THE NETHERLANDS

Joske Graat
Dr. Brenda Oude Breuil
Dr. Daan van Uhm
Emma van Gelder
Tineke Hendrikse

Overview Respondents in the Empirical Part of the Research

Respondent	Function	Location	Date	Comment
R1	Judge	Amsterdam	8-7-2016	Together with R2
R2	Clerk	Amsterdam	8-7-2016	Together with R1
R3	Public Prosecutor	Amsterdam	13-7-2016	
R4	Public Prosecutor	Haarlem	13-7-2016	
R5	Lawyer	Amsterdam	7-7-2016	
R6	Lawyer	Amsterdam	13-7-2016	
R7	NGO	Amsterdam	2-8-2016	
R8	Detainee	Nieuwegein	18-8-2016	
R9[1]	Detainee	Nieuwegein	25-8-2016	
R10	Detainee	Nieuwegein	26-8-2016	

[1] Respondent R9 has been transferred not on basis of the Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*, *WETS*), but on basis of the Enforcement of Criminal Judgements (Transfer) Act (*Wet overdracht tenuitvoerlegging strafvonnissen*, *WOTS*). Notwithstanding the fact that in this report we only consider the WETS, we did take the interview into account, as more general informative claims have been made (e.g. about the importance and experience of (lack of) family life in prison) which can be assumed to be valuable for individuals who have been subject to either one of the measures.

1. Meaning and scope of the fundamental rights subject to this study in the national legal order

In principle, binding treaties, such as the ECHR, have internal effect in the Dutch legal order. This means that these treaties bind the Dutch legislator, the judiciary and executive power.[2] These three powers also need to take the case law of the ECtHR into account, including judgements in cases in which the Netherlands was no party to the proceedings.[3]

The Dutch Constitution (*Grondwet, Gw*) contains the right to inviolability of the person, which includes protection against torture.[4] The protection of certain aspects of family life fall under the scope of the right to privacy,[5] but the right to a fair trial is not included in the Dutch Constitution. Recently, the Second Chamber of the House of Parliament accepted a bill to include the right to a fair trial in the Constitution.[6] However, the Dutch judge is not allowed to review the constitutionality of Acts of Parliament and treaties.[7] In addition, the Netherlands does not have a constitutional court.

The Dutch Constitution does state that treaty provisions that may be binding on all persons by virtue of their contents become binding after they have been published.[8] These treaty provisions are directly applicable and do not need to be transposed into a national law.[9] In addition, treaty provisions which are binding on all persons or resolutions by international institution take precedence over statutory regulations in case of a conflict.[10] The requirement binding on all persons means that the provision has legal consequences affecting citizens. In other words, the provisions impose obligations on individuals or provide them with rights.[11] A provision which is binding on all persons can be invoked before Dutch courts by individuals.[12] The judge is the competent authority to decide whether a provision is binding on all persons.[13] Most substantive rights in the ECHR, classify as treaty provisions which fall under this scope.[14]

2. National legal framework implementing the obligation of mutual recognition in the EAW, FD 2008/909 and FD 2008/947

2.1. The status of the principle of mutual recognition and mutual trust in the national legal order

The principles of mutual recognition and mutual trust have a prominent position in the Dutch legal order. The principle of mutual recognition constitutes the basis of the Surrender Act (*Overleveringswet*, *OLW*) and Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act (*Wet wederzijdse erkenning en tenuitvoerlegging*

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[2] T. Barkhuysen, *Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht* (https://openaccess.leidenuniv.nl/handle/1887/12673, Boom Juridische uitgevers 2004) 46; T. Barkhuysen, M.L. van Emmerik and E.R. Rieter, *Procederen over mensenrechten onder het EVRM, het IVBPR en andere VN-verdragen* (2nd edn Ars Aequi Libri, Nijmegen 2008) 15. See also J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (Boom Juridische uitgevers, 2004) 19.

[3] *Barkhuysen* 2004 (n 2) 47. See for instance HR 10 November 1989, ECLI:NL:HR:1989:AC1692 (Supreme Court).

[4] *Kamerstukken II* 1978/79, 15463, 2, p. 4.

[5] *Kamerstukken II* 1975/76, 13872, 3, p. 40.

[6] *Handelingen II* 2016/17, 80, 10.

[7] Art 120 Gw.

[8] Art 93 Gw.

[9] A.W. Heringa and T. Zwart, *De Nederlandse Grondwet* (3rd edn W.E.J. Tjeenk Willink, Zwolle 1991) 205.

[10] Art 94 Gw.

[11] Fleuren (n 2) 62.

[12] Fleuren (n 2) 62; C.A.J.M. Kortmann and P.P.T. Bovend'Eert, *Constitutional Law in the Netherlands* (2nd edn Kluwer Law International, Alphen aan den Rijn 2012) 143.

[13] Heringa & Zwart (n 9) 207.

[14] Barkhuysen, *Het EVRM als integraal onderdeel van het Nederlandse materiële bestuursrecht* (n 2) 46. For the right to family life in article 8 ECHR see for instance Rb.'s-Gravenhage 10 November 2008, ECLI:NL:RBSGR:2008:BG4563 (District Court 's-Gravenhage); ABRvS 27 February 2013, ECLI:NL:RVS:2013:BZ2516 (Administrative Jurisdiction Division). With regard to article 6 ECHR see P.H.J. de Jonge and F.T.J. Kruijsbergen, *Toezicht op de naleving* (1st edn Lineke Eerdmans, Naarden 2014) 62.

vrijheidsbenemende en voorwaardelijke sancties, *WETS*) and is codified in these Acts.[15] In the jurisprudence on the EAW of the District Court of Amsterdam both the principle of mutual recognition and the principle of mutual trust are relevant in relation to fundamental rights defenses. As will be discussed in more detail later on, the District Court of Amsterdam has decided that the fact that states have accepted the obligation to surrender a person, on the basis of the principle of mutual trust, does not exonerate them, as members of the EU and the ECHR, from their responsibility to prevent that the requested person is subjected to violations of fundamental rights as a result of its decision to execute an EAW.[16] Furthermore, the District Court of Amsterdam uses the principle of mutual trust as the basis of the European arrest warrant system in its arguments to deny fundamental rights defenses on the basis of article 11 OLW. The starting point remains mutual trust meaning that

> "…national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter, so that it is therefore within the legal system of the issuing Member State that persons who are the subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested…"[17]

Interviewees struggle with the principle of mutual trust when an individual is transferred for the execution of a custodial sentence or detention order. How can one be sure that prison conditions in the issuing country are up to (Dutch interpretations of) fundamental human rights? Finding sources reliable enough to be able to prove a violation of these rights is a hard nut to crack, according to the interviewed lawyers (R5, R6). It is a 'puzzle that has to be solved' (R2, clerk). The interviewed clerk criticizes the fact that the Court is not allowed to ask questions about the *in concreto* test on whether fundamental rights are being guaranteed. He suggests an objective monitory system to be put in place to check prison conditions. The NGO recounts a Dutch national surrendered to Lithuania and imprisoned in a "kind of concentration camp" (R8). He was imprisoned for a long time, only because the trial was suspended several times. Other examples of hearings being constantly postponed, no interpreter being available, nor legal aid, etc. make legal actors question the legitimacy of mutual trust – and, thereby, mutual recognition as the fundament under the EAW.

So, the principle of mutual trust is considered as the basis for the current surrender system and it is used in the argumentation of the District Court of Amsterdam.

Notwithstanding this prominent and equivocally sustained position of mutual trust in the Dutch legal order, the interviews in the empirical part of this research indicate a discrepancy between *legal* reality and *empirical* reality. By this we mean that what has been legally decided – e.g. the fact that we trust other EU countries' national legal systems to be 'capable of providing equivalent and effective protection' of fundamental human rights – is not necessarily *felt* and *lived* by actors in the Dutch legal system. Judges in this research have expressed doubts – in particular on prison conditions in other member states – to be up to Dutch fundamental rights standards. We will come back to this issue, and how it is being dealt with in the next section (2.2, p. 5-6). The bottom line here is to remember that mutual trust is a *legal* reality, that may play havoc with the actual trust individual actors in the Dutch legal order have.

2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order

[15] Art 21(1) OLW; Art 1:2 WETS. See also *Kamerstukken II* 2002/03, 29042, 3, p. 20.
[16] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448 (District Court of Amsterdam).
[17] Case C-168/13 PPU *Jeremy F.*, Judgment of the Court (2nd Chamber) of 30 May 2013, EU:C:2013:358, para 50. Referred to by Rb. Amsterdam 25 March 2016, ECLI:NL:RBAMS:2016:2382.

The FD EAW is implemented in the Dutch Surrender Act.[18] Every public prosecutor in the Netherlands is in principle competent to *issue* an EAW.[19] The public prosecutor at the District Court of Amsterdam (hereafter: Court of Amsterdam) is the first one to consider an incoming EAW.[20] If he or she is of the opinion that the surrender of the convicted person is not possible, because, for instance, the requested person was younger than twelve when the crime was committed,[21] the EAW will not be forwarded to the Court of Amsterdam for a decision on its *execution*.[22]

Otherwise, the public prosecutor will send the EAW within three days after its receipt to the Court of Amsterdam, which is the only competent court to decide on both prosecution and execution EAWs.[23] In the light of the cases *Özçelik*,[24] *Kovalkovas*[25] and *Poltorak*[26], related to the preliminary ruling of the CJEU in *Bob Dogi*,[27] the Court of Amsterdam has decided that it is competent to investigate whether the authority that issued the EAW is in fact a judicial authority in the light of article 6(1) FD EAW jo 1(1) OLW jo 5 OLW designated to issue EAWs by the issuing member state. However, it is not competent to investigate whether the designation of the issuing authority with the power to issue EAWs is lawful according to the law of the issuing state. The fact that the issuing state has failed to provide the notification as referred to in article 6(3) FD EAW is irrelevant for the question whether the issuing authority is a judicial authority in the light of article 6(1) FD EAW.[28] In case the issuing authority is not a judicial authority ex article 6(1) FD EAW and the EAW is not a judicial decision ex article 1(1) FD EAW jo 1(b) OLW, the Court of Amsterdam will not refuse the surrender of the execution of the EAW, but it will disallow the request of the public prosecutor to consider the EAW *(niet-ontvankelijkheid van het openbaar ministerie in de vordering tot het in behandeling nemen van het EAB)*[29].[30]

The concept of mutual trust has been discussed in the interviews in the empirical part of this research and different point of views have been brought forward. Lawyers and the NGO were quite critical about mutual trust as, they argue, fundamental rights are being undermined by it. The examples discussed (see box 2.2.b, p. 5) bring the matter clearly into focus: if mutual trust sees to ‘respect differences’ – whereby a shared minimum level of fundamental human rights’ protection is assured (or assumed?) – does that minimum level convince legal actors *in everyday praxis* that these rights are, indeed, sufficiently guaranteed? The *legal* reality of mutual trust is at tension here with the *empirical* reality of doubt (or outright distrust). Since the legal reality holds that mutual trust and mutual recognition are a fact, it is hard to prove a violation of fundamental human rights in European countries. Moreover, it can be expected that political motives might play havoc with refusing a EAW on grounds of violations of fundamental rights and put judges under pressure not to ‘rock the boat’.

2.3. FD 2008/909 transfer of prisoners

a) Forwarding judgements imposing sentence and transfer of convicted persons

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[18] Overleveringswet, *Stb.* 2004, 195.
[19] Art 44 OLW.
[20] Art 20(1) OLW.
[21] V.H. Glerum in *T&C Internationaal Strafrecht*, Article 23 OLW, comment 2, updated until 1 July 2015 (electronic source).
[22] Art 23(1) jo (2) OLW.
[23] Art 23(2) OLW. See also *Kamerstukken II* 2002/03, 29042, 3, p. 8-9.
[24] Case C-453/16 PPU *Özçelik*, Judgment of the Court (4th Chamber) of 10 November 2016, EU:C:2016:860.
[25] Case C-477/16 PPU *Kovalkovas*, Judgment of the Court (4th Chamber) of 10 November 2016, EU:C:2016:861.
[26] Case C-452/16 PPU *Poltorak*, Judgment of the Court (4th Chamber) of 10 November 2016, EU:C:2016:858.
[27] Case C-241/15 PPU *Bob-Dogi*, Judgment of the Court (2nd Chamber) of 1 June 2016, EU:C:2016:385.
[28] Rb. Amsterdam 15 December 2016, ECLI:NL:RBAMS:2016:9312.
[29] Art 23(1) OLW.
[30] Rb. Amsterdam 1 December 2016, ECLI:NL:RBAMS:2016:9267; Rb. Amsterdam 1 December 2016, ECLI:NL:RBAMS:2016:9311.

FD 2008/909 is implemented in the Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act.[31] Formally, the Dutch minister of security and justice is the competent issuing authority,[32] but *de facto* the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen*) takes the decisions in the minister's name.[33] Furthermore, the convicted person may request the minister of security and justice to transfer his sentence to another state,[34] but the minister is not obliged to comply with such a request. According to FD 2008/909 the executing state may also request the issuing state to transfer the imposed sentence.[35] In other words, the Netherlands may receive a request from another member state to transfer a sentence imposed by a judge in the Netherlands. However, the minister of security and justice is not obliged to comply with such a request.[36]

The use of the power to transfer a custodial sanction is subject to several criteria. Firstly, the convicted person needs to be present in the Netherlands or the executing state.[37] Secondly, the executing state must consent to the transfer, unless 1) the convicted person is a national of the executing state and has his permanent domicile or residence in that state or 2) the convicted person is a national of the executing state, does not have his permanent domicile or residence there, but may be deported to the executing state after his liberation as a result of the obligation to leave the Netherlands, imposed on him on the basis of the Aliens Act 2000 (in Dutch: Vreemdelingenwet 2000).[38]

Thirdly, the convicted person must have requested the transfer or at least have consented to it.[39] