of Application: This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force. Extradition shall not be granted, however, for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.”

⁹⁸ See Article 32 of the Germany – US treaty: “Definitions: This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force. Extradition shall not be granted, however, for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.”

15⁸¹, which handles sensitive information, 16⁸² which states how to deal with provisional arrests, 17⁸³, which reads what has to be done when several states make extradition requests for the same person and 29⁹³ which deals with certification of the Germany – US agreement. Therefore, they still might be differently worded but their content and scope are the same as in the EU – US agreement. An example of this would be Article 16⁸², paragraph 1 where an exact sentence from the EU – US agreement has been added and now provisional arrest in moments of urgency can be done using help from Interpol. This was not the case before but it was introduced by the 2003 treaty concluded by the EU. The EU therefore fulfilled its duty to ensure that the member states bilateral agreements acknowledge the new treaty and its application in a written statement⁴²

This does not mean, though, that the agreements are completely coherent. That becomes already evident when one looks at the number of articles each agreement has. The EU – US agreement consists of 22, the other treaty of 34 which makes it evident that the agreements are different after all. The larger number of articles in the latter agreement can be explained by the fact that the treaty uses articles 14 to 30⁹⁹, in total 16, to set out the actual rules and practices of the extradition process. The agreement between the EU and the US uses only 9 articles to deal with the same topic¹⁰⁰ and puts more emphasis on another matter: the review of the treaty and how it is related to member states bilateral agreements with the US. Article 3⁴⁶ of the EU – US agreement describes in detail which articles need to be read in which way when they are related to member states agreements and article 18⁶⁹ states that this treaty shall not prevent any future agreements between the an EU member state and the US. Article 15⁶⁹ reads that the contracting parties should consult each other if a point stated in the treaty is not clear and Article 21⁶⁹ states that the contracting parties are obliged to review the treaty after a few years to assess its effectiveness.

After pointing out the differences in the agreements, the similarities have to be assessed too¹⁰¹. When one compares the agreements, some articles are found that deal with the exact same issue but they might be worded differently. In both agreements, the contracting parties felt the necessity to define certain concepts in order to clarify them in the context of the treaties. In addition, both agreements state that extraditable offences are offences which are punishable under both parties' criminal law system¹⁰². In addition, both agreements set rules for provisional arrest demands by the requesting state and they also state what has to be done when a suspect agrees to its extradition¹⁰³. Last but not least, both treaties define the territories to which they apply and both state when exactly the agreements enter into force.

⁹⁹ Namely the articles are: 14: Channel of communication; Extradition documents, 15: Additional Evidence, 16: Provisional arrest, 17: Requests for extradition made by several states, 18: Simplified extradition, 19: Decision, 20: Delayed decision and surrender, 21: Surrender of the person sought, 22: Rule of speciality, 23: Re extradition to a third state, 24: Information on the result of the criminal proceeding, 25: Surrender of property, 26: Transit, 27: Applicable law, 28: Language to be used, 29: Certification, 30: Expenses

¹⁰⁰ Namely, the articles are: 5: transmission and authentication of documents, 6: transmission of requests for provisional arrest, 7: transmission of documents following provisional arrest, 8: supplemental arrest, 9: temporary surrender, 10: requests for extradition made by several states, 11: simplified extradition procedure, 12: transit and 14: sensitive information in a request

¹⁰¹ This part excludes the already mentioned articles which had been altered and thus will only focus on articles which have been similar from the beginning.

¹⁰² The Germany – US agreement used to entail an appendix which lists all extraditable offences but with the first supplementary treaty in 1983, this was changed into double criminality and the provision that the offence has to be punishable with one year (or more) of imprisonment

¹⁰³ Simplified extradition procedures

All in all, it can be noticed that the agreements are not consistent in every single aspect but some issues have been in both agreements from the beginning and neither the member states nor the EU saw the necessity to amend them in the Germany – US agreement to make them even more alike. This has been done to only a few articles in order to satisfy Article 3⁴⁶ of the EU – US agreement. The differences described above can be explained by two simple reasons. First of all, EU law has primacy over member state law and as a result, the EU agreement has to state how this primacy works in the case of extradition and thus it also has to set out the rules which manage the relationship between the two treaties. Secondly, the EU agreement can rely on the detailed extradition procedures described in the member state agreement as they are responsible for the actual process of extradition. The EU does not extradite as it is not a sovereign state and thus the EU does not need such specific rules for it.

