The EAW in the Netherlands

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THE EUROPEAN ARREST WARRANT IN LAW AND IN PRATICE: A COMPARATIVE STUDY FOR THE CONSOLIDATION OF THE EUROPEAN LAW-ENFORCEMENT AREA

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Index

Preface 7
Introduction and methodological overview 11

Part I
The European Arrest Warrant: comparative analysis

1. A comparison of national laws 29
Introduction 31
1.1. Common ground: the Framework Decision.. 32
1.1.1. Analysis of the EAW Framework Decision 33
1.2. National transpositions and their variations 40
1.2.1. Rights and guarantees 41
1.2.2. Authorities 47
1.2.3. Procedures 50
Conclusions 58
2. Practices and perceptions in a comparative perspective 63
Introduction 65
2.1. The practice: cross-country analysis of judicial proceedings 66
2.1.1.The countries involved: a geography of warrants 67
2.1.2. Profile of the requested persons 70
2.1.3. Underlying criminality 76
2.1.4. Procedures 93
2.2. The perceptions of the actors in a compared perspective 97
3. Comparative remarks 105
References 113

Part II
The European Arrest Warrant: case studies

4. The EAW in Italy 119
Acknowledgments 120
4.1. Introduction... 122
4.2. The dimension and role of the EAW Italian law 124
4.2.1. Some elements of the story preceding the Italian Law 69/2005 124
4.2.2. The Italian Law and case law from the Frameword Decision perspective.......... 128
4.3. The EAW in action... 183
4.3.1. Issuing an EAW in Italy 183
4.3.2. Executing an EAW 190
4.4. The EAW from the Italian case files perspective 196
4.4.1. Notes on the data collection methodology 196
4.4.2. Data analysis 198

4.5. The Perceptions of Judges and Public Prosecutors.. 220
4.5.1. Notes on the data collection 220
4.5.2. Analysis of the Italian public prosecutors and judges perceptions' data 221
4.6. Conclusions.. 240
Bibliography 244
5. The EAW in the Netherlands 245
5.1. Introduction.. 247
Research context 248
Methodology 248
Limitations.. 250
This report 251
5.2. Dutch infrastructure and organizational practice concerning the EAW.......... 252
5.3. Analysis of Surrender Law (legislation, case law and doctrine) 254
Abolition of the double criminality test 254
Breach of fundamental rights 257
Surrender of nationals 259
Judgment *in absentia*.. 261
Locus Delicti.. 262
Life Sentence 266
Lapse of Time 266
Humanitarian grounds for refusal.. 267
Appeal 268
Multiple requests 268
5.4. Perception of judicial officers, advocates, scholars and policymakers 270
Differences between surrender and extradition 270
Mutual trust 272
Developments in surrender practice.. 275
Cooperation with foreign colleagues 284
5.5. The practice of the EAW in the Netherlands in numbers 290
EAW issued to the Netherlands 290
Discussion.. 310
EAW issued by the Netherlands.. 312
Discussion.. 325
5.6. Conclusion and Discussion 326
Timeliness.. 326
Developments in the Netherlands 327
Principles and legality 328
Mutual trust 330
Defence rights 332
Advocates' expertise and cooperation.. 333
Outcome in numbers 333
The discomfort of strangers.. 335
Bibliography 338
6. The EAW in Portugal..345
Acknowledgments 347
6.1. Introduction.. 349
6.2. The dimension of law.. 351
6.2.1. The EAW Act and the Framework Decision: an overview 351
6.2.2. Procedural characterization 358
6.3. The role of Case Law 368
6.3.1. Case law: brief characterization 369
6.3.2. Summoned matters 370

6.4. The EAW in figures 379
6.4.1. Issued EAWs 379
6.4.2. Received European arrest warrants 407
6.5. Perceptions 437
6.5.1. Opinions of agents 437
6.5.2. Survey 450
6.6. Conclusions 460
References 466
7. The EAW in Spain 469
The research project 471
7.1. Spanish report 472
7.1.1 Introduction 472
7.1.2 Topicality of the subject 473
7.1.3 Methodology and structure 475
7.1.4 Acknowledgments 479
7.2. EAW Legislation 481
7.2.1 The Framework Decision's transposition history 481
7.2.2 EAW Spanish Legislation 483
7.3. The data on the EAW in Spain 509
7.3.1 Limitations in the fieldwork 510
7.3.2 The numerical side of the EAW: an empirical investigation into flight from Justice in the EU 513
7.4. Spanish Case Law 552
7.4.1. Double jeopardy; Res judicata effect; Right to effective judicial protection 553
7.4.2. Right to freedom 554
7.4.3. Right to defence 556
7.4.4. Due Process - Right to a trial with full guarantees 558
7.4.5. Principle of reciprocity 560
7.5. Experts opinion 562
7.5.1. Survey 562
7.5.2. Results and Lessons about the EAW learned from Spanish Interviews and the expert meeting 564
Bibliography 583

Annexes

Guidelines for an EAW training programme 595
EAW International Conference Programme 601
Survey 603
Digital outputs 605

5

5. The EAW in the Netherlands

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5.1. Introduction

The European Arrest Warrant (EAW) is based on the Framework decision of the European Commission of June 13, 2002. The main aim of the Framework Decision on the EAW is to broaden judicial cooperation in criminal matters within the third Pillar of the EU. The EAW tries to simplify and expedite the surrender of persons. Therefore it "took the procedure from the hands of politicians and made it a purely judicial matter, whereby only the courts of the member states cooperate without the need to turn to the executive, which traditionally participated in the process of extradition" (Komarek, 2007: 14). Paragraph 12 of the Preamble states the EAW is based "on a high level of confidence between member states. Its implementation may be suspended only in the event of a serious and persistent breach by one of the member states of the principles set out in Article 6(1) of the Treaty on European Union." These words suggest more for citizens than what they actually refer to: enhancing transborder law enforcement within the European Union from an efficiency perspective while neglecting defence issues.

In general terms the European Arrest Warrant sets aside the applicability of the extradition treaties between the member states of the European Union. The Framework decision (hereafter referred to as: FD) obliges the member states to transform it into domestic law. The Netherlands has done so in the Surrender Act (hereafter referred to as: SA), which replaces the applicability of the Extradition Act on Arrest warrants from within the European Union. The Surrender Act makes the District Court of Amsterdam competent to decide on the surrender of a person for whom an EAW has been issued. The aim of the Framework Decision on the European Arrest Warrant is to make law enforcement easier and to put an end to the delays and restrictions of the cross border transfer of suspects and convicts under the extradition treaties regime. Furthermore, its aim is to make it difficult to flee for prosecution to another country and to make law enforcement in the European Union more effective.

This instrument for fighting criminality, consolidating judicial cooperation and for the mutual recognition of decisions calls for an efficient and effective application in all Members States. However, the "law in action" is frequently and significantly different from the "law in the books"; therefore it is essential to examine these differences. The objective of this report is to describe the practical application of the EAW in the Netherlands, the profile of the criminal practices and defendants, as well as the

perception of judges, prosecutors, advocates and scholars on how this instrument works and how effective it is in preventing and combating the circulation of crimes.

Research context

This report is part of a comparative research project organized by the Observatory for Justice of Coimbra University Portugal, co-financed under the criminal justice program 2007 of the European Commission. The research was directed by dr. Conceição Gomes, research coordinator of the Observatory. The aim of the project is to make an inventory of the practices of the implementation of the Framework Decision on the European Arrest Warrant in Portugal, Spain, Italy and the Netherlands. The project was executed by national research teams based at the Faculty of social and juridical sciences, University Carlos III de Madrid), Coimbra University, IRSIG-CNR, Bologna, Italy and at Utrecht Law School. The data were analyzed by the Observatory for Justice in Coimbra.

Methodology

The project combines juridical and qualitative and quantitative research methodologies.

The methodologies used to achieve the aim of providing adequate information for the comparative analysis is, juridical, qualitative and quantitative in order to be able to describe and understand how the European Arrest Warrant actually functions in the Netherlands. To achieve this, we analyzed the relevant judgments of Amsterdam district court and of the Dutch Court of Cassation, de Hoge Raad, in surrender cases, using a traditional juridical research methodology, relying on legislation and the legislative history of the Surrender Act, jurisprudence and analyses published in legal journals and books, and the surrender cases published on www.rechtspraak.nl.

For the empirical part of the research, we sought and acquired the kind cooperation from the Dutch Prosecutions office and the Surrender Chamber of Amsterdam District Court via the Council for the Judiciary.

For the analysis of cases concerning surrender requests from abroad, we got access to the archives of the Public Prosecutions Office in Amsterdam. From the about 1600 surrender cases dealt with by the PPO between 2004 and 2008 we drew a random

sample of 250 cases, based on the production registration of the International Legal Aid Centre of the Amsterdam Public Prosecutions office. These were closed cases. In the archive building, the relevant files based on the file numbers were brought to us by archive personnel, where the data, pre-established during research meetings in Bologna and Utrecht, were entered into SPSS files for further analysis.

For surrender requests from the Netherlands to authorities abroad, we were severely handicapped by the fact that these cases were filed differently at the International Legal Aid Centres of the Public Prosecutions Service. We managed to get access to copies of 105 Dutch EAW's. Their representative character therefore, is questionable.

We also conducted interviews with prosecutors and support staff of the International Legal Aid Chambers in Rotterdam, Haarlem, The Hague and Amsterdam. Furthermore we interviewed five judges of the Surrender Chamber of Amsterdam District Court.

Part of the project as also to have a questionnaire filled out by public prosecutors to catch their perception on the EAW. In order to get cooperation we contacted the Procurator General Office in The Hague. After 3 months we got cooperation, which unfortunately failed. In order to get cooperation we had sent the link to the dummy website of the questionnaire. This was sent without further consultation with us to the prosecutors at the International legal aid centres. The prosecutors filled out the dummy, but, of course, their answers were not saved. Our contact reported that the prosecutors protested, stating that they had shown their answers already to us in interviews. Therefore it was not possible to re-enact the entire operation with a well working website. That is why this report does not show data on the questionnaire.

The research has found cooperation from the PPO and Amsterdam district court. This was quite difficult to achieve, because in late 2008 all authorities involved in the application of the EAW in the Netherlands have participated in the European Unions' process of Peer Review of the practices of the EAW. Our research was of quite a different character, but, of course, we also borrowed information of the Peer review report on the Netherlands, as it was published in the early spring of 2009.

A first version of the report was discussed with stakeholders (PPO, Amsterdam District Court, Advocates) and dr. Luisa Marin of Twente University. That, of course, does not relieve us from our responsibility for this text.

Limitations

This is a case study with limitations. Part of the ongoing debate about the European Arrest Warrant concerns the ways in which surrendered persons are treated in proceedings and prisons in the requesting member states. Reports of Amnesty International and other human rights organizations are critical about the gathering of proof, and the treatment of suspects and convicts in several countries within the EU. Also, refusals of surrender by a 'judicial authority' in one country do not lead to removal of a person from the Sirene system. The same person can be arrested repeatedly in several countries during many years for the same offence, regardless of an evaluation of proof or guilt (Amnesty report, 2005; Cronin, Guardian August 5, 2009; NCRV broadcast 17 December 2007). From that perspective it would have been interesting and relevant for this research to also focus on the gathering of proof concerning a requested person, on the information exchange between the different countries from a defence right perspective and on the treatment of persons (suspects and convicts) after being surrendered to the Netherlands. The first few aspects are not taken into account by the International legal AID Centre or by Amsterdam district court, and an evaluation of the treatment of persons surrendered to the Netherlands was very difficult to achieve in this research. Incoming EAW's are registered separately, and therefore are easily traceable. The same holds for outgoing EAW's, even although this was a little more difficult already. However, surrendered persons are dealt with as ordinary suspects and convicts are, and their files do not have a recognizable marker except their names. This makes it extremely labour intensive to identify these files, trace the persons and their advocates. An explanation for this is that the scope of the Framework decision is limited to surrender proceedings and not to prosecution and court proceedings that are considered to fall within national jurisdictions only. The Framework decision focuses on cooperation between authorities only and almost not on the consequences for suspects and convicts. We, unfortunately, were time wise not able to conduct such research, notwithstanding the suggestion of the Dutch Minister of Justice to develop a monitoring system with the purpose to 'facilitate discussions within the EU context about obstacles in the criminal legal cooperation' (Ballin and Schoordijklezing, 2009). Such obstacles may be a lack of timeliness, failing legal aid, absence of adequate interpretation or encroachments of human rights in gathering proof. And such a monitoring process presumes instruments to identify surrendered persons in criminal proceedings and prisons. These do not exist yet.

This report

As a result of this research, this report entails the following information: chapter 1 deals with the surrender act and an analysis of Dutch literature and case law, chapter 2 deals with the perception of judicial officers on the EAW, and chapter 3 gives information on the application of the EAW following from quantitative research on surrender cases. We finalize this report with a discussion of the application of the EAW in the Netherlands also from a EU-legal perspective, where we confront the issue of defence rights with the issue of enhancing transnational criminal law enforcement.

5.2. Dutch infrastructure and organizational practice concerning the EAW

The Framework decision on the European Arrest Warrant has been implemented in the Surrender Act. The Surrender Act is implemented by the international legal Aid Centre of the Public Prosecutions Office in Amsterdam for incoming European Arrest Warrants. Amsterdam District Court has a separate chamber for Surrender cases, and it is the only court who can decide on EAW´s. Ordinary appeals to a higher court are not possible. For that reason, Amsterdam District Court sits with a three judge panel on Surrender cases.

For incoming EAW’s working procedures can be sketched as follows.

In practice, the data of wanted suspects and convicts are entered into the Sirene System and the Schengen information System. Sometimes a notification is sent to Interpol. The Sirene office checks the most important requirements, like the age of the requested person and the applicable maximum sentence for the crime (at least one year imprisonment). This may already lead to refusal to enter a persons’ dates into the Sirene System. Once a person is traced or arrested in the Netherlands, the issuing authority, is informed rapidly. This authority then can decide if it wants to send an EAW to the International Legal Aid Centre of the Public Prosecutions Office in Amsterdam. The EAW received is checked first, and if need be, extra information is asked from authorities abroad. During the years since 2004, the International Legal Aid Centres had to learn how to deal with this, but they also had to get acquainted with the different practices and requirements of the authorities in other countries. Then the case is referred to the Surrender Chamber of Amsterdam district court. Sometimes the PPO demands refusal of an EAW, but in the vast majority of cases the PPO demands surrender of the requested person. Refusal of surrender by the court does not automatically lead to removal of a person from the SIS or the Sirene system. The person has to ask that separately.

In case of refusal by the court, the PPO has a possibility to appeal to the Court of Cassation in the interest of law. This has been done only twice until now.

For outgoing EAW’s working procedures can be sketched as follows.

Each public prosecutor in the Netherlands is competent to demand the issuance of a European Arrest Warrant against a suspect or convict. The issuing of EAW´s from the Netherlands however is coordinated by the 5 International Legal Aid Centres of the Dutch Public Prosecutions Service. Thus, specialized staff and prosecutors take care of it.

Then the public prosecutor can decide if and how the European Arrest Warrant can be sent to the authorities responsible for surrender of the wanted person. Often this is a matter of information exchange between the authorities, as e.g. for suspects the offence has to be specified quite precisely, and the EAW has to be drafted in the accurate language.

In general, Dutch prosecutors ask for surrender of persons for heavier crimes only.

5.3. Analysis of Surrender Law (legislation, case law and doctrine)

This chapter deals with the Framework Decision and the way it is transposed into the Dutch Surrender Act. Furthermore, this chapter elaborates on the recent literature and case law, which is important for understanding the developments of the EAW in practice.

Abolition of the double criminality test

The Framework Decision on the European Arrest Warrant does away with the double criminality requirement under the extradition regime as far as a list of 32 crimes is concerned - Article 2(2) FD. The Netherlands implemented the double criminality list in complete conformity with this Article and extended it to include manslaughter (European Commission, 24 June 2006). member states can choose whether they require double criminality for offences not mentioned on the list. Thus they are not obliged to require double criminality. In the case of Advocates for the World the question is dealt with whether the list of 32 offences amounts to a breach of the fundamental rights of legality and equality. Advocates for the World argued that no reference has been made to the legal definition and content of these offences. The ECJ refers to Article 7(1) ECHR in which the principle of legality is thus defined: “legislation must define clearly offences and the penalties which they attract”. Then, the ECJ states that the list of 32 offences is not intended to create criminal offences, as the offences listed must be punishable in the issuing member state: “The definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties” (Samiento, 2008: 176; ECJ 03 May 2007, Advocaten voor de Wereld).

Nevertheless, the meaning of some offences remains rather unclear, e.g., of racketeering, terrorism, trafficking in human beings or computer crime. The definition of these offences might be broadened all the time due to international and technological developments. However, the minimum definition – the amount of elements – is always the same. Even so, the translation of the FD into 21 languages might result in different

definitions (Smeulers, 2004: 69). Furthermore, it is possible that some acts are punishable in the issuing country, but not in the executing country. Because judges cannot test the double criminality of offences in concrete terms, they have to surrender the person asked for. This means that a Dutch doctor who carried out an illegal abortion outside the Netherlands has to be surrendered (Smeulers, 2004).

With regard to the principle of equality, the ECJ did not constitute a breach, as the distinction made between facts for which double criminality is tested and facts for which this test no longer exists can be objectively justified. First, introducing the list of 32 offences is based on the principles of mutual recognition and mutual trust and solidarity. Second, “by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality” (ECJ May 2007, par. 57).

The abolishment of the double criminality test with regard to the offences on the list means that the offence does not need a double qualification; only the issuing State qualifies the offence (Blekxtoon, 2004: 28). In the Netherlands the choice of the issuing State to indicate one of the punishable offences from the list is only tested marginally: is it reasonable to conclude one of the listed offences is at issue? The Dutch court does not accept fishing expeditions or lists that are filled out poorly. If the issuing authority does not have a reasonable suspicion, but wants to speak a person to clarify his involvement in criminal offences, then the authorities should use another type of request. Also, when further information is asked for by the court, but is not provided, surrender will be refused (Klip, 2005: 1680).

In the texts of both the FD and the SA, both the terms ‘act’ and ‘offence’ are used. As a consequence, whether an act can be regarded as an offence should be examined, in particular when double criminality is required, according to the law of the executing State, i.e., the State of the authority competent to decide on the surrender of a suspect to another State. By the abolition of the requirement of double criminality and by the wording ‘offence’ a situation is created in which the Netherlands should surrender suspects and convicts for acts that are, according to national law, regarded as minor offence and not as a criminal offence (Blekxtoon, 2004: 28). For example, acts which are mentioned in the Dutch Opium Act.