The largest difference between the agreements has not been mentioned so far: the fact that one treaty has a preamble at the beginning while the other one lacks it. The EU – US agreement has such a preamble which describes the goals and provisions of the agreement such as facilitating further and deeper cooperation in criminal law matters between the two contracting parties. This difference will be explained in detail in the next section as it is related with human rights and their relationship with extradition agreements.

3.3 The agreements and their coherence with Human Rights

This part deals with the question of how coherent the extradition agreements are with human rights and how they deal with the possibility of capital punishment in the US. As already mentioned above, this section will start with looking at the preamble of the two agreements in order to see whether human rights are effectively protected. As the description of the agreements already pointed out, neither agreement explicitly states that the agreement will act in accordance with human rights and/or make it its goal to protect them. The EU – US agreement, however, states that it will protect individual rights and the rule of law and in addition, it refers to the different legal systems under which it works and their guarantee to a fair trial for everyone.

An actual reference to human rights, though, is missing in the preamble of the EU – US agreement and in each treaty's actual text. As a result, this study will have a look at articles of the agreements which can be interpreted as "being in line with human rights"¹⁰⁴ or as being in clear violation of human rights.

The first articles which have to be mentioned are Article 4⁵⁹ of the EU – US agreement and Article 12⁷⁸ of the Germany – US agreement as they deal with extraditable offences. Both agreements state that only these offences are reason for extradition which are punishable under both jurisdictions which is known as double criminality. Double criminality "[...] essentially guarantees that the fugitive could be prosecuted for the same crime in her asylum state had the crime been committed there"¹⁰⁵. In addition, the suspect will not be tried if the requesting (and often home state of the suspect) does not have a law which could be used for a similar trial there. This protects Article 7 of the ECHR: no

¹⁰⁴ i.e. the chosen articles offer some protection of human rights by the way they are to be carried out

¹⁰⁵ Shearer, I. A. (1971). *Extradition in International Law*. Manchester, Manchester University Press.

punishment without law³⁶. A third article which has to be taken into account is Article 24⁹⁰ of the Germany – US agreement which states that the requested state may ask for information about the trial and the punishment imposed on the suspect. This possibility can be used if a state is no longer sure about the human rights protection of the requested state. This possibility, however, is not stated so in the actual treaty text. In addition, it appears unfair to the already tried suspect if another suspect is not extradited because their trial was not in line human rights. Nevertheless, the article can be connected with articles 3²¹, 6³⁴ and 14³⁷ of the ECHR and to articles 4³³, 21³⁸ and 47³⁵ of the Charter of Fundamental Rights. These articles prohibit any kind of torture¹⁰⁶, discrimination¹⁰⁷ and give suspects the right to a fair trial¹⁰⁸. Thus, if torture, unfair trial or discrimination is imposed on suspects in the requesting state, the requested state can obtain information on that by using Article 24⁹⁰ of the Germany – US agreement and then decide to terminate extradition. By doing that, it protects the six mentioned articles of the ECHR and the Charter of Fundamental Rights. Another article which is in line with human rights is Article 8⁷⁵ of the Germany – US agreement which reads that no suspect may be tried twice for the same offence. This principle is called double jeopardy and even though this principle has many aspects to it, the plainest definition dates back 2,000 years: "[T]he laws forbid the same man to be tried twice on the same issue"¹⁰⁹. It protects Article 50 of the Fundamental Rights Charter¹¹⁰ and Protocol 7 Article 4 of the ECHR¹¹¹ which have not been mentioned as important but turned out to be after all. The articles state that no one shall be tried for an offence twice and Article 8 forbids this for suspects extradited between the US and Germany.

There is, however, also an article in the same agreement which seem not be in line with human rights concerns: Article 7⁷⁴ which states that nationals of the requested state may only be extradited if the state thinks it is appropriate to do so. This is a violation of Article 14 ECHR which prohibits discrimination of any kind. Article 7⁷⁴, however, allows a better treatment of a state's nationals than of foreigners residing or being in custody in the requested state. When one looks at the extradition agreements analyzed in this study, it is obvious that states hold wide discretion when it comes to extradition as they decide on the terms under which it is allowed, e.g. Germany and the US do not allow for extradition when the offence is of military nature. Nonetheless, this article discriminates non-nationals of the German Republic and the US and therefore violates the articles which prohibit any kind of discrimination. In addition, it also has to be mentioned that neither agreement states

¹⁰⁶ See Article 3 ECHR and Article 4 of the Charter of Fundamental Rights

¹⁰⁷ See Article 14 ECHR and Article 21 of the Charter of Fundamental Rights

¹⁰⁸ See Article 6 ECHR and Article 47 of the Charter of Fundamental Rights

¹⁰⁹ See "DEMOSTHENES 589 (Vance transl. 1962), quoted in *United States v. Jenkins*, 490 F.2d 868, 870-71 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975). Cf. 4 BLACKSTONE, COMMENTARIES *335: "[It is] a universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offense." From Westen P. & Drubel R. (1978). "Toward a General Theory of Double Jeopardy." The Supreme Couter Review **1978**: 81-169.

¹¹⁰ See Article 50 of the Charter on Fundamental Rights: "Right not to be tried or punished twice in criminal proceedings for the same criminal offence: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

¹¹¹ See Protocol 7 Article 4 of the ECHR: "Right not to be tried or punished twice: 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention".

human rights concerns as a reason to refuse extradition. It is true that some reasons are mentioned which prohibit extradition e.g. if the offence is of military nature, the Germany – US extradition agreement does not allow the surrender of a suspect but no such reason can be linked to the prohibition of discrimination, the fear that the suspect may face torture or inhuman treatment or an unfair trial.

A positive point which both agreements share is the fact that they both deal with the death penalty in the way described above¹¹². That means neither agreement allows for the extradition of any suspect which might face capital punishment to the US unless the latter guarantees that the punishment will be either turned into a prison sentence or not imposed at all. This article spares the suspect from inhuman or degrading treatment and is in line with Protocol 6, Article 1 ECHR¹⁹ which prohibits the death penalty for every state who ratified the Convention.

Concluding, it can be seen that the EU – US agreement is the only one who refers to a fair trial and individual rights in its provision but the article which makes double criminality a necessity is the only one that can be related to human rights concerns. The Germany – US agreement, on the other hand, does not refer to any kind of human or individual rights and their protection in the beginning or any other part of the treaty. Nevertheless, articles 8⁷⁵ and 24⁹⁰ can be understood as being supportive of human rights and their protection. Article 8⁷⁴ prohibits that a suspect gets extradited if they had been tried for the same offence before and this prohibition is an actual part of the ECHR as well as well Charter on Fundamental Rights. Article 24⁹⁰ gives the contracting parties the possibility to get information on the trial of an extradited suspect and therefore it offers the opportunity to check for either party's compliance with human rights. It has to be noted, however, that article 7⁷⁴ allows Germany and the US to discriminate foreigners as they have to be extradited while nationals of the state can be protected and refused to be extradited.

Nevertheless, it has to be noted as positively that both agreements are in line with the prohibition of the death penalty in Europe by not allowing any extradition to end in capital punishment as laid out by Article 13 of the EU – US agreement⁶⁷ and Article 12 of the Germany – US agreement⁷⁸. In addition, it can always be the case that the requested state refuses extradition because of human rights violations in the requesting state. The possibility is given even if the agreements do not entail any such articles as the US and the EU member states are still sovereign states and therefore cannot be forced to extradite neither its nationals nor foreigners. The next section, however will not deal with detailed extradition cases. As this section concludes with the analysis of the two agreements' consistency with human rights after looking at their general consistency with each other and their legal relationship, the next part will deal with answering the above mentioned research questions.

4 Conclusion

The detailed analysis offered insight into four different aspects of the two extradition agreements: their legal relationship with each other, their consistency with each other and with human rights and their handling of capital punishment in the US. These aspects are all related to the aforementioned research question *“To what extent are the agreements on extradition between the USA and Germany and between the USA and the EU consistent especially in relation to Human Rights?”* and its sub-

¹¹² See 2 Determining the lawfulness of an extradition agreement

questions “*Do the different agreements mention the death penalty and if they do, how do they deal with the different opinions on the matter in the EU and the USA? What is the relationship between the agreements in light of current treaty framework?*” The conclusion will now focus on answering these questions by recalling what has been discovered in the analysis.

The main question will be answered first and in order to understand the agreements consistency with each other, it is crucial to start by pointing out that extradition agreements always have certain similarities. If that were not the case, one would look at two agreements with different meanings. Therefore, it comes as no surprise that these two agreements share some similarities. First of all, both agreements include the principle of double criminality and thus state that every offence is punishable if it is punishable in both states and they both focus on the actual extradition procedures but with varying intensity. In addition, the two agreements also specifically state to which territories the agreements apply and when they enter into force. In addition, the Germany – US agreements has been altered by the second supplementary treaty which has come into force after the conclusion of the EU – US agreement. Germany and the US were forced to change certain subjects of their agreement in order to make it more coherent with the new agreement between the EU and the US and this has led to some new similarities between the agreements. For example, the article on provisional arrest in the Germany – US agreement has been altered in such a way that it now states that Interpol can be used to achieve a provisional arrest⁸². This sentence has been copied by the EU – US agreement⁶⁰ which entails the exact same sentence.

Despite these similarities, though, the agreements also have many differences. The most obvious one is the fact that the EU agreement with the US consists of only 22 articles while the Germany – US agreement has 34 articles. This however, does not say much and therefore, one has to look at the scope and emphasize of the two agreements in order to understand this difference. The agreement between the EU and the US mainly focuses on the relationship between the agreement and similar agreements between the US and EU member states. One article for example states that the conclusion of an extradition agreement by the EU does not mean that member states can no longer do that same⁶⁹. As discussed above, the agreement also requires the EU to make its member states change their agreements if necessary and states how some articles of the agreement have to be interpreted in relation with member state agreements⁴⁶. The agreement between the US and Germany puts more emphasize on describing the actual extradition procedure in detail and it lists explicit offences which are not ground for extradition⁷³. The EU puts less emphasizes on these aspects of extradition as the Union cannot extradite anyone. This right is solely left to sovereign states.

All in all, it can be seen that the agreements are consistent with each other to the extent that they share similarities partly because they have to and partly because the EU – US agreement required some changes of the Germany – US agreement. The differences can be explained by the fact that the EU agreement with the US has to explicitly state where it stands in relation with member state agreements and as it does not declare the latter void, it does not have to state exact and precise extradition procedures as the member states have mostly figured those out in their own agreements.

When one looks at the two extradition agreements, it becomes evident that neither states human rights explicitly. It is true that the EU – US agreement mentions individual rights and the right to a fair trial but even there, actual human rights concerns are not entailed. As a result, it can be said that neither agreement is consistent with human rights at first sight since the Germany – US agreement

does not make any reference to it at all and the mentioning of a fair trial in the EU – US agreement is not linked to human rights but to the “respective legal systems” of the contracting parties¹¹³. Nevertheless, after a more careful look at the agreements one can find certain articles that can be used in order to favor and protect human rights. Especially the Germany – US agreement entails articles that can be interpreted in a way that allows protecting the aforementioned human rights articles in the ECHR and the Charter on Fundamental Rights. An example would be Article 24 of the Germany – US agreement⁹⁰ which allows the requested state to ask for information about the trial of the extradited person. This offers the possibility to check whether a fair trial was given, whether discrimination influenced the trial and whether the suspect was subject to inhuman treatment. The same agreement, though, entails an article that clearly violates the articles in the ECHR and the Charter on Fundamental Rights that prohibit discrimination. Article 7⁷⁴ allows refusing the extradition of nationals if the requested state finds it inappropriate to surrender its own citizen. Both agreements have an article which makes double criminality requirement for extradition which makes it impossible that a suspect gets extradited if they are sought for an offence which is legal in the requested state and might even be a human right in that country⁵⁹. As a result, both agreements are not consistent with human rights when one only looks for their protection and mentioning in the agreements. After a more careful analysis, though, it becomes evident that both agreements entail articles which can be used to protect human rights if the contracting parties wish to do so.

Both agreements use the same approach when it comes to dealing with capital punishment in the US. Neither the EU nor Germany allow extradition of a suspect who might face the death penalty unless the US guarantees that the punishment will be sentenced^{67,78}. The system is not perfect since the US could simply disregard the guarantee after the extradition has been carried out. It has to be noted, though, that such a violation of a guarantee can have far reaching consequences for the relationship between the US and the EU and Germany and the US. Therefore, it is unlikely that such a guarantee, once given, will be broken again.

At last, it will be concluded how the agreements are related with each other given that Germany is a member state of the EU. It has already been noted before that the EU – US agreement requires that the EU moves the member states to change their agreements with the US so that they share the same provisions⁴⁶. Nevertheless, the members states, and in this specific case Germany, keep the right to conclude extradition agreements with the US. Article 3⁴⁶ of the EU – US agreement even states how some of the articles in the agreement have to be interpreted when related to similar articles in the member states agreements. Therefore, it can be stated that neither the EU takes away all competences from the member states nor do the member states have full power over their agreements on extradition with the EU since the latter concluded an extradition agreement with the US.

¹¹³ See EU – US agreement preamble: “MINDFUL of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law”

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