In a judgment of 6 March 2007 the court ruled regarding a Belgian arrest warrant, which was issued for human trafficking, that some acts for which boxes of the list were

crossed are not punishable in the Netherlands and, for that reason, surrender should be refused (Amsterdam District Court, 6 March 2007). The question rose whether the court has the right to test the double criminality when some acts might not be punishable according to Dutch law. The court stated that the principle of trust between States, on basis of which the suspicions should be assumed to be correct, should prevail, except when there are important clues that a mistake has been made. In a judgment of 10 July 2007 the court examined in detail the suspicion which is part of the defence of innocence (Amsterdam District Court, 10 July 2007).

However, the FD does not allow such examination. Regarding the requirements of the information that is send together with the arrest warrant, Article 8 FD does not give a clear answer. The advocate general did answer this question in the Advocaten voor de Wereld case:

> "The court responsible for executing the warrant must establish that the conditions for handing over an individual who is in its jurisdiction to the issuing court have been satisfied, but the executing court is not required to hear the substance of the case, except for the purposes of the surrender proceedings, and must refrain from assessing the evidence and delivering a judgment as to guilt." (AG. ECJ 12 September 2006, par. 105).

More recently the court has refused surrender of a suspect of having caused a traffic incident in Poland. The question to be answered by the court was not if article 177 Polish criminal code has an analogous provision in the Dutch criminal code. The fact the suspect is requested for, should fall within the scope of a provision of the Dutch Criminal code with a minimum sentence of 12 months. The court found such provisions in articles 5 and 6 of the Road and Traffic Act. However, article 6 did not apply, because the EAW did not contain enough information to make it likely the requested person shouldered the required degree of guilt to the accident described. The other provision in article 5 of the Road and Traffic Act did apply but allows a maximum sentence of 2 months only. Therefore surrender was refused (Amsterdam District Court, 29 July 2009).

The Amsterdam District Court was furthermore used to require the issuing State to add the relevant statutory provisions to the EAW. Subsequently, the court could check whether the requirements are met that the act should be punishable by maximum custodial sentence of at least three years. This was also the result of the EAW being inaccurate, so the Dutch authorities wanted to – marginally – check whether the offence could reasonably be seen as an offence from the list (Council EU 27 February 2009, 18). However, Article 8 FD and Article 2 SA only require that 'the nature and legal status of the offence' have to be mentioned. Checking the reasonableness of ticking a box can be

regarded as marginal double criminality verification (Keijzer and Sliedregt, 2009: 63). Also the Netherlands Supreme Court ruled that the requirement to add the criminal law provisions to the EAW is incorrect (Supreme Court of the Netherlands, 8 July 2008). Not requiring the full texts of the criminal law provisions to be attached, is, according to the Supreme Court, in line with the purpose of the FD, which to a considerable extent is based on trust between the member states in order to avoid difficulties and loss of time. According to Rozemond, it follows from this decision and from the underlying principles that the executing authority has to be very restrictive in examining the ticking of a fact from the list by an issuing authority (Rozemond, 2008: 289).

Breach of fundamental rights

When a flagrant breach of human rights is invoked this can lead to a refusal of surrender, e.g., in case of a violation of reasonable time, because such violation is irreversible. In the Netherlands, such violation leads to remission most of the times (Klip, 2005: 1680). The Netherlands Supreme Court has stated that judges have a wide obligation to examine whether there is a flagrant breach of fundamental rights. A disproportionate prison sentence of 42 years has led a case before the ECHR, which stated that: “extradition of an individual to a State in which he runs the risk of being sentences to life imprisonment without a possibility of early release might in some circumstances raise issues under Article 3” (Klip, 2005). In the Netherlands early release is, however, not possible for persons who are serving a life sentence. The provision of pardon cannot be considered sufficient, because it is difficult to effectuate.

Judges have the responsibility to test surrender against the ECHR, even in absence of Article 11 SA. It follows from Article 94 of the Dutch Constitution that when there is a conflict between an act and a treaty, the latter shall have precedence. On the ground of this Article the ECHR will have priority over the Surrender Act; the explicit regulation of Article 11 SA only confirms this (Smeulers, 2004: 73). The Council of State mentioned in its advice that this regulation is rather unnecessary as well, as it is already the task of the judge to test the execution of the EAW against the Etch (TK 2003-2004: 105). Moreover, the word ‘flagrant’ in Article 11 cannot restrict the Constitutional regulation. For that reason, Article 11 has to be interpreted more widely than the term ‘flagrant’ seems to suggest. Furthermore, it was not the intention of the minister to restrict the test flowing from Article 94 of the Constitution (Smeulers, 2004: 80). Based on the principle of trust, the executing State should not start investigations on the human rights guarantees in the issuing State. Only when there are reasons to believe that the

person involved would risk a denial of human rights, the judge has to examine whether those reasons are substantive and constitute a real risk.

So, as Article 11 SA has a rather open character; its meaning has been filled in by the ECtHR and national case law. The question that remains difficult to answer is to what extent member states have a duty to examine the respect of human rights when granting assistance to other member states. In the Soering case is stated that Article 1 ECHR cannot be read as justification to test whether the circumstances in the other State are in full accord with each of the safeguards of the Convention (ECHR, 07 July 1989, par. 86). Based on Article 3 ECHR, extradition must be refused when there are substantial grounds for believing a person “would be in danger of being subjected to torture, however heinous the crime allegedly committed.” (ECtHR, 07 July 1989, par. 86). The obligation not to extradite also extends to cases in which the person concerned “faces a real risk of exposure to inhuman or degrading treatment or punishment” (ECtHR, 07 July 1989, par. 88). The ECtHR also stated that an issue might also be raised under Article 6 ECHR by an extradition decision “where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.” (ECtHR, 07 July 1989, par. 113). It seems as if the ECtHR distinguishes between reversible and irreversible violations. In the Mamatkulov and Abdurasulovic case the ECtHR took into consideration the special nature of the alleged violation of Article 3 of the ECHR and referred to the UN Committee against Torture which stated that there is ‘irreparable harm’; this criterion is also used by the ECtHR later on (ECtHR, 6 February 2003). This shows that the ECtHR differentiates between reversible and irreversible violations of human rights (Krationis, 2005: 350).

Since 2003 the Netherlands Supreme Court changed its rulings on human rights exceptions substantially: not only a flagrant denial of Article 6 was required, but also the lack of legal remedy, as prescribed by Article 13 ECHR (Amsterdam District Court, NJ 2004: 42). Moreover, a completed torture does come under to scope of the defence of a risk of flagrant denial of Article 6. The requirement of lack of legal remedy applies as well (Amsterdam District Court, NJ 2004: 41). As a result, the responsibility to examine the warrant shifts from the questioned State to the requesting State by the requirement of lack of legal remedy, as derived from Article 13 ECHR. As a common rule, ECHR-defences should be put forward in the criminal proceedings that are held after extradition or surrender took place (Rozemond, 2008). In 2007 the ECtHR stated that even in case of violation of Article 6 the applicant has to file a complaint with the ECtHR after being extradited. As follows from this reasoning, the ECtHR makes a distinction between extradition to a country which is party to the ECHR and extradition to a country which is

not (Rozemond, 2009: 31). Furthermore, no real risk is required anymore, as the executing country is not obliged to examine the risk of denial of human rights and, subsequently, refuse extradition. It can be concluded that the ECtHR – like the Netherlands Supreme Court – has shifted from holding the State questioned to extradite/surrender responsible, to holding the State requesting to surrender/extradite responsible. The questioned State no longer has to check the requesting State to respect human rights, if that state is party to the ECHR (Supreme Court of the Netherlands, NJ 2008: 44). Only a lack of an effective remedy in the requesting state makes extradition inadmissible (Rozemond, 11 June 2008).

Smeulers argues that this is an unreasonably onerous additional requirement, as the primary goal of the ECHR is to prevent the denial of human rights and not to repair them afterwards. Furthermore, this criterion can result in a burden of proof for the requested person. In other words: when a State has acknowledged an individual's right of complaint, an effective remedy is always guaranteed. In Smeulers' opinion, when the issuing State has acknowledged the individual's right of complaint, an appeal based on Article 6 ECHR is unable to succeed in advance. This might be different when the person asked for can prove that this right has no practical meaning with respect to its content in the issuing State. Therefore, the question whether there is a legal remedy should not only be examined formally in order to determine whether access to a judge is theoretically guaranteed; this remedy also has to be effective in practice (Krianotis, 2005: 355). Smeulers thinks this development in case law, in particular the additional onerous requirement, is worrying (Smeulers, 2004: 78).

Surrender of nationals

Whereas the European Convention on Extradition provided for a mandatory refusal ground when the requested person was a national of the executing country, the Framework Decision on the EAW states that nationals have to be surrendered in order to be prosecuted subject to the condition of being re-surrendered – Article 5(3) FD. This replaces the double criminality test in the extradition practice. This means it is impossible under current extradition treaties – and national law – to transfer a person when the offence is not punishable in both States. But Dutch nationals will not be surrendered for the prosecution of an offence which is not an offence according to Dutch law as well. From case law of the court of Amsterdam it became clear that judges do test the double criminality of the act in concrete terms when it concerns a Dutch citizen or an alien with a residence permit in the Netherlands for an indefinite time. This was confirmed in the

Wolzenburg case by the ECJ (ECJ 6 October 2008, Wolzenburg). The outcome of that case is currently part of the case law of the surrender chamber (Amsterdam District Court 05-01-2010; 23-02-2010).

According to the European Commission, the position of the Netherlands obviously runs counter to the removal of the double criminality test as follows from Article 2(2) FD (European Commission, 24 January 2006: 13). Rozemond and Glerum also call the extra requirement of double criminality 'at odds' with Article 2(2) (Glerum and Rozemond, 2008). How does this work?

Surrender can only take place after the guarantee is given that the person asked for can serve his sentence in the Netherlands after being convicted in the issuing State and when the issuing State agrees to the conversion procedure of Article 11 of the Convention on the Transfer of Sentenced Persons (1983) (Council of the European Union, 27 February 2009: 34). This means that the procedures for execution provided for by Dutch law apply and the legal nature and duration of the sentence will be converted to Dutch law. However, such transfer of a sentence can only take place when the act is punishable in the Netherlands as well (Smeulers, 2004: 70). Therefore, the court has to perform the double criminality test, or – in other words – the double criminality test is "reintroduced 'through the back door'." (Glerum and Rozemond, 2008). The most recently published judgment referring to the double criminality test is

Whenever an EAW is issued for the purpose of the execution of a sentence, it is allowed to refuse surrender under the condition that the sentence is executed in the country of origin – Article 4(6) FD. Glerum and Rozemond argue that this provision, together with Article 5(3) FD, protects only the requested person's interest in reintegration and not that person's interest in being prosecuted and tried in his/her own State" (Glerum and Rozemond, 2008). Furthermore, they conclude that "an issuing Member State's interest in execution in certain cases has more weight than a person's interest in serving a custodial sentence is his/her own State" (Glerum and Rozemond, 2008). For example, when the executing State cannot execute the sentence in accordance with its domestic law, then execution has to take place in the issuing country after all. Moreover, they argue that the guarantee to return to the executing State will be required without exception, and no conditions for the return, such as consent of the requested person, double criminality and adaptation or conversion of the sentence, will be stated. Therefore, Rozemond and Glerum conclude that the principle of reintegration, EU-citizenship and mutual recognition are not explicitly expressed in the text of the Framework Decision (Glerum and Rozemond, 2008).

Judgment *in absentia*

In the Netherlands persons can be tried and convicted *in absentia*. Appeal against these judgments can only be brought to the Supreme Court. Nevertheless, the Supreme Court does not examine the facts of the case, and therefore does not provide a ‘retrial’. Without a change of law the Netherlands will not be able to guarantee a retrial. In Germany judgments *in absentia* are only possible in minor cases, while in England and Sweden it is not possible at all. In France and Belgium objections can be lodged against all judgments *in absentia*, which results in new hearings at a special college (Blekxtoon, 2004: 27).

In a case before the Court of Amsterdam in 2004 the Belgian authorities promised that the requested person, who was judged *in absentia*, could raise objections to this judgment after being surrendered to Belgium. However, the Court of Amsterdam regarded the guarantee of a retrial given by Belgium insufficient, as it is not certain whether this application for a retrial will be admissible (Amsterdam District Court, 23 November 2004, NJ 2005/8). Article 12 SA provides for an assessment of the merits of the case, according to the legislature. The court argues that the procedure that the admissibility of the objections lodged has to be evaluated before the surrendered person could make use of his right to defend himself in a retrial is insufficient, regardless the legal validity of the Belgian procedure (Amsterdam District Court, 23 November 2004, NJ 2005/8). The mere existence of a retrial is therefore regarded insufficient to guarantee a new assessment of the merits of the case. This can lead to a situation in which the Netherlands – or Belgium – becomes a safe haven for persons tried and convicted *in absentia* in another State (Jonk & Hamer, 2005). The Netherlands have had several bilateral contacts with Belgium in order to solve these problems. Belgian Procurators-General recently have promised that an amendment of Belgian law, which has to ensure a uniform approach by Belgian prosecutors, will come into force in the early part of 2009 (Council of the European Union, 27 February 2009: 27)

In cases where reason was for doubt that the person had been properly informed of the judgment *in absentia* by prosecuting authorities, Amsterdam district court seeks explicit explanations from the issuing authorities, in conformity with article 12 Surrender Act. In a recent case the doubt arose because of an inaccurate signature under the receipt of a notification of a judgment *in absentia* in Poland (Amsterdam District Court 19 03 2010 and 12-01-2010).

In a case where the surrender of a Bulgarian national was requested, the court did not accept the general declaration of Bulgarian authorities that the suspect would be retried according article 423 Bulgarian Code of Criminal Procedure because the English translation of the provision was unclear (Amsterdam District Court, 13 11 2009).

The new framework decision on trial *in absentia* (Council Framework Decision of 26 February 2009). stresses the mutual trust authorities in the national member states must have. It restricts the conditions under which a surrender of a requested person that was tried and convicted in his absence may be refused, to cases where the requested person could not have been aware of the trial against him. It furthermore stresses the defence rights of requested persons but it also stresses that is does not aim at harmonizing national legislation on trial *in absentia*. This means that surrender still can be refused unless requesting authorities can proof the requested person should have known of the case against him.

We will have to wait in order to see in how far this change in the FD EAW will affect the jurisprudence of Amsterdam district court.

Locus Delicti

In general, surrender may be refused if the committed act did take place in part or entirely on the territory of the executing State – Article 13 SA. The second paragraph of Article 13 is more complicated, as it introduces an element the court has used extensively to evaluate the legality of the requested surrender: “At the public prosecutor’s request, and only in the terms of paragraphs 1a and 1b, a refusal of surrender shall be waived, unless, in the opinion of the court, the public prosecutor could not reasonably make such a request.” This phrase was introduced into the body of the proposal for the Surrender Act by parliamentary amendment.

The court of Amsterdam elaborated the requirements of Article 13(2) even further. First, in its judgment of July 2, 2004 the court declared surrender inadmissible, because the public prosecutor did not give notice of the personal interests of the requested person in his reasons (Amsterdam District Court, 2 July 2004). The public prosecutor argued that the interests of the requested person are irrelevant for an action based on Article 13(2), but the court declared this unreasonable. Second, the court of Amsterdam introduced a heavier obligation to provide reasons. This was based on the lack of policy rules by which the public prosecution service should make use of its power to take an action based on Article 13(2) SA. Third, the court stated that putting forward

personal circumstances concerning the work, the home, the family, or the state of health of the person claimed, could provide reasons to declare the action of the public prosecutor on the basis of Article 13(2) unreasonable, in particular when he has based his judgment solely on general grounds while the person claimed has put forward concrete interests.

However, according to the Supreme Court, humanitarian reasons are no ground to refuse surrender (Supreme Court of the Netherlands, 28 November 2006). The Supreme Court stated that Article 13(1) only aims at protecting certain interests of the Netherlands, such as the Dutch policy on soft-drugs, euthanasia, abortion, brothel keeping, pornography and adultery (Blekxtoon, 2004: 28). Furthermore, Article 13(2) is written in the interest of a proper administration of justice when an act is partly committed in the Netherlands and a decision has to be made about which member state is designated to prosecute. The Supreme Court also mentions that an increased duty to provide reasons does not follow from the text or the legal history of Article 13 SA. Still, the Supreme Court made no statements with regard to the first requirement of the Court of Amsterdam. For that reason, the court still takes the personal interests of the requested person into consideration when deciding upon the reasonableness of an action of the public prosecution based on Article 13(2) SA (Amsterdam District Court, 15 December 2006; 19 December 2006; 29 December 2006; 12 January 2007). When the interests of the person involved will be disproportionately harmed, the court is – still – likely to refuse surrender (Klip, 2005: 1680).

Nevertheless, these considerations have not led to the refusal of surrender yet (Rozemond, 2007: 493). Procurator-General Fokkens mentions that further substantiation of ‘a proper administration of justice’ can entail consideration of personal interests. He refers to the ministerial circular ‘inzake de overdracht en overname van strafvervolging’ (Stcrt. 2001, 143, 13), which says that with regard to a proper administration of justice, in many cases prosecution in the country of origin is to be preferred to prosecution in the country in which the act is committed (Supreme Court of the Netherlands, 28 November 2006). This ministerial circular mentions unfamiliarity with the legal procedure, language problems, and cultural differences as relevant factors. Taking personal circumstances into consideration fits the constitutional meaning of proper administration of justice in which the human individual is placed in the middle. A proper administration of justice, therefore, requires consideration of the domicile principle: the suspect should be prosecuted in the country of which he is resident. The minister of justice said in this regard that a proper administration of justice means that

prosecution in the country of origin is to be preferred to judgment in the country where the offence is committed most of the times.

Another reason for this is that the pre-trial detention can be suspended in the country in which the person has his permanent address, thus limiting so-called 'collateral damage' of the suspect. In the issuing State that is hardly possible, because the surrendered person has no permanent address or residence in that State. Also the interest of – social – rehabilitation can lead to a refusal of surrender. Because the convicted person has to repatriate to society again it is preferable that this person is prosecuted in the Netherlands and that his punishment can be executed there as well. Yet, this goal can also be achieved by the guarantee of Article 6 SA which requires the re-surrender of the person involved to the executing State as soon as he has been convicted in the issuing State. Still, it cannot be guaranteed that this procedure does not harm the possibility to rehabilitate, because the person involved might lose his home or his job in the Netherlands in the meantime. The interest of rehabilitation should not only be considered as an interest of the person claimed, but also of the Dutch society in which this person has to repatriate in.

According to procurator general Fokkens, the public prosecutor has to take all these interests into consideration, but the court can only declare its decision unreasonable after the alternatives for surrender are examined (Rozemond, 2007: 495). Nevertheless, when surrender should be refused on the basis of Article 13(1), the public prosecutor can still surrender the requested person based on Article 13(2); when the prosecution against this person is already started in the issuing State, when the main evidence or the other suspects or witnesses are present in the issuing State, or when the legal order of the issuing State is more shocked by the act (Blekxtoon, 2004: 26). Then, the public prosecution service must explicitly motivate why this ground for refusal is not admissible (Klip, 2005: 1680). Humanitarian reasons can play a role in order to refuse surrender on the basis of Article 13(2), according to the system and the parliamentary history of the SA. These reasons should be balanced by the public prosecutor against the other interests involved in a proper administration of justice. Consequently, the judge can perform a test of reasonableness and can check the clarity of the reasons (Rozemond, 2007, 497).

The Supreme Court judged in its case of 28 November 2006 that the Court of Amsterdam, which examined the public prosecutor's request which contained humanitarian reasons to oppose surrender, has shown an incorrect interpretation of Article 13 SA regarding the criterion that should be used for testing the prosecutor's

request (Supreme Court of the Netherlands, 28 November 2006, par. 3.6). The public prosecutor requested to waive a refusal of surrender, which, according to the court, was unreasonable, as the requested person has behaviour disorders, ADHD and a limited development of his mental faculties. Furthermore, the court considered that prisons in Germany do not provide sufficient forms of therapy and medicine which are required to keep this person mentally stable. Therefore, surrender would have a radical and permanent negative effect on the requested person, so the weighing up of interests by the public prosecutor was considered unreasonable by the court. Nevertheless, the Supreme Court ruled that, regardless the meaning of the term 'proper administration of justice', surrender cannot be refused on the ground of humanitarian reasons, because they are not a relevant factor for answering the question if a refusal of surrender should not be allowed in the interest of a proper administration of justice based on Article 13(2) SA.

Annotator Klip writes that reference to a proper administration of justice became a leading principle for the court, but got rejected by the Supreme Court. He considers that within the EU a request for extradition became a warrant. This means that mutual agreement no longer is required to decide which judicial assistance would be appropriate considering the circumstances of the case. Now, the State that takes the initiative decides what will happen and the interests of that State will be dominant. However, there still is a major inequality in the way suspects are treated in different European countries. This can become problematic when human rights are at stake or with regard to the term a suspect can be placed in pre-trial detention. It seems that the court wants to protect suspects against such problems. But Klip does not think that is the right thing to do. It would be better to uplift the procedural rights of suspects to an acceptable level within the EU. There is no place for the principle of proper administration of justice within the EU- context of rules for surrender of suspects and convicts. Moreover, it is contrary to the mandatory character of judicial assistance within the EU. There is no place for discussion, weighing of interests or own judgment; a State simply has to execute a warrant. That is the main principle of mutual recognition. The goal of the EU is a totally free movement of judicial warrants and decisions. In the long run, also the surrender procedure will be abolished, as the government stated in the explanatory memorandum (Tweede Kamer II, 2002-2003, 29042, nr. 3, 8). This should stimulate the court to put forward less, rather than more, obstacles to the EAW. Nevertheless, though mutual trust is required by the EU; in practice it is not always present (Supreme Court of the Netherlands, 28 November 2006).

Life Sentence

Article 5 FD and Article 45 SA enable executing authorities to consider whether effective remedies are present in order to transform life sentences into 20 years sentences. The Netherlands is one of the EU member states still interpreting a life-time detention order as detention until the end of the life of the person involved. It seems as if the Framework Decision does not think it is a good idea to interpret life-time too literally. Twenty years seems to be the maximum. In the Netherlands, 20 years is practically the maximum for temporarily detention. The execution of life-time detention can only be stopped after requesting a pardon. However, pardon is almost never given. The German Explanatory Memorandum of the German Act based on this Framework Decision says that the possibility of pardon is not sufficient: "*Entscheidend ist, dass ein Rechtsanspruch auf Überprüfung besteht. Die immer bestehende Möglichkeit einer Begnädigung ist jedoch hierfür nicht ausreichend.*" (Blekxtoon, 2003: 1237). Also Portugal does not regard the provision of pardon sufficient, as in Portugal life-time detention is not provided for by law and is regarded inhumane. When the Dutch legal system will not be changed, it remains possible to give ad hoc guarantees in every single case. Such guarantees are also asked by the Netherlands for extradition to countries in which the death penalty is possible. Germany itself has a regulation that provides for a conversion of life-time detention into a conditional sentence after 15 years are served and the seriousness of the guilt of the convicted person does not require further execution and the public safety will not be prejudiced. This review provision is made, because Germany regards life-time detention without any prospect inhumane (Blekxtoon, 2003: 1238).

Lapse of Time

Article 9(4)(f) SA provides an optional ground for refusal when the Netherlands can exercise legal authority, but punishment of the offence is no longer possible because terms of limitation concerning lapse of time apply. Whether there is a lapse of time in accordance with the law of the issuing State is not examined. This is probably based on the principle of trust and on the assumption that issuing surrender has no use when lapse of time applies regarding the offence in the issuing State (Blekxtoon, 2004: 27). When the Netherlands have jurisdiction as well, a lapse of time needs to be assessed according to national law. When Germany issues a warrant, e.g., for murder, this offence is on the list of Article 7(1) SA and no double criminality test has to be executed anymore. However, for examining the punishability of the act according to the law of the

executing State, all the facts have to be taken into consideration. These facts are only considered for acts that are not included in the list. Regarding acts from the list of Article 7(1), Annex 2 only requires a "description of the circumstances in which the offence(s) were committed, including the time, place and degree of participation in the offence(s) by the requested person." Regarding acts not covered by this list, Annex 2 requires a full description of the offence. This was a problem in a case where surrender was issued by Germany for a murder, because in the Netherlands murder is defined differently. Consequently, the same act is often only punishable as homicide in the Netherlands, which will result sooner in a preclusion of the right to prosecute because lapse of time applies (Blekxtoon, 2004: 27). As a result, it will be inevitable that Dutch authorities will ask to add a complete outline of the facts to every EAW in accordance with Annex 2 of the Surrender Act even when the issuing State has ticked a box on the list.

Humanitarian grounds for refusal

The Supreme Court of the Netherlands decided in 2006 that surrender cannot be refused on humanitarian grounds (Supreme Court of the Netherlands, 28 November 2006). The Procurator-General of the Supreme Court has brought forward an appeal to the Supreme Court in the interest of the law – Article 29(2) SA. It can be concluded from the FD as well as from the SA that refusing surrender on humanitarian grounds can only postpone the surrender – Article 35(3) SA. Some comments on this can be made. First, the humanitarian grounds may be permanent, for example when the state of health of the person involved does not seem to improve. Moreover, judges cannot decide on this, as it is the responsibility of the minister of Justice (Rozemond, 2004: 491). Second, it can be possible to institute interlocutory proceedings against the public prosecutor when he refuses to apply Article 35(3) SA. This is similar to decisions made by the minister of Justice under to the European Convention on Extradition, against which interlocutory proceedings could also be instituted to invoke the hardship clause of Article 19(2) of the Dutch Extradition Act. As the nature of the humanitarian grounds can result in the postponement being permanent, the judge has to decide upon such issue. It can also be stated that in some circumstances the humanitarian grounds fall within the scope of the protection of Article 3 ECHR which make the surrender inhumane, e.g., when the person involved is seriously ill or dying. In that case there is a mandatory ground to refuse surrender which has to be applied by the judge (Rozemond, 2004: 492).

Appeal

Every requested person has to be handed over to a public prosecutor in Amsterdam within three days in order to have his case examined by the Court of Amsterdam. As follows from Article 22 SA the court has to decide within 60 days. Because of this short period of time, appeal and cassation have been abolished. Only cassation in the interest of the law remains possible. The minister of Justice justifies this be claiming that appeal in cassation is only meant to maintain unity of the law. However, since there is one specific chamber of the Court of Amsterdam that is authorized to deal with EAW's, unity will be guaranteed without a doubt (Smeulers, 2004: 84). This means that this chamber has a huge responsibility, because its judgments will not be checked at another instance. This results in a concentration of the power of decision with one authority. Without the possibility of appeal this is a huge restriction of legal protection for the person asked for. However, because the power to decide is granted to the judge, an independent judgment will at least be guaranteed (Smeulers, 2004: 84). Some advocates and judges favour introduction of the option to appeal in the Dutch surrender procedure. Yet, the Dutch authorities concluded that this "would not be feasible in the current system." (Council of the European Union, 27 February 2009).

Multiple requests

In 2005 the court of Amsterdam dealt with a case concerning multiple requests – Article 26(3) SA – as Germany, as well as Belgium, issued a EAW for the same person (Amsterdam District Court, 14 January 2005). The court ruled that the public prosecutor could reasonably give priority to the German warrant in the interest of a proper administration of justice, as Germany argued that there were more aggrieved parties and that the harm caused is probably bigger in Germany. Therefore, it could be argued that the offences for which the requested person will be prosecuted are more serious than the offences mentioned in the Belgian warrant. Moreover, the German warrant is of an earlier date than the Belgian one.

Subsequently, the court answered the question whether surrender to Belgium can be permitted based on the facts the EAW is issued for. The court says this is not possible, because it is not sure whether the refusal ground of Art 9(1)(e) might be applicable after the person is surrendered to Germany and has been sentenced by final judgment there. Because it has not become clear for what offences the Belgian judicial authorities want to prosecute the surrendered person, the court claimed it is not justified

to decide upon whether or not to allow surrender to Belgium. In order to make surrender possible in the future, it should be established for which facts the German judge shall sentence or acquit the requested person by final judgment.

5.4. Perception of judicial officers, advocates, scholars and policymakers

In this chapter we describe the information and perception based on the interviews and expert meeting held for this research. The opinions are described by subject. We make a distinction between the different functionaries, and also between the context they refer to: judges, public prosecutors, support staff, scholars, and the Netherlands as executing state and the Netherlands as requesting state. Judges only consider incoming EAW´s when the Public Prosecutor demands surrender from a person to a judicial authority in a requesting EU member state.

Differences between surrender and extradition

Judges

The major difference between the former extradition procedure and the present surrender procedure is it´s speediness. In extradition procedures, suspects could lodge an appeal against a decision and, subsequently, appeal to the Supreme Court. Due to the fact that many suspects in extradition proceedings lodged an appeal with the court of cassation, the extradition procedure could not be as short as the surrender procedure. At that time, also human rights defences could be put forward at the proceedings. According to the Surrender Act there is no possibility to appeal against the decision of the court anymore. The public prosecutor's office can appeal to the Supreme Court in the interest of the law, but this happens very rarely. The only reason for appealing is when the court made a series of judgments which have a public effect and which is considered not to be in line with the law.

As a consequence of the extradition procedure, detainees that had to be extradited could have to wait in prison for one up to two years before their actual extradition took place. In contrast, the surrender procedure first took about eighty days, which means that the maximum period of sixty days was often extended by a twenty days – Article 22 SA. Nowadays the Amsterdam District Court can deal with most surrender cases within sixty days. Eighty percent of the surrender cases can be closed within the maximum period of ninety days. This includes the actual transport of the requested person from Dutch borders or the airport to the issuing country. For suspects

this means that the actual time of pre-trial detention is much shorter than under the former extradition procedure.

Another important change that contributed to the speediness of the surrender procedure is the reduced intensity of the examination by the court. Maintaining a critical attitude was much easier under the extradition convention than under the current surrender act. The ECtHR approves surrender between European countries very easily, even when human rights are at stake, e.g., in Albania (see the *Cenaj* case). Nowadays, the discussion about human rights became blurred. Whether a case will be examined critically often depends on the activity of the chair of the court. First of all, the court has to take good care of a correct and sufficient description of the facts. One judge explained not to feel hindered to ask questions to the public prosecutor. However, there is a tendency to not test *ex officio*. Many judges claim to depend on the defences that advocates put forward. Yet, they think most advocates do not know the case law on surrender, because it has always been a very special branch of law. For that reason, judges think they cannot let the procedure become a complaint procedure. They do have to discuss things that catch their attention during the hearing, even when there is no complaint brought forward by the advocate.

Another major difference with the former extradition procedure is the constricted margin of appreciation. The extradition procedure was considered to be more severe as requests were examined more seriously and the principle of mutual trust, although applicable, was not prevailing. The surrender procedure only takes ticking off one or more boxes and meeting some minimum requirements. Therefore, it can be regarded as being standardized. As a consequence, the case files are less extensive than the files in extradition cases.

A third cause of the speediness of the surrender proceedings is that the court has a limited margin of appreciation of EAW´s. Under the extradition conventions it was up to the minister of Justice to assess whether there were humanitarian grounds that appealed for non-extradition. Now it seems that the interest of another member state to prosecute and sentence suspects has become much more important than the interest of the individual, i.e., the suspect. This trend could also be observed in criminal law – e.g. the Dutch ISD-measure that could imprison re-offenders for 2 years after committing a minor offence – and in immigration law. The Dutch Supreme Court decided that human right defences should be put forward in the issuing country, as all EU member states are member of the ECHR.

One judge thinks that the constricted margin of appreciation has been a political decision: the legislature made the decision that almost all decision-making powers should be in the hands of the Public Prosecution Service and judges can do nothing but accept that. He argues that the power of the public prosecutor cannot be limited by judges; they only examine whether the public prosecutor could have reasonably come to his decision. A judge argued that in the case of Wolzenburg (ECJ 6 October 2009), the EC said that on certain points judges in the Netherlands have a very small margin of appreciation because the law is very strict. The court is the judicial authority that can put mutual trust in practice best and that can protect the unity of the law. Nevertheless, Europe keeps stressing that member states should pay more attention to not take away too much examining power from judges.

Mutual trust

The surrender procedure is based on mutual trust between all EU member states. For example in the *Cenaj* case the ECtHR ruled that it is not up to a member state to establish a breach of human rights in another member state (ECtHR, 4 October 2007). In principle, every State that is a member to the ECHR provides its own safeguards to protect human rights and to realize a fair trial. The principle of mutual trust also lies at the basis of the European Convention on Extradition. For instance, a requested person could be extradited to Macedonia (Supreme Court of the Netherlands, 27 May 2008) or Serbia. In 2003 the Netherlands Supreme Court clearly stated that it is the issuing country that shall decide upon a human rights defence. Moreover, the Council of Europe has supported the idea to convert the extradition procedure into the simpler and faster surrender procedure.

Judges

For the judges we interviewed, the principle of mutual trust requires a distant approach to a case. This is, however, not always common practice, a judge observes. When a judge bases his decision on his emotions too much, the Court of Cassation may be asked to squash that judgment by the Public Prosecutions Office and is likely to actually do as asked. The judge stresses the legal norm of mutual trust they have to depart from when evaluating a surrender request. Therefore, their evaluation of a case usually is, and should be, restricted to the technicalities of the surrender proceedings and disregard the contents of the case. However, some of the judges are inclined to do more than that.

One judge believes that every surrender judge will carry out a marginal examination sooner or later, because “it is all in the head”. However, sometimes it frightens him a little that some of the intuitive judges seem to be right at the end. This judge mentions one incident that happened recently:

> A Polish person had to be surrendered and was about to be picked up from the Dutch police station by Polish policemen. He resisted. When the Polish policemen came, they handcuffed him, kicked him to the ground and kept on kicking him while he was lying on the ground. The Dutch police intervened and made a report of this offence. Consequently, the Dutch police refused to hand him over to the Polish police. Yet, the pre-trial detention of this Polish person has not been suspended. Nevertheless, the court has to consider this case as an incident and not as a common practice of the Polish authorities.

A judge stated that since mutual trust is the basic principle in surrender law, he deals with cases rationally and starts from the idea that judges elsewhere in Europe are honourable and take their work seriously as well. Nevertheless, this judge is an advocate of the Framework Decision on minimum – procedural – rights. He argues that minimum rights on a EU basis are necessary. The Framework Decision on the EAW was a correct measure to take right after 9/11, but does need some improvement by now.

Another judge stated that he is not always sure whether they can trust all the Eastern European countries. When necessary, judges ask for clarification or additional information to be added to the arrest warrant sometimes. When the requested information will not be provided they will refuse surrender. This judge thinks they need more evidence to know for sure whether the rights of the suspects are not taken seriously. Nevertheless, the judicial authorities in the Netherlands cannot supervise what happened to a person after they allowed his surrender. A judge believes this knowledge can be useful in order to maintain the quality of the procedure.

Since mutual trust is a basic principle in EAW law, all EU member states have to trust each other in having a decent criminal procedure. Some judges mention that mutual trust is hard to work up since the new Eastern European countries became part of Europe. Since the expansion of the EU there is a tension between de-facto trust and the legal implication of the principle. The reason that Eastern European countries became member of the EU is mainly an economic one. The ideal situation of equal rights in all European countries is still a big fiction, as the legal systems of Eastern European countries differ very much from the legal systems in Western Europe. So, there is a certain tension between the trust the legislature takes as starting point and the trust that judges have in practice.

Advocates

An advocate believes the problem the EAW faces at this moment is that there is mutual trust between States flowing from the principles of the EU, but not between citizens of those States who will be imprisoned in another country. Requested persons fear e.g. that the maximum of pre-trial detention will be much higher than in the Netherlands and that there will be no guarantee of qualitatively good legal counsel for a reasonable price – some advocates ask extra fees, but do not do anything. Thus, this advocate argues, the European Council have invented a repressive instrument in order to fight – international – crime, but seem to have forgotten about the legal position of the suspect. Only some of the requested persons have the possibility to bring their situation to the notice of the government, e.g. by calling in the media.

Advocates believe, with regard to mutual trust, that judges use emergency steps sometimes, e.g. when humanitarian reasons cannot constitute a ground for refusal. Then, judges seem to check more profoundly whether the EAW meets all the requirements and, e.g., whether prosecution might be statute-barred in the issuing State, while in other cases they try to repair such small errors and give issuing States the opportunity to fix them. This advocate argues that because there is no margin of appreciation in the executing State and because mutual recognition requires States to execute all kinds of requests from abroad, the minimum standard of the suspect's rights will be adjusted to the lowest common denominator.

During the expert meeting we organized, a debate evolved on the discretion of the court to protect basic values. The participating judge maintained, that the competences of the court in surrender proceedings are limited. The Framework decision is the European construction to deal with transfer of suspects and convicts, and we have to apply that as it is elaborated in the Dutch Surrender Act. The representative of the Public Prosecutions office stressed that what they do in Surrender cases is not just execute the requests. In so far there is no blind trust between authorities. She explained that the Sirene office checks the eligibility of signalization of suspects of crimes from abroad against the rules of the surrender Act. Their work leads also to refusals, even before a case is dealt with by the PPO. A participating scholar recognized the inevitability of the restricted discretion of the surrender chamber under the Surrender Act. However, she was amazed by the fact that the Netherlands have almost no possibilities to protect their basic constitutional values. The participating advocate explained that if you start to differentiate in the amount of trust between countries, the cooperation between countries could be at risk. It is all or nothing, and “noting” is not acceptable anymore in today's EU.

The scholar presented the attitude of the German Constitutional Court as an example, because it forced German parliament to better exploit the possibilities of the Framework decision to protect the rights of requested persons. However during the meeting participants agreed that such an approach would require an unlikely change of the Surrender Act.

Developments in surrender practice

The first development is that the Dutch Supreme Court quashed the judgments in which judges used a certain margin of appreciation regarding the principle of territoriality. In principle, surrender shall not be allowed when the EAW concerns an offence which is regarded as having been committed in whole or in part in the territory of the Netherlands – Article 13(1) SA. However, the public prosecutor can waive a refusal of surrender, unless, in the opinion of the court, the public prosecutor could not reasonably do so – Article 13(2) SA. The Supreme Court ruled that there should not be much discretion for judges on this matter; they can no longer decide easily that such a waiver of refusal is unreasonable. Consequently, there is almost no margin of appreciation left for the court to decide on matters of territoriality. Therefore, this Article is rendered useless in practice.

The second development in Dutch surrender practice is that Article 6(5) SA became a hot issue. The main question is by what criteria an alien can be considered 'an alien with a residence permit for an indefinite time'. The Amsterdam District Court even referred questions to the ECJ for a preliminary ruling on the subject The ECJ answered with stating a standard of 5 years of lawful non national residents. (ECJ 6 October 2009).

The third development is that the *in absentia*-guarantee of Article 12 SA has taken shape. Without this guarantee no one will be surrendered by the Netherlands. When the Court of Amsterdam ever refuses surrender, it will be based on this Article.

The fourth development is that the Court of Amsterdam wanted to refuse surrender for humanitarian reasons; however, the Supreme Court did not allow that.

Characteristics of surrender cases

The characteristics of surrender follow for the greater part from the quantitative research. Nevertheless, it can be considered interesting to examine what practitioners

believe to be common practice in surrender procedures, and compare that with the analysis of our sample. In this section characteristics will be given with regard to the country that issues a EAW and to the type of crime for which the EAW is issued.

Countries and types of crime

Most judges, advocates, prosecutors and scholars agree that the majority of the cases deal with drug crimes. This does not imply that the majority of the cases deal with criminal organizations; it can concern the smallest courier as well as the highest drug baron. However, EAW's are mostly issued for the 'small guys': a mafia boss will rarely be surrendered. One of the reasons so many EAW's deal with drug crimes is that the Netherlands can be considered a transit country. The location of the Netherlands leads up to a lot of drugs to be imported through the harbour of Rotterdam or Schiphol Airport and to be exported from the Netherlands. There are some familiar drug trafficking routes, so it will be likely that importing marihuana is a crime often committed in Spain or France and exporting (hard) drugs from the Netherlands to Germany also takes place frequently.

Furthermore, EAW's are being issued for all sorts of other crimes, such as fraud, violence, homicide and murder. Several of these crimes take place within an organized structure. The United-Kingdom often asks for surrender for causing grievous bodily harm or for murder. Offences for which surrender is asked by Italy are often serious offences, sometimes committed by the mafia, which have resulted in large-scale investigations.

The majority of the EAW's that are executed by the Netherlands come from Germany, Belgium, France and Poland. An estimated 80 % of all EAW's received from Germany, France, Spain and Italy concern drug crimes. One judge notes that the public prosecution service in the Netherlands thinks it is great that the French will prosecute these crimes themselves. On the one hand, the maximum penalties are much higher in France, and on the other, it will yield profit for the capacity of the Dutch public prosecution service.

Many of the acts Poland asks surrender for can be considered less serious offences. The reason for receiving many EAW's concerning petty crimes from Poland is the principle of legality. Because of this principle, Poland is obliged to prosecute every type of crime for which a victim lodges a complaint. Moreover, prosecuting means issuing a EAW whenever necessary as well, so surrender will be requested for lots of petty offences. In addition, there are many Polish immigrants in the Netherlands, so they could be requested for offences they have committed in their country of origin. Therefore,

the Polish EAW's hardly request the surrender of a Dutch national. When the requested person is sentenced in Poland, the sentence has to be executed in Poland as well, as Poland is not a party to the Convention on the Transfer of Sentenced Persons.

Types of persons

According to the persons we interviewed, the persons that are requested are a little more different from the – standard – type of Dutch criminals. The types of persons that are requested to be surrendered are mostly male. Many of those persons have a police record in the Netherlands. The persons that are requested are from all social-economic positions. It can be poor people who try to earn some extra money by transporting drugs, but it can as well be managers of a business who embezzled money or committed tax fraud. Moreover, all kinds of people from all over the world can be arrested in the Netherlands on the basis of a SIS alert e.g. whenever they have to change planes at Schiphol Airport. Consequently, three-fourth of the requested persons is no Dutch national. The most Dutch nationals that are surrendered are requested by Germany.

Seniors can be surrendered as well, because there is no maximum age for surrendered to be allowed. The criterion to be surrendered is whether someone is fit to be held in prison. It is up to the public prosecutor to decide whether someone can travel or not, based on health reasons – Article 35(3) SA.

Problems with the requests from other countries

Judges have more experience with EAW's coming from Italy, Poland, France and Belgium. This gives them a better knowledge of proceedings in those countries and that allows them to better check these EAW's. Italy issues many EAW's, but the description of the facts is mostly quite general. Poland often mixes up times and places of offences and gives a very broad definition of the time an offence was committed, e.g. from 2004 until 2007. With France and Belgium there might arise problems concerning judgments *in absentia* and the guarantee to be present at a retrial. Belgium often provides only a very limited description of the facts. No problems at all occur with requests from England, Germany or Romania.

A public prosecutor mentioned that in some countries he had the impression that prosecuting authorities use an EAW to be able to close the file after an EAW has been

refused. Thus they export the work to authorities that have to consider the execution of the EAW. He called that a waste of time. He had rather use his time to prosecute suspects of heavy crimes.

Judges, as well as advocates, note that there have been small problems with the requests from Belgium with regard to judgments *in absentia*. It was not always clear when exactly the term to lodge an appeal would begin. Then, the Dutch public prosecution service had to ask explicitly how the Belgian authorities interpret *in absentia* and the right to a retrial. This judge notes that the public prosecution office acts very pro-active by asking extra questions in order to complete the information of a surrender case. However, countries still not always deal the same way with judgments *in absentia*, while the Netherlands want an effective retrial to be guaranteed. Therefore, this judge is supporter of the development of a Framework decision on judgments *in absentia*.

Judges also notice some differences in the procedure of re-surrender between countries. Often the issuing authorities do not inform the Netherlands on the fact that prosecution of their national is finished (Council of the European Union, 27 February 2009). Furthermore, the time between the judgment and the actual return can be very long. France, for example is seen as a country that de facto violates its return guarantees.

Fighting international crime

The Framework Decision on the EAW is introduces as a measure to combat terrorism which entered into force right after 9/11. One judge believes that European countries reacted hysterically on terrorism after 9/11. In the first years of the EAW there was a large deal of arrest warrants was issued for terrorist offences. Later on, this kind of offences formed only a small percentage of all offences for which EAW's are issued. Therefore, it cannot be concluded that the EAW is an effective instrument to fight international crime.

An advocate believes that the EAW is developed by people 'pursuing European unity' and instrumentalists who are thinking something like 'it will not happen to me' and 'the offence is committed by the offender'. As a result, politicians are not inclined to pay attention to the rights of the suspect. While the EAW came into force shortly after 09/11, this advocate argues it has nothing to do with terrorism as an EAW may be issued for acts punishable with a maximum of at least 12 months – Article 2(1) SA. As a result, EAW's have been issued for minor offences. Two examples were given in this regard:

> An EAW was issued for a person who rented a holiday home in Cyprus. When he arrived the home was a complete mess and not ready for use. He went back to the Netherlands and did not pay the rents. Greece requested this person by issuing a EAW for swindling. As no marginal examination of the substance of the case is possible before the Amsterdam District Court, this person had to be transported to Greece before he could defend himself.
>
> In another case, someone has been surrendered for defalcating two videos because he did not return them in time to the video shop. The maximum penalty for this offence is at least 12 months, so the person had to be surrendered.

One of the scholars we interviewed is of the opinion that the EAW has not proved to be an effective instrument to fight international crime as surrender cases account only a small part of all criminal cases a State has to deal with.

We think this means the effectiveness of the EAW in fighting crime should be evaluated in combination with other instruments used.

The Principle of proportionality and non-discrimination

As follows from the examples above, some countries, in particular Poland, issue many EAW's for minor offences. Consequently, an EAW can be issued for offences which the Netherlands deal with by a simple fine. One advocate notices that under the extradition convention international legal assistance was only asked for severe cases, for which severe penalties were likely to be imposed. In contrast, surrender is now being asked for petty crimes which would be dealt with by the police court judge in the Netherlands. Yet, if other countries consider something to be a serious offence, it is not up to the Netherlands to decide they should not consider that type of crimes severe.

Nevertheless, this practice can be regarded as disproportional for the suspects. Therefore, the Amsterdam District Court recently stated in one of its verdicts that the actual application of the Surrender Act could be disproportional damaging for the requested person (Amsterdam District Court, 30 December 2009). Only in *special circumstances* surrender could be refused because it would constitute a violation of the proportionality principle. The special circumstances refer to an individual case in which the nature of the offence, the duration, or the objective of the requesting country, could be disproportional with regard to the rights en freedoms of the requested person. In this regard the court referred the Council of Europe which recently stated in its 'Handbook on how to issue a European Arrest Warrant' that:

> "Considering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences. Therefore, the EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention" (European handbook, 2008: 14).

However, one of the judges explained that the proportionality principle as follows from EU recommendations is written for public prosecutors who decide to issue an EAW; it is not for the court to judge whether the use of an EAW is (dis-) proportional. Furthermore, as follows from the *Pupino* judgment, the court has to judge a case according to the objective and the purpose of the Framework Decision. This means that the court has to allow the execution of an EAW whenever that it is possible. There is only one case this judge remembers in which surrender was refused because it would have been disproportional considering the *personal circumstances* of the requested person. Disproportionality is often argued by the defence counsel in cases where there is a big difference between the sentence that could be imposed in The Netherlands as compared to the expected penalty in the issuing State. Anyway, it is not up to the Amsterdam District Court to decide for foreign States which crimes can be regarded as serious offences.

Another judge said with regard to this verdict that is was sort of a small hint to advocates that they could put up the proportionality principle as a defence. For that reason, the court even mentioned the website of the EU which mentioned that this principle plays a role in issuing EAW's. Yet, it is up to advocates to come up with it. Yet, this could be problematic, because there are only a few law firms that frequently deal with surrender cases. The rest of them has a common practice, and, therefore, they are not well-informed about the recent case law on the field of surrender. While in that field you have to know the law thoroughly, otherwise you will not succeed in court. An advocate needs to have some routine in defending persons who are requested to be surrendered. Moreover, advocates could make more use of EC and EU law in their defences. Therefore, they have to know ECJ case law on the principles of European law.

As the Dutch Surrender Act does not provide for a proportionality check, they have to refer to – general principles of – EC and EU law, which has priority over national law. In European law judges and advocates can also find room to put forward personal circumstances of the requested person based on the principle of non-discrimination. In Directive 2004/38 EU-citizenship is explained as "a primary and individual right to move

and reside freely within the territory of the member states". Article 24 of this Directive states that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty." This means that EU-citizens cannot have fewer rights in a foreign country. For the Netherlands this could imply that EU-citizens cannot be held in pre-trial detention for the only reason that they have no permanent address in the Netherlands.

Moreover, the personality principle, which makes re-surrender dependent on being a national of the Netherlands, can lead to a discriminatory distinction between EU-citizens. The question is whether someone with the nationality of another EU-member state which lives here for quite some time and, therefore, should be considered to be rooted here, should be considered an 'alien with a residence permit for an indefinite time' – Article 6(5). The ECJ ruled in the *Kozlowski* case that:

> "the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence. (…) It is necessary to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State" (ECJ 17 July 2008, par. 46 & 48).

Moreover the ECJ states that:

> "the terms 'staying' and 'resident', which determine the scope of Article 4(6), must be defined uniformly, since they concern autonomous concepts of Union law. Therefore, in their national law transposing Article 4(6), the Member States are not entitled to give those terms a broader meaning than that which derives from such a uniform interpretation" (ECJ 17 July 2008, par. 43).

As no broader meaning can be given to those terms, it is important to know for the Netherlands whether a stricter meaning is still possible. In that regard, the court of Amsterdam referred the *Wolzenburg* case to the ECJ and asked preliminary questions on Article 4(6) in relation to the EU-principle of non-discrimination. The Court of Amsterdam asked the ECJ: "may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a permanent residence permit?". The ECJ has answered the question stating that a lawful stay of 5 years of a non-national requested

person in a member state, under the non-discrimination clause of article 12 EC, allows national authorities to treat this person in the same way as a national concerning the execution of custodial sentences (ECJ 6 October 2009). This means that under that condition surrender may be refused and the requested person's sentence can be executed by the state requested to execute the EAW.

Possible defences

Advocates agree that under the extradition convention there were more possibilities for the defence, because: 1) the request had to be more substantial with regard to the description of the facts, 2) there had to be a more elaborated description of the particular suspicion, and 3) the requested person could appeal to the Supreme Court. They note that currently the margin to put up defences is small, just as the margin for judges to decide on the case. Advocates mention that only the following defences are possible to come up with before the court:

Is the act mentioned in the list or could it reasonably be regarded as a listed act?

Is the form filled in correctly (time, place, fact) – Article 2(d)(e) SA?

Is the identity of the requested person correct – Article 2(a) SA?

Are the relevant sections of the law enclosed?

Is the EAW translation correctly and clear?

Is criminal prosecution or punishment statute-barred – Article 9(f) SA?

Has the requested person reached the age of 12 at the time the offence was committed – Article 10 SA?

Is the judgment given *in absentia* without sufficient possibility of a retrial – Article 12 SA?

Is there a risk of a flagrant breach of human rights – Article 11 SA?

Is sufficiently guaranteed that the surrendered person will be able the serve his sentence in the Netherlands – Article 6 Sa?

Is the ne bis in idem principle violated – Article 9(a-e) SA?

Is the offence committed in its whole on Dutch territory – Article 13(1)(a) SA?

Regular defences of criminal procedure and criminal law, such as the defence of innocence or reference to the principle of discretionary powers, are not possible, as the substance of the case is only dealt with by the issuing State. Moreover, there is no obligation to send the underlying records of a request to the Court. This creates the risk that EAW's are issued by the authorities of the issuing State without sufficiently examining the importance of the incriminating materials. One advocate argues that if no sufficient information is given, the authorities of the executing State should ask for additional information. When there is only a – general – description of the suspicion it will become difficult for advocates to put up a defence of innocence. Another advocate gives the following example:

> Sometimes an EAW is issued for a very severe offence. However, the judge in the issuing country does not see any sufficient evidence to prove that the requested person committed that offence and sends this person back to the Netherlands within 10 days. Nevertheless, the consequences are often devastating. For example, a man who was wrongfully surrendered and was also involved in a child guardianship case: while he was in pre-surrender custody, the judge gave parental guardianship to his ex wife.

One scholar argues that the Dutch Surrender Act allows the court to examine whether there is a reasonable suspicion on the basis of evidence or testimonies of witnesses. According to the European Commission this is not up to the court of the executing State to decide. Therefore, this part is incorrectly implemented by the Netherlands. An advocate thinks that only when someone can prove he was lying in the hospital, he has been imprisoned, or he was on the moon, it will be regarded as a sufficient alibi by the court to proof his innocence. Then, the doctor from the hospital or the director of the prison has to testify as a witness before the court. The court considers a doctor or a prison director as a firm witness, but is not likely to trust any other type of witness. Only in extraordinary cases a defence of innocence will succeed before the Court of Amsterdam. The court applies very strict rules, i.e., there has to be immediate and absolute proof of the innocence of the requested person before this defence will be taken into consideration. In fact, this defence has succeeded only once since the EAW came into force! (Council of the European Union, 27 February 2009: 31).

For that reason, another advocate argues that, to improve the surrender procedure, at least a marginal examination of the substance of the case should be allowed in order to avoid excesses. Firstly, double criminality has to be checked in order to ensure the re-surrender of a person after he is convicted in the issuing State. Secondly, it should be examined whether it regards an offence punishable in both States – not only in the issuing State – by at least a custodial sentence or a detention order, as

is required in Article 2(1) SA. The Netherlands only allow for a fine or community service to be imposed for relatively many offences.

Advocates agree that another way to improve the possibility to put up defences and effectuate the rights of the suspect in the EAW procedure is to receive the case files in time. Records can now be handed in two days before proceedings take place. Sometimes, the case files are even incomplete until the last moment and the advocate receives the additional files, such as a fax between the Netherlands and the issuing State, when he arrives at the Court. When the court would require that all documents relating to a case must be handed in one week before the court session, advocates will able to prepare good defences.

Another advocate argues that a Framework Decision on certain procedural rights in criminal proceedings is necessary. Only then, minimum rights for the suspect will be guaranteed and 'forum shopping' can be excluded. The Netherlands have already implemented many procedural rights in its Code of Criminal Procedure, such as short periods for pre-trial detention and for dealing with requests of legal assistance, while other countries have not. Consequently, the Netherlands have to reduce the guarantees for suspects in a European context.

Cooperation with foreign colleagues

Contact with issuing authorities

During the procedure of extradition, States could confer on what the best instrument to deal with a criminal case would be. For example, when it concerned a Dutch national, the Netherlands could argue that it would be better if that person is prosecuted in the Netherlands and they could request to send the evidence to the Netherlands instead of sending the requested person to a foreign State. Yet, Dutch public prosecutors do not seem to mind very much that – Dutch – persons are surrendered to other countries. For example, when the surrender of a supplier of drugs is requested by German authorities, the public prosecution service will not consider prosecuting that person in The Netherlands. One of the reasons for this policy is that the costs of the prosecution of a surrendered person will not have to be borne by the Netherlands. Furthermore, public prosecutors would feel disrespectful to a foreign colleague if they took over his case. International cooperation also requires rational solutions, which may need support from Dutch authorities by not withholding a requested

person from a trial abroad, when the case best can be tried abroad. But this also depends on if the crime was committed in the Netherlands and the connection of this crime to the crimes prosecuted abroad (Amsterdam District Court 23-February 2010).

Moreover, surrendering a suspected person has more impact on him than prosecution in the Netherlands. Another reason is that the maximum penalties, especially for drug crimes, are much lower in the Netherlands than in other European countries. In contrast, the public prosecution service also refuses requests for surrender without referring the case to the court, most of the times because of *ne bis in idem*.

In general, judges and prosecutors agree that the cooperation with colleagues from abroad functions well. For example, the Dutch authorities can ask the issuing authorities for additional information, e.g., the maximum sentence that can be imposed in the issuing country. However, since the Supreme Court ruled that it is not in line with mutual recognition to ask for the full texts of the relevant criminal law provisions, the public prosecutor's office does not ask this anymore. Now, it looks at the description of the facts and converts it into an offence from the Dutch penal code.

Yet, one problem that often arises in contacts with foreign authorities is translation difficulties. The Netherlands accept EAW's in the Dutch and the English language. Consequently, most EAW's have to be translated. The quality of the translations is a major concern to the Dutch authorities, in particular the English translations from France, Spain and Italy (Council of the European Union, 27 February 2009: 16). Very often, misunderstandings arise between the issuing authorities and the public prosecutor and/or the court due to errors in the translation. Another problem contributing to translation complexities is that some countries require receiving a EAW within very short time periods. This will lead to high translation costs in order to get the EAW translated into the official language of the executing State in time (Council of the European Union, 27 February 2009: 10).

A judge stated that the public prosecution service works pro-actively and ask for supplementary information if necessary. When the public prosecutor, while preparing a case for the court hearing, finds that the EAW lacks necessary information, he will ask the issuing authority to provide this information. In some cases the court finds that the information provided is still insufficient. Then, the court will usually adjourn, in order to request extra information from the issuing authorities. The court will refuse the execution of the EAW only in exceptional cases, in view of the lack of necessary information. As the *ne bis in idem*-principle does not apply for EAW's, the issuing authority can – continually – send a new EAW as soon as it is informed of the refusal. The Court

therefore believes that a refusal on these grounds is not in the interest of the suspect. The Amsterdam District Court does not consider itself to be unreasonably strict.

Besides asking for the relevant criminal law provisions, the Dutch authorities ask for the guarantee of return of their nationals, the guarantee of retrial, arguments on why prosecution in the issuing country is preferable and should be given priority as the facts are partly committed on Dutch territory, and information about the exact time and place of the act and the degree of participation of the requested person (Council of the European Union, 27 February 2009: 20).

Improper usage

The EAW-instrument contributes to the fact that other instruments, such as a request for evidence or hearing witnesses or suspects through telecommunication, will be used in a smaller amount of cases. These instruments make use of requests, which are not based on mutual recognition and trust to the same extent as EAW's. Thus, the EAW enables States to surrender suspects much easier and quicker to other States compared to other forms of international legal aid. According to one scholar, one could notice a general tendency of using the EAW more often for criminal investigation instead of prosecution, because other instruments are executed by way of requests. A disadvantage of using to EAW so easily is that the requested person is likely to be surrendered and detained to the issuing State; even if a simple hearing of this person would make clear he has not committed the offence he is suspected of (Amsterdam District Court, 8 May 2008).

Among judges and prosecutors there is the strong impression that Belgium asks the surrender of persons for the goal of hearing them as a witness in a case. The reason for issuing EAW's for this purpose is because the procedure is rather simple and quick. This is regarded as wrongful behaviour and as using the EAW for improper reasons. However, the Court of Amsterdam does not have any proof of this. The mutual trust States ought to have in one another prevails here, as they have no means to know on beforehand that the wanted person will be used as a witness. When there is a strong suspicion that the requested person is only a witness in that particular case, the court firstly examines facts of the case and looks whether the documents relating to the case are sufficient. Thereby, the court is also dependent of what the advocate puts forward. If it appears that the name of the requested person cannot be found in the documents, further comment from the issuing State is required. When no concrete criminal offence

can be held against the requested person, the court can refuse to surrender this person. The court can also make a provisional decision and let the public prosecutor ask for an explanation from the issuing State again. Public prosecutors are tending to give more favourable consideration to EAW's than judges.

Dutch authorities are worried that this kind of improper usage will undermine the support of Dutch society for the EAW. Using such radical instruments as the EAW can result in a long period – more than one up to three years – of pre-trial detention, while there might not be any suspicion against this person. Moreover, in Belgium, 50% of the surrendered Dutch nationals got released or conditionally released right after their surrender, while there will never be a follow-up (Council of the European Union, 27 February 2009: 35). Alegre and Leaf noted that "while the EAW sets tight time limits for execution of an EAW, there are no such time limits for disposing of a case after surrender" (Alegre and Leaf, 2004: 209).

The public prosecutor's office in Amsterdam does not know for sure whether EAW's are issued for other goals then the prosecution or imprisonment of the requested person, because a warrant is a quick way to get a person to be send over to the requesting State. Judges also do suspect this happens, but do not have any proof of it. The court cannot know beyond doubt that a person is requested for such an aim. Improper use is not easy to prove, and mutual trust is the primary principle. Judges try to examine the facts as good as possible, however, on the basis of a EAW they cannot always get a completely clear picture of what happened. This is something you cannot do much about as a judge. Furthermore judges are not informed about what happens with a person after surrender. So, judges will also not be informed of a possible violation of the specialty rule after a person has been surrendered. Therefore, judges depend on the information an advocate brings up.

When everything functions correctly, it is up to the public prosecution service to pay attention to these cases and to consult authorities of the issuing State about it. The public prosecutor's office checks incoming EAW's on 1) whether alternative instruments, such as requests, are used first; 2) whether the facts are not too severe for other instruments to be used; and 3) whether – physical – confrontation with the victim might be necessary. A public prosecutor notices that Germany seemed to be willing to withdraw their EAW when the requested person promised to come voluntarily to Germany in order to be examined. But it also happened that the requested person was summoned in order to be examined several times, but did not go to the requesting country, so he is finally requested to be surrendered.

A judge notes that, sometimes, countries ask for a person to be surrendered for a simple theft which this person already confessed. Then, after the surrender took place, the authorities in the issuing country ask the Dutch public prosecution service for supplementary permission to prosecute for other facts as well, such as murder. The public prosecution service in the Netherlands will often allow this because of the proprieties and will not have extra contact with the requesting country. However, this could also be regarded as improper usage of the EAW, because in this manner countries can have a person surrendered and prosecuted for cases that are emotive subjects in the Netherlands, such as euthanasia and abortion, or for cases in which the evidence is not arranged yet. This could constitute a violation of the principle of fair play and the prohibition of arbitrariness (*détournement de pouvoir*). Matters like abortion and euthanasia are kept out of the – Dutch – surrender act, but now risk to have re-entrance in the Netherlands via the backdoor.

Problems from the defence's point of view

Advocates agree that the quality of interpreters can be problematic, because it is difficult to check. One of the major lacks of interpreters is that some of them use very simple words when translating complex specific juridical terms. Moreover, the right to an interpreter is guaranteed during judicial proceedings; however, there is no right of translation of all the case files, as it is very expensive. For this reason, an advocate has to go visit his client in jail to translate what is written in the – Dutch – records.

Another problem, which is related to translation, is that it can be difficult for advocates to know the law of the issuing State. It can be important for an advocate to gain in-depth knowledge of the – criminal – law of the issuing State, e.g., about the procedure of re-trial in case of judgment *in absentia* and about whether or not prosecution is statute-barred. Therefore, it is important to understand the language of other countries which have not translated all their criminal legislation in English yet. Sometimes advocates need to call in acquainted advocates or experts from the issuing State in order to collect arguments for the court of Amsterdam to refuse surrender. One advocate raised the question whether it is already possible for his clients – who are arrested in the Netherlands – to receive legal aid from the issuing State while the person is still in the Netherlands.

It can also be really difficult to check whether the issuing State respects the principle of specialty. Therefore, advocates from the issuing State sometimes ask for

additional records to be able to check for which facts surrender was exactly allowed. Yet, the records, which are written in the official language of the executing State, are not translated, so the advocate has to put in extra effort to find out whether or not the issuing State prosecutes his client for facts that he is not surrendered for in the first place. Moreover, the ECtHR ruled in the Leymann and Pustovarov case that, in order to establish whether an 'offence other' than that for which the person was surrendered is at issue – Article 27(2) FD, it is necessary to:

> "ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision." (ECJ 1 December 2008, par. 57).

Another important problem is for a surrendered person to find a good advocate in the issuing country. Clients abroad are only entitled to consular assistance, which very explicitly contains no legal aid. Some of the Dutch advocates happen to know colleagues they which are excellent advocates, but that definitely cannot be said about every country or every part of the country. Therefore, one advocate believes it is necessary to set up a European bar of excellent advocates. Then, the Netherlands can pay for legal counsel of their nationals who are surrendered to other States. It can also be regarded necessary for advocates to have a small network of colleagues in other member states to rely on, e.g., when witnesses should be examined.

Finally, it can be stated that advocates have to act very pro-actively in surrender cases. There are a few Dutch advocates who put considerable effort in such cases. For example, by making arrangements with the public prosecution service in the issuing country, so that the requested person will voluntarily come over for a hearing or even for a court session, instead of staying in prison during the surrender procedure and pending his trial. Getting in contact with the issuing authority requires a lot of effort (Council of the European Union, 27 February 2009, 43).

5.5. The practice of the EAW in the Netherlands in numbers

In this chapter we first show the data on the EAW's issued to the Netherlands. These data concern the requested persons, their (alleged) crimes, the issuing countries and the way the authorities (the international legal aid centre of the public prosecutor's office in Amsterdam and the surrender chamber of Amsterdam District Court) have dealt with these cases.

Next, we show the data of cases issued by the Dutch Public Prosecutors.

The data for the EAW's issued to the Netherlands were gathered by drawing a random sample of 250 out of approximately 1600 files of concluded cases (2006-july 2008), of the international legal aid centre in Amsterdam. Frequently we were confronted with incomplete files. We could not always fill out all the data we wanted.

The data of the EAW's issued by the Netherlands are the cases issued by the international legal aid centre in the Hague. This sample of 105 cases is probably not a good representation of the EAW's issued by Dutch public prosecutors.

EAW issued to the Netherlands

The order of subjects is: The requested persons, the content of the arrest warrant, and the way the authorities (the international legal aid centre of the public prosecutors' office in Amsterdam and the surrender chamber of Amsterdam District Court) have dealt with these cases.

The requested persons

We report here on aspects of the requested persons, like age, sex, nationality, country of residence and language abilities.

TABLE 1 Sex of the defendant

Sex of defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Male	234	93,6	93,6	93,6
Female	16	6,4	6,4	100

Table 1 shows that a large majority of the requested persons is male.

TABLE 2 NATIONALITY OF DEFENDANT

Nationality of defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	64	25,6	25,8	25,8
Poland	33	13,2	13,3	39,1
Germany	23	9,2	9,3	48,4
Belgium	18	7,2	7,3	55,6
Italy	14	5,6	5,6	61,3
Turkey	12	4,8	4,8	66,1
Romania	8	3,2	3,2	69,4
Hungary	7	2,8	2,8	72,2
Albania	4	1,6	1,6	73,8
Czech Republic	4	1,6	1,6	75,4
France	4	1,6	1,6	77,0
Nigeria	4	1,6	1,6	78,6
Bulgaria, Ireland, Morocco	3	3 x 1.2	3,6	83,9
Algeria, Bosnia and Herzegovina, Colombia, Latvia, Liberia, Luxembourg, Macedonia, Pakistan, Serbia, Spain, Tunisia, United Kingdom	12 x 2	12 x 0.8	9,6	93,5
Australia, Burundi, Congo, Croatia, Cyprus, Finland, Greece, Iran, Kosovo, Portugal, Sierra Leone, Slovakia, Sudan, Suriname, Sweden, Switzerland	16 x 1	16 x 0,4	6,4	99,9
Total	248	99.2	100	100
Missing	2	.8		
Total	250	100	100	

Table 2 shows the nationality of defendants. With the Dutch on top, Polish defendants are second, where one would expect Germans and Belgians as they are from the neighbouring countries. An explanation is twofold. First, there has been an inflow of Polish persons in the Netherlands to work there in the last 5 years. Second, Polish prosecutors do not have the competence to decide not to prosecute cases which are based on a citizens' complaint. Even so, it is also an indication of the high activity of Poland in prosecution.

TABLE 3 Age of the defendant at the time of the EAW issue

Age of the defendant at the time of the EAW issue	Frequency	Percent	Valid Percent	Cumulative Percent
≤ 20	3	1,2		1,2
21-30	70	28		29,9
31-40	91	36,4		67,2
41-50	51	20,4		88,1
51-60	20	8,2		96,3
61-70	8	3,3		99,6
> 70	1	0,4		100
	244	97,6		
Missing	6	2,4		
Total	250	100		

Table 3 shows that over 80% of the defendants is between 21 and 50 years old.

TABLE 4 Residence country of defendant

Residence Country of defendant	*Frequency*	*Percent*	*Valid Percent*	*Cumulative Percent*
Netherlands	96	38,4	71,1	71,1.
Belgium	8	3,2	5,9	77,0
Poland	8	3,2	5,9	83,0
Italy	5	2,0	3,7	86,7
Germany	4	1,6	3,0	89,7
France	2	0,8	1,5	91,1
Hungary	2	0,8	1,5	92,6
Portugal	2	0,8	1,5	94,1
Bulgaria	1	0,4	0,7	94,8
Colombia	1	0,4	0,7	95,6
Latvia	1	0,4	0,7	96,3
Lithuania	1	0,4	0,7	97,0
Nepal	1	0,4	0,7	97,8
Romania	1	0,4	0,7	98,5
Spain	1	0,4	0,7	99,3
USA	1	0,4	0,7	100
Total	135	54	100	
Missing/ Unknown	113	45,2		
ND	2	0,8		
Total	115	100		

Table 4 shows the majority of defendants lives in the Netherlands. The table shows also a large number of missing data or ‘unknown’. This is due to the fact that these data were not in the file. This may be explained by the circumstance that quite a number of persons probably does not have a formal address.

TABLE 5 Languages spoken by defendants

Languages spoken by defendants	N	Percentage	Percentage of cases
Albanian	6	2,4	2,6
Arabic	5	2,0	2,2
Bulgarian	3	1,2	1,3
Croatian	1	0,4	0,4
Czech	5	2,0	2,2
Dutch	89	35,0	38,5
English	21	8,3	9,1
French	8	3,1	3,5
German	33	13,0	14,3
Hungarian	5	2,0	2,2
Italian	10	3,9	4,3
Kurdish	1	0,4	0,4
Latvian	1	0,4	0,4
Lithuanian	3	1,2	1,3
Polish	30	11,8	13,0
Portuguese	2	0,8	0,9
Romanian	4	*1,6*	*1,7*
Russian	2	0,8	0,9
Serbian	1	0,4	0,4
Serbo-Croatian	1	0,4	0,4
Somali	1	0,4	0,4
Spanish	7	2,8	3,0
Sudanese	1	0,4	0,4
Swedish	1	0,4	0,4
Turkish	12	4,7	5,2
Urdu	1	0,4	0,4
Total	254	100	110

According to table 5, languages spoken are mostly Dutch, German, Polish, English and Turkish – in that order.

TABLE 6 Language abilities of suspects

Language abilities of suspects	N
1 language	231
2 languages	20
3 languages	3
Dutch +	8
English +	10
German +	5

This Table (6) together with table 5 shows that interpreting activities are a must in 65% of the cases. Multiple language abilities are scarce in our sample. This sustains worries of advocates concerning translations, especially after surrender.

The Content of the Arrest Warrants sent to the Netherlands

We report here on the aim of the EAW, and its contents in terms of issuing country, crimes committed, maximum sentences or imposed sentences, and the results of the warrant.

TABLE 7 Purpose of the EAW

Purpose of the EAW	Frequency	Percent	Cumulative Percent
Prosecution	160	64	64,8
Execution of sentence	87	34,8	100
Missing	3	1,2	
Total	250	100	

Table 7 shows that 64% of EAW's serve the prosecution of a suspect and 34% relates to a sentence to be executed in the issuing country.

TABLE 8 Issuing Country

Issuing Country	Frequency	Percent	Valid Percent	Cumulative Percent
Germany	71	28,4	28,7	28,7
Belgium	54	21,6	21,9	50,6
Poland	31	12,4	12,6	63,2
Italy	27	10,8	10,9	74,1
France	18	7,2	7,3	81,4
Spain	10	4,0	4,0	85,4
Austria	6	2,4	2,4	87,9
United Kingdom	6	2,4	2,4	90,3
Hungary	5	2,0	2,0	92,3
Czech Republic	4	1,6	1,6	93,9
Lithuania	3	1,2	1,2	95,1
Portugal	3	1,2	1,2	96,4
Latvia	2	,8	,8	97,2
Luxembourg	2	,8	,8	98,0
Sweden	2	,8	,8	98,8
Bulgaria	1	,4	,4	99,2
Finland	1	,4	,4	99,6
Slovakia	1	,4	,4	100,0
Total	247	98,8	100,0	
Missing/ND	3	1,2		
Total	250	100		

This table 8 shows that 50% of the cases come from Belgium and Germany. Poland, France, Italy and Spain take care of another 35%.

TABLE 9 Number of offences in the warrant

Number of offences in the warrant	Frequency	Percent	Valid Percent	Cumulative Percent
1	110	44,0	45,1	45,1
2	51	20,4	20,9	66,0
3	27	10,8	11,1	77,0
4	9	3,6	3,7	80,7
5	10	4,0	4,1	84,8
6	4	1,6	1,6	86,5
7	5	2,0	2,0	88,5
8	7	2,8	2,9	91,4
9	1	,4	,4	91,8
10	1	,4	,4	92,2
11	3	1,2	1,2	93,4
12	1	,4	,4	93,9
13	1	,4	,4	94,3
14	1	,4	,4	94,7
16	2	,8	,8	95,5
17	1	,4	,4	95,9
18	1	,4	,4	96,3
19	1	,4	,4	96,7
22	1	,4	,4	97,1
23	1	,4	,4	97,5
24	1	,4	,4	98,0
32	1	,4	,4	98,4
34	1	,4	,4	98,8
37	1	,4	,4	99,2
40	2	,8	,8	100,0
Total	244	97,6	100,0	
System	6	2,4		
total	250	100,0		

The number of offences in the majority of warrants received is between 1 and 3. However in 20% of the cases it is 5 or higher. The range ends with 2 cases of 40 offences. We wonder why sometimes so many offences are mentioned in one EAW.

TABLE 10 Listed offences in the EAW

Listed Offences in EAW's[124]	N= 176	Percentage	Percentage of cases
Illicit trafficking in narcotic drugs and other substances	102	45,7%	58,0%
Organised or armed robbery	21	9,4	11,9
Participation in a criminal organization	21	9,4	11,9
Fraud, etc.	14	6,3	8,0
Swindling	11	4,9	6,3
Forgery of administrative documents and trafficking therein	11	4,9	6,3
Murder, grievous bodily injury	10	4,5	5,7
Kidnapping, illegal restraint and hostage taking	8	3,6	4,5
Rape	6	2,7	3,4
Trafficking in stolen vehicles	4	1,8	2,3
Facilitation of unauthorised entry and residence	4	1,8	2,3
Racketeering and extortion	3	1,3	1,7
Trafficking in human beings	2	0,9	1,1
Illicit trafficking in weapons, munitions and explosives	2	0,9	1,1
Terrorism	1	0,4	0,6
Corruption	1	0,4	0,6
Laundering of the proceeds of crime	1	0,4	0,6
Forgery of means of payment	1	0,4	0,6
Total	223	100,0	126,7

This table shows that of the List offences, 45% concerns drugs, about 10% armed robbery and about 10% participation in a criminal organization. Terrorism is less than 1%. In an EAW more than 1 offence can be mentioned.

[124] In an EAW more than 1 crime per suspect is possible.

TABLE 11 Non-list offences in EAW

NON-LIST OFFENCES in EAW's[125]	Frequency	Percentage
Robbery	36	38,16
Physical assault	9	9,54
Threatening	6	6,36
Fraud	6	6,36
Forgery	4	4,24
Illegal possession of firearms	4	4,24
Swindling	4	4,24
Tax offence	4	4,24
Handling stolen goods	3	3,18
Violation of Drug Act	3	3,18
Causing a road accident	2	2,12
Blackmailing	2	2,12
Vandalism	2	2,12
Driving while being intoxicated	2	2,12
Preparation of a crime	2	2,12
Computer fraud	2	2,12
Sexual assault	1	1,06
Embezzlement	1	1,06
Removing a child from lawful custody	1	1,06
Hit-and-run	1	1,06
Attempted murder	1	1,06
Pimp	1	1,06
Criminal conspiracy	1	1,06
Abduction	1	1,06
Attempted manslaughter	1	1,06
Hooliganism	1	1,06
Disobeying an official command	1	1,06
Threatening with deprivation of life	1	1,06
Violation of the Foreigners Act	1	1,06
Smuggling	1	1,06
Spreading an infectious disease	1	1,06
TOTAL	106	100,00

This table shows the huge variety of non-listed crimes in EAW's. Robbery in different guises (e.g. theft by threatening, attempted robbery) and physical assault are the highest numbers.

[125] This table summarizes the original, which contains separate descriptions for each non-list crimes, as far as in the sample. Combinations of listed crimes and non-listen crimes are possible

TABLE 12 Decision rendered in Absentia

Decision rendered in absentia	Frequency	Percent	Valid Percent	Cumulative Percent
No	238	95,2	95,2	95,2
Yes	12	4,8	4,8	100,0
Total	250	100,0	100,0	

EAW's received contained in about 5% cases where persons were convicted *in absentia*.

TABLE 13 EAW pertains to seizure and handing over of property

EAW pertains to seizure and handing over of property	Frequency	Percent	Valid Percent	Cumulative Percent
No	248	99,2	99,2	99,2
Yes	2	,8	,8	100,0
Total	250	100,0	100,0	

About 1% of the EAW's is about seizure and handling over of property. In those two cases the goods were 'materials for selling drugs', like phone numbers of suppliers and buyers, and money.

TABLE 14 Suspects : maximum sentence applicable in years

Suspects: maximum sentence applicable to the offence, in years	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
1	1	0,4	0,6	0,6
2	3	1,2	1,8	2,4
3	5	2,0	3,0	5,4
4	3	1,2	1,8	7,2
5	22	8,8	13,2	20,4
6	1	0,4	0,6	21,0
7	1	0,4	0,6	21,6
8	7	2,8	4,2	25,7
9	1	0,4	0,6	26,3
10	39	15,6	23,4	49,7
12	2	0,8	1,2	50,9
14	2	0,8	1,2	52,1
15	51	20,4	30,5	82,6
16	1	0,4	0,6	83,2
20	17	6,8	10,2	93,4
24	1	0,4	0,6	94,0
27	1	0,4	0,6	94,6
30	9	3,6	5,4	100,0
Total	167			
Missing plus ND	83	33,2	100	
Total	250	100,0		

Accepting this sample represents all cases means that the majority of EAW's issued to the Netherlands prosecutors' office concerns offences for which more than 5 years imprisonment is possible, according to the national law of the issuing country. This suggests that the majority of the EAW's issued to the Netherlands concerns important crimes, and not just the light ones as the stories go.

TABLE 15 Convicts, sentence imposed in years

Convicts: sentence imposed to the offence, in years	Frequency	Percent	Valid Percent	Cumulative Percent
1	8	3,2	15,1	15,1
2	4	1,6	7,5	22,6
3	9	3,6	17,0	39,6
4	8	3,2	15,1	54,7
5	4	1,6	7,5	62,3
6	6	2,4	11,3	73,6
7	1	,4	1,9	75,5
8	5	2,0	9,4	84,9
9	3	1,2	5,7	90,6
11	1	,4	1,9	92,5
14	1	,4	1,9	94,3
16	1	,4	1,9	96,2
21	1	,4	1,9	98,1
24	1	,4	1,9	100,0
Total	53	21,2	100,0	
Missing/ ND	197	78,8		
Total	250	100,0		

Table 15 shows quite the opposite of the table about the maximum sentences applicable to an offence (14). This table shows that the majority of the sentences imposed are 5 years or less imprisonment. It is unclear how this relates to the crimes committed and the maximum sentences in different countries.

Decisions and Outcomes

Below, we show the result on the outcomes of the EAW's.

TABLE 16 Defendant consented to surrender

Defendant consented to surrender	Frequency	Percent (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	197	78,8	78,8	78,8
Yes	53	21,2	21,2	100,0
Total	250	100,0	100,0	

About 20% of the defendants consented to surrender. As a consequence, they can no longer refer to specialty rules.

TABLE 17 It was demanded that the person be returned after hearing

It was demanded that the person be returned after hearing	Frequency	Percentage (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	214	85,6	85,9	85,6
Yes	35	14	14	99,6
missing	1	0,4	0,1	100,0
Total	250	100,0	100,0	

The return guarantee was asked in 14% of the cases concerning suspects and convicts. This is a peculiar number, because for persons of Dutch nationality always a return guarantee is asked. Dutch nationals will not be allowed to be surrendered for execution of their sentence abroad. The percentage of persons of Dutch nationality in the total sample is 25 (64 cases). Of the 250 EAW's received, 87 had the purpose of *execution* of the sentence, 160 had the purpose of *prosecution*. 36 is 22.5% out of 160. An extra check on the data shows that of the 36 warrants where return was demanded, 31 was for Dutch citizens, four concerned none – Dutch residents and one was a file concerning a Dutch national where purpose (execution or prosecution) could not be found and that was counted.[126]

[126] Data mining thanks to José Reis.

TABLE 18 There were contacts between authorities for the resolution of problems

There were contacts between authorities for the resolution of problems	Frequency	Percent (relative to total sample)	Valid Percent (relative to valid numbers in sample)	Cumulative Percent
No	146	58,4	58,4	58,4
Yes	104	41,6	41,6	100,0
Total	250	100,0	100,0	

In the sample, in case of a life time sentence, no guarantee of measures of clemency was demanded. There were 2 cases with a possible life time sentence.

TABLE 19 Result of the warrant

Result of the Warrant	Frequency	Percent (relative to total sample)	Valid Percentage (relative to valid numbers in sample)	Cumulative Percent
Was approved and executed	176	70,4	85,4	85,4
Was refused	24	9,6	11,7	97,1
Was approved but not executed	6	2,4	2.9	100,0
Total	206	82,4	100,0	
Missing/ND	44	17,6		
Total	250	100,0		

70 -85% of the EAWs was approved of. The data do not show who decided to refuse the surrender; the surrender chamber or the district court or the public prosecutors' office.

Aspects of time of Dutch surrender proceedings

Here we show data on the time that was needed to catch, decide and surrender suspects and convicts.

TABLE 20 Suspects, year of the offence underlying the EAW

Suspects: year of the offence underlying the EAW	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percentage
1990	1	0,4	0,6	0,6
1993	2	0,8	1,3	1,9
1994	1	0,4	0,6	2,6
1995	1	1,6	0,6	3,2
1997	4	0,4	2,6	5,8
1998	1	2,4	0,6	6,4
1999	6	3,2	3,8	10,3
2000	8	2,8	5,1	15,4
2001	7	0,8	4,5	19,9
2002	2	2,4	1,3	21,2
2003	6	5,6	3,8	25,0
2004	14	12,4	9,0	34,0
2005	31	12,4	19,9	53,8
2006	31	12,4	19,9	73,7
2007	36	14,4	23,1	96,8
2008	5	2,0	3,2	100,0
Total	156	62,4	100	
Missing (convicted persons plus ND)	94	37,6		
Total	250	100,0		

This table shows that relatively old crimes are still being listed. 15% of the EAW's issued to the Netherlands concerned offences that have been committed before the year 2001. The majority of the EAW's, however, result from the time after the Framework decision and the surrender act entered into force in 2004.

TABLE 21 Suspects: months between offence and EAW issue

Suspects: months between offence and EAW issue	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
up to 6 months	45	18,0	29,8	29,8
6 months to 1 year	20	8,0	13,2	43,0
1 to 1,5 year	21	8,4	13,9	57,0
1,5 to 2 years	10	4,0	6,6	63,6
2 to 2,5 years	9	3,6	6,0	69,5
2,5 to 3 years	7	2,8	4,6	74,2
More than 3 years	39	15,6	25,8	100
Total	151	60,4	100	
Missing (convicted persons plus ND)	99	39,6		
Total	250	100,0		

Table 21 shows that it may take considerable time before the decision to prosecute may result in an EAW. In 25% of the cases this may be more than 3 years. This has to do with the way the search for a suspect is organized. The person is signalled in the Schengen Information System. Apart from direct searches, if the persons is accidentally found, e.g. because of a traffic violation, the prosecuting authority will be informed and sends a formal EAW.

TABLE 22 Convicts : months between the sentence and the EAW issue

Convicts: months between the sentence and the EAW issue	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of convicts in sample)	Cumulative Percent
up to 6 months	8	3,2	10,0	29,8
6 months to 1 year	8	3,2	10,0	43,0
1 to 1,5 year	7	2,8	8,7	57,0
1,5 to 2 years	3	1,2	3,7	63,6
2 to 2,5 years	8	3,2	10,0	69,5
2,5 to 3 years	7	2,8	8,8	74,2
More than 3 years	39	15,6	48,8	100
Total	80	32	100,0	
Missing (convicted persons plus ND)	170	39,6		
Total	250	100,0		

The outcome of table 22 is clear. Most of the sentences were given at least two years before the EAW was issued. This could be an indication of the time needed to actually enforce a sentence on a convicted person.

TABLE 23 Convicts : year of the sentence underlying the EAW

Convicts: year of the sentence underlying the EAW	Frequency	Percent (relative to total sample)	Valid Percent (relative to number of suspects in sample)	Cumulative Percent
1992	3	1,2	3,5	3,5
1993	1	0,4	1,2	4,7
1994	1	0,4	1,2	5,9
1995	4	1,6	4,7	10,6
1996	1	0,4	1,2	11,8
1997	2	0,8	2,4	14,1
1998	5	2,0	5,9	20,0
1999	4	1,6	4,7	24,7
2000	4	1,6	4,7	29,4
2001	3	1,2	3,5	32,9
2002	6	2,4	7,1	40,0
2003	6	2,4	7,1	47,1
2004	15	6,0	17,8	64,7
2005	14	5,6	16,5	81,2
2006	9	3,6	10,6	91,8
2007	5	2,0	5,9	97,6
2008	2	0,8	2,4	100,0
Total	85	34,0	100,0	
Missing (convicted persons plus ND)	165	66,0		
Total	250	100,0		

For convicts, 20% of the sentences dates back from earlier than 1999. 36% of the sentences were given since 2004, when the EAW framework decision was enacted.

TABLE 24 Months between custody and hearing

Months between EAW Issue and custody	Frequency	Percent	Valid Percent	Cumulative Percent
0	81	32,4	47,6	47,6
1	20	8,0	11,8	59,4
2	11	4,4	6,5	65,9
3	10	4,0	5,9	71,8
4	5	2,0	2,9	74,7
5	9	3,6	5,3	80,0
6	3	1,2	1,8	81,8
7	6	2,4	3,5	85,3
8	2	0,8	1,2	86,5
9	1	0,4	0,6	87,1
10	1	0,4	0,6	87,6
11	1	0,4	0,6	88,2
12	3	1,2	1,8	90,0
13	2	0,8	1,2	91,2
14	4	1,6	2,4	93,5
16	1	0,4	0,6	94,1
17	1	0,4	0,6	94,7
19	1	0,4	0,6	95.3
20	2	0,8	1,2	96,5
22	1	0,4	0,6	97,1
24	1	0,4	0,6	97,6
25	1	0,4	0,6	98,2
30	1	0,4	0,6	98,8
33	1	0,4	0,6	99,4
55	1	0,4	0,6	100,0
Total	170	68,0	100,0	
Missing/ND	80	32,0		
Total	250			

80% of the EAW's lead to custody within 6 months or less. 2,5% of the EAW's lead to a detention after more than 2 years. The missing numbers relate to incomplete files.

The value of these data is questionable, not because of inaccuracy, but because a requested person usually is signalized in the SIS, before he is arrested. The files at the International Legal Aid Centre in Amsterdam did not contain this information.

TABLE 25 Months between custody and hearing

Months between custody and hearing	Frequency	Percent	Valid Percent	Cumulative Percent
0	52	20,8	32,9	32,9
1	69	27,6	43,7	76,6
2	34	13,6	21,5	98,1
3	2	0,8	1,3	99,4
6	1	0,4	0,6	100,0
Total	158	63,2	100,0	
Missing/ND	92	36,8		
Total	250	100,0		

This table shows that 76 % of the requested persons have a hearing within one month after custody, 98 % within 2 months. This is fairly within the 60 days limit of the surrender act. The missing numbers relate to incomplete files

TABLE 26 Months between hearing and surrender

Months between hearing and surrender	Frequency	Percent	Valid Percent	Cumulative Percent
0	127	50,8	82,5	82,5
1	9	3,6	5,8	88,3
2	6	2,4	3,9	92,2
3	3	1,2	1,9	94.2
4	1	0,4	0,6	94,8
5	5	2,0	3,2	98,1
6	3	1,2	1,9	100,0
Total	154	61,6	100,0	
Missing/ND	96	38,4		

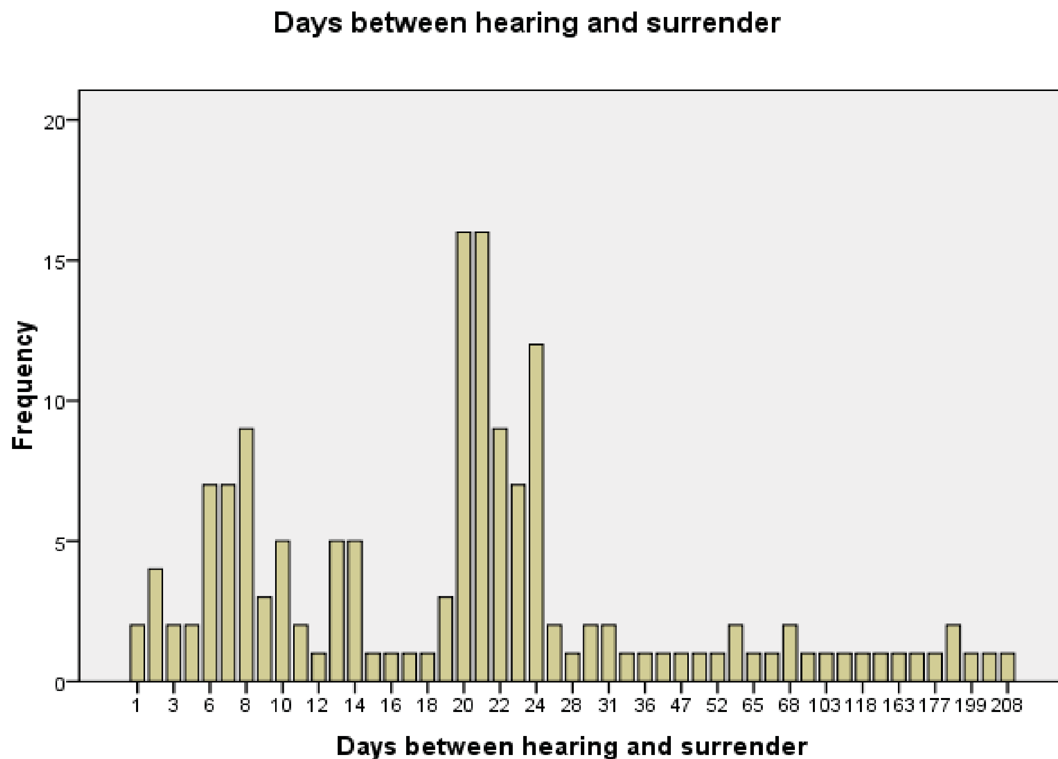

Table 26 shows that 82% is surrendered within 1 month following the hearing, 92% within 2 months. However, article 35 Surrender Act prescribes that surrender takes place 10 days following the hearing at the latest. The diagram above shows that a large majority of surrenders take place after that deadline, whereas the mean is 20 days!

Once an EAW has been issued, proceedings evolve quite fast, on average. The unknown number is how long it takes to catch the suspect. This is due to the fact that requested persons usually are first entered into the SIS. When they are (accidentally?) caught, the signalling prosecutors' office is informed and they then can decide whether they should send an EAW.

Discussion

First of all, it should be noted that the data– based on the archived files- are not complete. The data show that most of the EAW's concern male suspects/convicts. The crimes concerned often are 'ordinary' crimes. Most of them have a severe character, but some of them have not. An indicator for this is the maximum sentence for a crime

according to the national criminal laws. Most of the alleged crimes (about 80%) of suspects are punishable by more than 5 years of imprisonment.

Does this somehow contradict the urgency of the debate on proportionality in relation to the EAW? Or does it only show that relatively small crimes get quite a lot of attention in this debate?

Regarding the actual sentences of convicts, 60% concerns 4 years or less imprisonment. One explanation might be that the maximum sentence is not often imposed. This would mean that further research needs data about the sentences following surrender of suspects. The maximum sentence in an EAW may turn out to be a primitive indicator of the severity of the crime. E.g. theft of a mobile phone is not the same as stealing a valuable painting from a museum.

The crimes that occur the most in EAW's are drugs related, participation in a criminal organization, robbery in some way or another, fraud and physical assault. Participation in a criminal organization is only 10% of the cases, terrorism less than 1 percent. In so far the issued EAW's for the PPO's concern 'business as usual'. 106 out of 250 cases regard crimes that are not listed. In 223 cases the EAW concerns FD-listed facts. It often happens that an EAW contains several more crimes. We do not know why sometimes high numbers of offences are listed in an EAW.

Furthermore, Germany and Belgium are as neighbouring countries the countries that issue most EAW's to the Netherlands, followed by Poland. This matches with the nationality and the country of residence of the largest proportions of defendants, and with the language abilities of the defendants.

The large majority of EAW-requests are granted by Amsterdam District Court. The proportion of refusals is about 11%. This number does give no information on the question whether the refusal was by the court or by the PPO. So, the discussion on: should surrender be a judicial decision or just a decision of the PPO cannot be fed with arguments based on those data. However, the peer review report shows that in 2006 33 EAW's were refused by the DPPA and 38 by Amsterdam district court (Council of the European Union, 27 February 2009, 29). That is a low proportion.

Requests for seizure of goods in EAW's do occur very rarely. Practically this is a competence of the prosecutors' office where the suspect lives. Is easier to address those persons directly.

For only 14 % of cases a return guarantee of the requested person was demanded, while 25% of the requested persons concern Dutch nationals and another part will be aliens with a residence permit for an indefinite time according to Article 6 Surrender Act. In about 40% of the cases there have been contacts between the PPO-Amsterdam and the issuing authorities.

Regarding the timeliness, once an EAW is issued (and the suspect or convict is held in custody) proceedings move rapidly forward in 80% of the cases. Amsterdam district court is quite successful in making the legal deadline of a hearing within 60 days in 98% of the cases. This outcome contradicts the peer review report (Council of the European Union, 27 February 2009, 25). However, the peer review report shows that there are increasing throughput times from 2006 onwards. Nevertheless, the speed of handling cases upon receipt of an EAW is considerable. This may be considered the biggest success of the EAW-FD. Actual surrender following the hearing takes about 20 days on average. That is too long as the Surrender Act demands surrender within 10 days following the hearing.

The explanation for the huge time between the offence committed and the issuing of an EAW in 25% of the cases, lays with the prosecuting authorities abroad. We do not know why this sometimes takes several years.

EAW issued by the Netherlands

We gathered data on 105 EAW's. We present the same tables as for the EAW's received in the Netherlands, but leave them out when the data are too limited to present them. No information was available on the time that passed between the issuance of the EAW and actual surrender, This may be registered in the executing state, but not in the Netherlands as issuing state.

Characteristics of the suspects

TABLE 27 Sex of defendants

Sex of defendants	Frequency	Percent	Valid Percent	Cumulative Percent
Male	97	92,4	92,4	92,4
Female	8	7,6	7,6	100,0
Total	105	100,0	100,0	

This table confirms the male- female *ratio* of defendants.

TABLE 28 Nationality of defendant

Nationality	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	48	45,7	48,5	48,5
Morocco	9	8,6	9,1	57,6
Turkey	7	6,7	7,1	64,6
Bulgaria	4	3,8	4,0	68,7
Algeria	3	2,9	3,0	71,7
Poland	3	2,9	3,0	74,7
Romania	3	2,9	3,0	77,8
United Kingdom	3	2,9	3,0	80,8
Iraq	2	1,9	2,0	82,8
Serbia	2	1,9	2,0	84,8
Suriname	2	1,9	2,0	86,9
-- Other --	2	1,9	2,0	88,9
Albania	1	1,0	1,0	89,9
Austria	1	1,0	1,0	90,9
Bosnia and Herzegovina	1	1,0	1,0	91,9
Colombia	1	1,0	1,0	92,9
Egypt	1	1,0	1,0	93,9
Jordan	1	1,0	1,0	94,9
Lebanon	1	1,0	1,0	96,0
Nigeria	1	1,0	1,0	97,0
Pakistan	1	1,0	1,0	98,0
Russia	1	1,0	1,0	99,0
Tunisia	1	1,0	1,0	100,0
Total	99	94,3	100,0	
Missing/ND	6	5,7		
Total	105	100,0		

Almost half of the defendants is Dutch. There are quite some defendants from Northern African Countries, from Turkey and from Eastern Europe. There are no Germans and Belgians in this sample and this may be explained by the circumstance that German, Belgian and French suspects are dealt with by other prosecutors' offices in the Netherlands.

TABLE 29 Age of defendants in categories

Age of defendants	Frequency	Percent	Valid Percent	Cumulative Percent
<=20	1	1,0	1,0	1,0
21-30	25	23,8	24,3	25,2
31-40	41	39,0	39,8	65,0
41-50	26	24,8	25,2	90,3
51+	10	9,5	9,7	100,0
Total	103	98,1	100,0	
Missing/ND	2	1,9		
Total	105	100,0		

Also in this sample most defendants are between 21 and 50 years old.

TABLE 30 Residence country of defendant

Residence country of the defendant	Frequency	Percent	Valid Percent	Cumulative Percent
Netherlands	19	18,1	54,3	54,3
Spain	2	1,9	5,7	60,0
Turkey	2	1,9	5,7	65,7
United Kingdom	2	1,9	5,7	71,4
Austria	1	1,0	2,9	74,3
Belgium	1	1,0	2,9	77,1
Brazil	1	1,0	2,9	80,0
Bulgaria	1	1,0	2,9	82,9
Egypt	1	1,0	2,9	85,7
France	1	1,0	2,9	88,6
Germany	1	1,0	2,9	91,4
Poland	1	1,0	2,9	94,3
Thailand	1	1,0	2,9	97,1
-- Other --	1	1,0	2,9	100,0
Total	35	33,3	100,0	
Missing/ND	70	66,7		
Total	105	100,0		

Table 30 shows that a lot of data are missing, also based on the fact that the public prosecutors' office simply does not know where most of the suspects live.

TABLE 31 Languages the defendant speaks

Languages the defendant speaks	Responses		
	N	Percent	Percent of Cases
Arabic	12	10,2%	12,8%
Bulgarian	4	3,4%	4,3%
Bosnian	1	,8%	1,1%
English	13	11,0%	13,8%
Spanish	3	2,5%	3,2%
French	2	1,7%	2,1%
Hindi	1	,8%	1,1%
Lingala	1	,8%	1,1%
Dutch	60	50,8%	63,8%
Polish	3	2,5%	3,2%
Romanian	3	2,5%	3,2%
Russian	1	,8%	1,1%
Albanian	1	,8%	1,1%
Serbian	2	1,7%	2,1%
Turkish	11	9,3%	11,7%
Total	118	100,0%	125,5%

Those data do match the data of the nationality of the defendants, more or less.

TABLE 32 Language abilities of defendants

Language abilities of defendants	Cases					
	Valid		Missing		Total	
	N	Percent	N	Percent	N	Percent
language_1	94	89,5%	11	10,5%	105	100,0%
language_2	23	21,9%	82	78,1%	105	100,0%
language_3	1	1,0%	104	99,0%	105	100,0%
Dutch +	18					
English +	6					
Arabic+	5					

This table shows that most of the non-Dutch speakers do need interpreters for their defence.

Content of the EAW's

TABLE 33 Purpose of the EAW

Purpose of the EAW (prosecution or execution of sentence)	Frequency	Percent	Valid Percent	Cumulative Percent
prosecution	77	73,3	73,3	73,3
execution of sentence	28	26,7	26,7	100,0
Total	105	100,0	100,0	

About 25% of the EAW's are directed at the arrest of convicts.

TABLE 34 Number of offences in a warrant

Number of offences in the warrant	Frequency	Percent	Valid Percent	Cumulative Percent
1	42	40,0	40,0	40,0
2	26	24,8	24,8	64,8
3	19	18,1	18,1	82,9
4	7	6,7	6,7	89,5
5	4	3,8	3,8	93,3
6	2	1,9	1,9	95,2
7	2	1,9	1,9	97,1
8	1	1,0	1,0	98,1
10	1	1,0	1,0	99,0
17	1	1,0	1,0	100,0
Total	105	100,0	100,0	

This table shows that most of the EAW's do not count more than 3 offences. But larger enumerations do occur.

TABLE 35 Listed offences

Offences in the EAW[127]	N	Percent	Percent of Cases
illicit trafficking in narcotic drugs and other substances	25	17,0%	26,9%
murder, grievous bodily injury	22	15,0%	23,7%
organized or armed robbery	21	14,3%	22,6%
participation in a criminal organization	17	11,6%	18,3%
kidnapping, illegal restraint and hostage-taking	17	11,6%	18,3%
fraud, etc.	14	9,5%	15,1%
Swindling	8	5,4%	8,6%
Rape	5	3,4%	5,4%
trafficking in human beings	4	2,7%	4,3%
forgery of means of payment	4	2,7%	4,3%
forgery of administrative documents and trafficking therein	3	2,0%	3,2%
laundering of the proceeds of crime	2	1,4%	2,2%
racketeering and extortion	2	1,4%	2,2%
sexual exploitation of children and child pornography	1	,7%	1,1%
counterfeiting of currency, including the euro	1	,7%	1,1%
arson	1	,7%	1,1%
Total	147	100,0%	158,1%

A large proportion is dedicated to drugs-related crime, but an even larger proportion concerns heavy crimes like murder, armed robbery kidnapping and the like. The Dutch PPO appears to follow a selective policy for using the European Arrest Warrant infrastructure.

[127] One arrest warrant can have more offences listed.

TABLE 36 Non-listed offences

Non-Listed offences	Frequency	Percent	Valid Percent	Cumulative Percent
Opium Act	4	3,8	14,8	14,8
Robbery	5	4,8	18,4	33,2
Assault, Robbery, Extortion, Threatening with assault & Opium Act	1	1,0	3,7	36,9
Attempted assault	1	1,0	3,7	40,6
Deprivation of liberty and Robbery	1	1,0	3,7	44,3
Illegal possession of weapons	1	1,0	3,7	48,0
Illegal resident	1	1,0	3,7	51,7
Escape from parental authority or from youth care	4	3,8	14,8	66,5
Opium Act and Act Weapons and Munitions	1	1,0	3,7	70,2
Opium Act and Selling stolen goods	1	1,0	3,7	73,9
Selling of stolen goods	3	2,9	11,1	85,0
Sexual assault	1	1,0	3,7	88,7
Tax offence	1	1,0	3,7	92,4
Theft and embezzlement	1	1,0	3,7	96,1
Embezzlement	1	1,0	3,7	99,8
Missing				
Total	27	25,7	100,0	
Missing	78	74,3		
Total	105	100,0		

This is a strange set of apparently auxiliary crimes. A large number of files did not contain this category.

TABLE 37 Decision rendered *in absentia*

Decision rendered in absentia	Frequency	Percent	Valid Percent	Cumulative Percent
No	105	100,0	100,0	100,0

This sample does not contain *in absentia* decisions.

TABLE 38 EAW pertaining to seizure and handing over of property

EAW pertains to seizure and handing over of property	Frequency	Percent	Valid Percent	Cumulative Percent
No	102	97,1	97,1	97,1
Yes	3	2,9	2,9	100,0
Total	105	100,0	100,0	

		Property which may be required as evidence			
		No		Yes	
		Count	Subtable N %	Count	Subtable N %
EAW pertains to seizure and handing over of property	Yes	1	33,3%	2	66,7%

Description of goods to seize	Frequency	Percent	Valid Percent	Cumulative Percent
Money	1	1,0	50,0	50,0
passport driving license other identification documents or passes	1	1,0	50,0	100,0
Total	2	1,9	100,0	
Missing	103	98,1		
Total	105	100,0		

Those tables show 3 cases out of 105 where seizure of goods is requested.

TABLE 39 Maximum sentences

Maximum sentence applicable to the offences, in years	Frequency	Percent	Valid Percent	Cumulative Percent
3	1	1,0	1,0	1,0
4	5	4,8	5,0	5,9
6	23	21,9	22,8	28,7
8	12	11,4	11,9	40,6
9	8	7,6	7,9	48,5
10	7	6,7	6,9	55,4
12	29	27,6	28,7	84,2
15	7	6,7	6,9	91,1
16	1	1,0	1,0	92,1
20	2	1,9	2,0	94,1
30	6	5,7	5,9	100,0
Total	101	96,2	100,0	
System	4	3,8		
Total	105	100,0		

Considering the maximum sentences according to Dutch law, the crimes committed are rather heavy, and this fits the listed offences above.

TABLE 40 Convicts : sentences imposed, in years imprisonment

Sentences imposed on the offences, in years	Frequency	Percent	Valid Percent	Cumulative Percent
2	2	1,9	16,7	16,7
3	1	1,0	8,3	25,0
4	3	2,9	25,0	50,0
5	2	1,9	16,7	66,7
6	1	1,0	8,3	75,0
9	2	1,9	16,7	91,7
20	1	1,0	8,3	100,0
Total	12	11,4	100,0	
Missing/ND	93	88,6		
Total	105	100,0		

The imposed sentences are quite milder than the maximum sentences.

Decisions and outcomes

Considering the nature of the data analyzed, we cannot give many data on e.g. consent to surrender, actual seizure of property, or the communications between the executing authorities abroad and the Dutch prosecutors' office.

Aspects of time concerning Dutch issued EAW's

TABLE 41 Year of the prosecutions act underlying the EAW

Year of the prosecution act underlying the EAW	Frequency	Percent	Valid Percent	Cumulative Percent
1997	1	1,0	1,4	1,4
1998	2	1,9	2,7	4,1
1999	1	1,0	1,4	5,4
2000	1	1,0	1,4	6,8
2001	1	1,0	1,4	8,1
2002	3	2,9	4,1	12,2
2003	3	2,9	4,1	16,2
2004	5	4,8	6,8	23,0
2005	10	9,5	13,5	36,5
2006	25	23,8	33,8	70,3
2007	4	3,8	5,4	75,7
2008	12	11,4	16,2	91,9
2009	5	4,8	6,8	98,6
	1	1,0	1,4	100,0
Total	74	70,5	100,0	
Missing	31	29,5		
Total	105	100,0		

This table shows most prosecution decisions date back to the time the surrender act was in force.

TABLE 42 Months between prosecution act and EAW issue

Months between the prosecution act underlying the EAW and EAW issue	Frequency	Percent	Valid Percent	Cumulative Percent
Up to 6 months	33	31,4	46,5	46,5
6 months to 1 year	14	13,3	19,7	66,2
1 to 1 1/2 year	7	6,7	9,9	76,1
1 1/2 to 2 years	4	3,8	5,6	81,7
2 to 2 1/2 years	2	1,9	2,8	84,5
More than 3 years	11	10,5	15,5	100,0
Total	71	67,6	100,0	
Missing/ND	34	32,4		
Total	105	100,0		

Two thirds of the EAW's is issued within a year following the prosecutions act. This leaves the question unanswered why in other cases – one third, it takes longer to issue an EAW.

Discussion

It follows from this limited set of data that the The Hague international legal aid centre has a functional approach to the EAW. The data, as far as they are representative for the Netherlands, show that the EAW's issued concern major offences. Proportionality for using the EAW is not a point for debate concerning the The Hague practice.

Still information on the Dutch practice of issuing EAW's is hard to gather. The information is dispersed over various Public prosecution offices, who have their own practices. Gathering of data therefore is extremely time consuming and therefore prohibitive for a decent quantitative (evaluation) research without extra funding.

5.6. Conclusion and Discussion

Here we present our findings and the discussions that have evolved during interviews and the expert meetings. It should be noted that the sample of the files we studied reflects the first 4 years of the EAW practice in the Netherlands. For the International Legal Aid Centres and for the surrender chamber, this functioned as learning period, in which they had to learn to work with relatively new responsibilities. As we write this report, the International Legal Aid Centres and the surrender chamber have developed policies and routines within the context of the Dutch Surrender Act. We summarize the outcomes below.

In separate paragraphs at the end of each subject description we will give our own views.

Timeliness

Shifting from extradition to surrender has led to several – radical – changes. One of the major differences between the former extradition procedure and the present surrender procedure is the speediness of it. As a consequence of the extradition procedure, requested persons could have to wait in prison for one up to two years before their actual extradition took place. Nowadays, the Amsterdam District Court can deal with incoming surrender cases within sixty days, and eighty percent of the cases can be dealt with within the maximum period of ninety days. See tables 25 and 26 in chapter 5.

Another important change, which also contributed to the speed of the surrender procedure, is the reduced intensity of examination of requests. The surrender procedure is based on mutual trust and is standardized; it only takes ticking off one or more boxes and meeting formal minimum requirements. As a consequence, the case files are less extensive than the files in extradition cases. Due to the norm of mutual trust there is a constricted margin of appreciation in surrender cases. There is a tendency to not test *ex officio*. The Court of Amsterdam ruled that the principle of trust between states, on the basis of which the suspicions should be assumed to be correct, should prevail, except when there are important clues that a mistake has been made (Amsterdam District Court, 6 March 2007).

Therefore, judges depend on the defences that advocates put forward. Still, the court used to require from the issuing State to add the relevant statutory provisions to the EAW. The Dutch authorities wanted to – marginally – check whether the offence could reasonably be seen as an offence from the list. Later on, the Netherlands Supreme Court ruled that not requiring the full texts of the criminal law provisions to be attached is more in line with the purpose of the FD, which is based to a considerable extent on trust between the member states in order to avoid difficulties and loss of time (Supreme Court of the Netherlands, 8 July 2008).

Developments in the Netherlands

Next to the changes that followed from the Framework Decision, there are also developments in surrender law that follow from practice. The first development is that the Court of Amsterdam wanted to refuse surrender based on human rights; however, the Supreme Court did not allow that. Since 2003 the Netherlands Supreme Court changed its rulings on human rights exceptions substantially: not only a flagrant denial of Article 6 ECHR was required, but also the lack of legal remedy, as prescribed by Article 13 ECHR (Amsterdam District Court, *NJ* 2004, 42). Moreover, a completed torture does come under to scope of the defence of a risk of flagrant denial of Article 6. In 2007 the ECtHR stated that in case of violation of Article 6, the applicant has to file a complaint with the ECtHR after being extradited. Consequently, human rights defences should be put forward in the criminal proceedings after extradition or surrender took place with regard to countries that are party to the ECHR. The questioned State is not responsible anymore for respecting human rights after surrender when there is an effective remedy in the issuing State. The ECtHR differentiates between reversible and irreversible violations of human rights (ECtHR, 6 February 2003).

The second development is that the Dutch Supreme Court quashed the judgments in which judges used a certain margin of appreciation regarding the principle of territoriality (Supreme Court of the Netherlands, 28 November 2006). In principle, the public prosecutor can waive a refusal of surrender – based on the territoriality principle –, unless, in the opinion of the court, the public prosecutor could not reasonably do so – Article 13(2) SA. The Supreme Court ruled that there should be only a marginal test for judges on this matter; they can no longer decide easily that such a waiver of refusal is unreasonable. Consequently, there is almost no margin of appreciation left for the court to decide on matters of territoriality. Therefore, this Article is rendered useless in practice. Moreover, according to the Supreme Court, humanitarian reasons are no

ground to refuse surrender. Therefore, they are no relevant factor to decide on the question whether the refusal of surrender should be waived.

The third development in Dutch surrender practice is that there are questions raised on whether someone with the nationality of another EU-member state who lives here for quite some time and, therefore, should be considered to be rooted here, should be considered an ‘alien with a residence permit for an indefinite time’ – Article 6(5). The personality principle, which makes re-surrender dependent on being a national of the Netherlands, might lead to a discriminatory distinction between EU-citizens, as follows from EC law. To answer this question, the Court of Amsterdam referred the *Wolzenburg* case to the ECJ and posed the question: “may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a permanent residence permit?” (ECJ, 6 October 2009; Glerum and Rozemond, 2010).

The fourth development is that the *in absentia*-guarantee of Article 12 SA has taken shape. The Court of Amsterdam regarded the guarantee of a retrial given by Belgium insufficient, because it is not certain whether an application for a retrial will be admissible (District Court of Amsterdam, 23 November 2004). Article 12 SA provides for an assessment of the merits of the case, according to the legislature. Therefore, the Court of Amsterdam argued that the procedure, in which the admissibility of the objections lodged has to be judged before the surrendered person could make use of his right to defend himself in a retrial, is insufficient. The mere existence of a retrial is therefore regarded insufficient to guarantee a new assessment of the merits of the case. In how far the new framework decision on trial *in absentia* (Council Framework Decision 26 February 2009) will lead to a change of course of the practice of the surrender chamber of Amsterdam District Court is not clear yet, as the practice focuses on the adequacy of notifications of the pending trial and its outcome to the requested person in the issuing member state.

Principles and legality

Currently, practitioners speak of three important problems that arose in Dutch EAW practice. The first problem, in the opinion of judges, prosecutors and advocates, is the lack of a proportionality test. For example Poland often issues a EAW for petty offences, which the Dutch authorities claim to be disproportional. Therefore, the Amsterdam District Court recently stated that in special circumstances surrender could

be refused because it would constitute a violation of the proportionality principle (Amsterdam District Court, 30 December 2008). The court referred to the Council of Europe which stated that: “Considering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences.” (European handbook, January 2008: 14). Yet, this recommendation is written for public prosecutors who decide on issuing an EAW; it is not for the court to judge whether the use of an EAW is (dis-)proportional and to decide which crimes foreign States can consider the most serious.

From the data we assembled for incoming EAW’s 80 percent of the cases concern crimes with a possible maximum sentence of more than 5 years. 20 % has a possible maximum sentence of less than 5 years (table 14). We consider this an indication that the majority of the EAW’s concern serious crimes. However regarding imposed sentences for convicted persons about 70 % concerns sentences of less than 5 years imprisonment and about 30% concerns heavier sentences. This is a contrary indication that better fits the perception of judges that the EAW regards ordinary criminals (table 15). Also the data we gathered on Dutch issued EAW’s have a similar ratio between 5 years and less max. sentences and 70% more than 5 years sentences. This is one of the subjects that needs more research and monitoring.

The second problem is improper usage of the EAW. The EAW is sometimes used for criminal investigation instead of prosecution, because other instruments are executed by way of requests which are not as simple and quick as EAW’s. Among judges and prosecutors there is the strong impression that Belgium asks the surrender of persons for the aim of hearing them as a witness. In Belgium, 50% of the surrendered Dutch nationals got released or conditionally released right after their surrender, while the will never be a follow-up in their case. In other situations, using a radical instrument as the EAW can result in a long period – more than one up to three years – of pre-trial detention, while there might not be any suspicion against this person. This is not in line with the tight maximum for a requested person to be surrendered – 90 days. Some judges and prosecutors are worried that this kind of improper usage will undermine the support of Dutch society for the EAW.

We were not able to gather numbers on this phenomenon.

It should be noted that during the expert meeting both the judge and the person from Rotterdam international legal aid centre protested against this finding, because the PPO had undertaken efforts to find better understanding between Dutch and Belgian authorities. We do not doubt these efforts but we also do not doubt that these are opinions we heard during interviews.

The third problem that judges and prosecutors as well as advocates face, are translation difficulties. The quality of the translated EAW's is a major concern to the Dutch executing authorities, because translation errors very often lead to misunderstandings. Another problem contributing to translation difficulties is the very short time period within which countries require the transmission of an EAW, because it takes much extra effort and costs to get the EAW translated into the official language of the executing State in time. For advocates, it can be very difficult to get to know the law of the issuing State when no translation is available. This reduces their defence possibilities and it also reduces their ability to adequately contribute to the defence of the suspect following surrender.

Furthermore, advocates agree that the quality of interpreters can be problematic, because it is difficult to check. One of the major lacks of interpreters according tom advocates is that some of them only use simple words when translating complex specific juridical terms.

Mutual trust

In general, judges and prosecutors agree that the EAW functions well as an instrument to combat international crime. This was contested by a scholar who maintains it is mainly used for ordinary crime. For the EAW to function properly a basic quantity of mutual trust between judicial authorities is required, as it is the cornerstone of the EAW. The principle of mutual trust requires a distant approach to a surrender case. In order to give mutual trust priority, judges have to look to a case in a more technical way and not look too much at the problems concerning human rights and the treatment of persons in the requesting state.

The judicial authorities in the Netherlands cannot supervise what happens to a person after they allowed the surrender. Some of the judges think this information would be useful in order to maintain the quality of the procedure. Other maintain that they would not be able to use this information in surrender proceedings whatsoever.

Prosecutors are not unwilling to surrender persons to neighbouring countries, nor seem to mind to surrender a person to their foreign colleagues when the act is partly committed on Dutch territory. They give four reasons for this. One, public prosecutors usually cooperate with coordinated international action against organized crime, sometimes it is easier to have a person transferred abroad because all the evidence is located there. Two, it will yield profit for the capacity of the Dutch public prosecution service. Three, the maximum penalties are often higher in other European countries, in particular concerning drug crimes.[128] Four, surrendering a suspect has more impact on him than prosecuting him in the Netherlands.

In contrast, advocates do notice some problems regarding mutual trust. There may be trust between authorities of EU member states, but that is not the same for the citizens of those States who have to be imprisoned in another country. Requested persons fear for example that the maximum of pre-trial detention will be much higher than in the Netherlands and that there will be no guarantee of qualitatively good legal counsel, for a reasonable price. Advocates and judges agree that the ideal situation of equal rights in all European countries is still a fiction, as the legal systems of Eastern European countries differ very much from the legal systems in Western Europe. So, there is a certain tension between the mutual trust the European legislator has taken as a starting point, and the trust suspects, advocates and some judges have in practice. Some of them, therefore, are in favour of a framework decision on minimum rights or improvement of the FD with regard to the legal position of the suspect.

For future research, therefore the time of pre-trial imprisonment after surrender in the different EU countries should be registered and monitored.

Several advocates believe that judges sometimes use emergency steps when there is no mutual trust. Then, they seem to check more profoundly whether the EAW meets all the requirements and whether any refusal ground applies. Nevertheless, because mutual recognition requires States to execute all kinds of requests from abroad, the minimum standard of the suspect's rights will be adjusted to the lowest European common denominator. The Netherlands have already implemented many procedural rights in its Code of Criminal Procedure, such as short periods for pre-trial detention and for dealing with requests of legal assistance, while other countries have not. This reduces the rights of suspects to a European minimum quality of criminal proceedings.

[128] It would be interesting to check if this still holds. Sentences have increased considerably in the Netherlands during the past 5 years.

We reiterate that although the European Union takes a rather strict approach to enforcing the Framework decision on the EAW, it has no competences to steer or monitor proceedings after a person was surrendered. Therefore it is not possible to do research on how surrendered, requested persons were actually treated abroad. From a mutual trust perspective, we think this is desirable, as a part of the debate on transnational criminal law enforcement evolves about defence rights and living up to minimum requirements from a human rights perspective, in criminal proceedings, in custody and concerning imprisonment.

Defence rights

With regard to the legal position of the requested person, the possibility to put up a defence is strongly reduced under the surrender system. The extradition procedure did allow for appeal and cassation. Moreover, the request had to be more substantial with regard to the description of the facts and of the particular suspicion. The EAW does not require sending the underlying records of a request to the executing authorities. In some cases, when the court regards the information provided insufficient, the case will be adjourned in order to request extra information from the issuing authorities. Yet, the court will refuse the execution of the EAW only in exceptional cases, in view of the lack of necessary information. As the *ne bis in idem*-principle does not apply for EAW's, the issuing authority can – continually – send a new EAW as soon as it is informed of the refusal, which the court does not consider to be in the interest of the suspect.

The defence of innocence will only be taken into consideration by the court when there is immediate and absolute proof of the innocence of the requested person. Testimonies of witnesses are not easily accepted as a sufficient alibi to proof someone's innocence. In fact, this defence has succeeded only once since the EAW entered into force. Advocates agree that an important way to improve the possibility to put up defences and effectuate the rights of the suspect in the EAW procedure is to receive the case files in time. Records can now be handed in two days before proceedings take place and, sometimes, the case files are even incomplete until the last moment before the hearing starts.

Advocates' expertise and cooperation

Finally, it is very important for advocates to gain in-depth knowledge of surrender law and – particularly – case law. Judges agree that many advocates do not have any routine in defending requested persons and are not well-informed on the recent case law on surrender procedure. Yet, this could be problematic, because there are only a few law firms that frequently deal with surrender cases, while in this field you have to know the law thoroughly, otherwise you will not succeed in court. Moreover, advocates could make more use of EC and EU law in their defences, such as the principles of proportionality and of non-discrimination. Judges agree that they are dependent of the defences that advocates put forward. Sometimes they seem to be worried about the lack of creativity on the side of the defence. For that reason, judges cannot let the procedure become a complaint procedure; they have to discuss things that catch their attention during the hearing, even when there is no complaint brought forward by the advocate.

Furthermore, advocates have to cooperate with their colleagues from abroad, however, that does not happen in the majority of the cases. It is important to know good advocates in every other member state, e.g., to explain the law of the issuing country. For that reason, it might be necessary to set up a European bar of advocates. In addition it would be in the interest of the requested person if the Dutch State would pay for the legal counsel of their nationals before and after their surrender. Finally, it can be stated that advocates would have to act very pro-actively in surrender cases. At the moment, only a small number of them put considerable effort in such cases. Sometimes it can be profitable to make arrangements with the public prosecution service in the issuing country, in order for the requested person to voluntarily go there for a hearing or even for a court session, instead of staying in prison during the surrender procedure and pending his trial.

Outcome in numbers

The vast majority of incoming EAW's is executed within the 90 days timeframe (tables 25 and 26). However, the data do not show how much time lapses between signalization of the requested persons and their arrest. Most requested persons are men (93%) (table 1). Only 5% of the incoming EAW's concerns judgments *in absentia* (table 12). 20% of requested persons consented with surrender (table 16). Only in 1 % of cases seizure and handing over of property was requested (table 13). 45% of the EAW for

listed crimes are drugs related (table 10). For 80% of the EAW's there were 5 months or less between the EAW and custody (table 24).

Most incoming EAW's are from the neighbour countries, Poland, France and Italy (table 8).

60% of incoming EAW's concern requested persons from Dutch, Polish, German, Belgian and Italian nationality (table 2). The numbers of the EAW use in the Netherlands show for incoming EAW's with the purpose of prosecution that the majority (80%) is for crimes with a maximum sentence of more than 5 years (table 14). The mirror image is shown by EAW's with the purpose of execution: 80% is for crimes with a maximum sentence of 5 years or less (table 15). Return guarantees were asked for Dutch defendants for EAW's with the purpose of prosecution (table 17).

Furthermore it is interesting to note that about 10 % of the incoming EAW's are refused, about half by the PPO and the other half by the surrender Chamber of Amsterdam District Court (table 19).

For Dutch issued EAW's, most requested persons, are Dutch, male. They do concern drugs in 25% of cases, but also murder (23%) and organized or armed robbery (23%). So this gives the impression that the Dutch PPO issues EAW's for heavy crime predominantly. This is also confirmed by the fact that 72% of these EAW's concerns crimes with a maximum sentence of 6 years or more imprisonment (table 39). However, the imposed sentences (table 40) are apparently less severe than the maximum sentences.

It should be noted that the analyzed Dutch issued EAW's are not a random sample.

The numbers show that the majority of the EAW's concern heavy crimes (if measured by the maximum sentence). The peculiarities debated amongst lawyers (judgments *in absentia*, seizure and handing over of property, return guarantees for non-nationals) are not major parts of this sample. This does not mean that these debates are not important. They are.

The human rights perspective is as good as absent in surrender proceedings. The routines are very efficient and the number of refusals of EAW's is limited. Surrender law is quite complicated, but the discretion for judges in surrender cases is very limited. Now that defence rights are almost non-existent in surrender proceedings, a question is if the surrender chamber needs a three judge panel to decide on surrender cases.

The discomfort of strangers[129]

First of all, we are convinced a system of transnational cooperation in criminal law enforcement is a necessity in an integrating Europe. The development of the current system based on the Framework decision on the European Arrest Warrant, however, leaves several urgent problems unsolved. From the perspective of citizenship and the constitutional state this is unacceptable.

It is a feature of the EAW system in Europe that it is for the requesting authority to decide to put the data of a wanted person into the SIS and Sirene systems. And it is up to the executing authorities to decide if a requested and arrested person will actually be surrendered in accordance with national legislation. However, if a court refuses surrender, this by no means involves that the requested person will be removed from the signalling system. Of course, there can be different reasons to refuse surrender, apart from the age or the maximum punishment for the offence, e.g. the requesting authority delivered a bad EAW that could not be repaired in time. But the cases described also are of a different nature, e.g. persons that by all means cannot have committed the crime; persons that have been put in the signalling system on instigation of criminals that corrupted a prosecutor. The administration of criminal law enforcement is not infallible, whereas the EAW system in effect ignores (postpones) the presumption of innocence and the defence rights evolving from that basic constitutional value.

The current EAW system has no way to deal with such situations at the detriment of the unjustly requested persons, who appear as ‘wanted’ throughout Europe. Even when the executing country is able to remove the data of the requested person from the national signalling system, the person is likely to remain signalled in the SIS. The usual crime fighting attitude amongst law enforcers, policemen and prosecutors alike, that persons have not been entered into the signalling systems for no reason, also does not help. In this regard Europe needs legislation that makes it possible for persons dismissed from surrender to have their details removed from the SIS ((Amnesty report, 2005; Cronin, Guardian August 5 2009; NCRV broadcast 17 December 2007). That also can be marked as a means to enhance mutual trust, this time not from an institutional but especially from a citizens’ perspective.

A question to be answered is, in how far judges in Amsterdam District Court really are restricted to only test the administrative accuracy of an issued EAW. The

[129] This paragraph header paraphrases a novel by Ian MCEwan, The Comfort of Strangers, 1981.

International legal aid chamber of Amsterdam District court has tried to invoke human rights arguments into surrender law, but was corrected by the Supreme Court. Now one wonders if and how they are able to invoke defence rights based on the EU treaty (Klip, 2010). If this will not be possible the question is if a three judge panel is necessary to take these decisions, even although surrender law is a complicated area of law. Would one judge be enough or can surrender cases just as well be left to be decided by the public prosecutions office?

Furthermore national bar institutes need to join forces in Europe in order to support the defence for surrendered suspects. This regards not only supervision of interpreter's services but also the services of advocates that have to deal with suspects from abroad. Not only the efficiency of transnational law enforcement, but also respecting civil rights that are also a part of European citizenship should be high on the agenda of European policymakers. The proposal of the Commission for Framework decision on procedural rights dates back to 2004 and still has not been realized (European Commission, 28 April 2004). The European Commission has stressed that the procedural rights from the proposal, more than other rights need harmonization, because that would contribute most to mutual trust and cooperation between EU-member states. The proposal wants to promote that these rights will be respected at a minimum level, "To promote compliance at a consistent standard" (European Commission, 28 April 2004, 2). Moreover, according the European Commission, the knowledge and the respect for human rights will increase by giving them more visibility. This fact only already calls for the question how come that this proposal has not yet reached legal status, as it contains only minimum requirements. A report of the House of Lords (House of Lords 2009) explains that the reason is that certain countries do not want to do more than they do, whereas others (the UK) find the proposal too limited. This is all the more disturbing, as the European Council did manage to bring about a Framework Decision on judgments *in absentia*, thus amending the Framework Decision on the EAW. Hope comes from the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01.

For us it seems essential that before mutual trust will be stretched even further from the defence interests of EU citizens, defence related rights can be enforced on a minimum level throughout the EU, if possible on a better level than the minimum requirements of the European Convention on Human Rights, and before too much 'collateral damage' can be imposed by law enforcement bureaucracies. As far as we are concerned, the European Frameworks designed to deal with transnational criminal law

enforcement need further elaboration by giving guarantees for minimum defence rights for EU citizens and others alike. We do hope the new decision making proceedings in the EU based on article 82 of the Lisbon Treaty will enable the European Legislator to cut through the political stalemate on this issue.

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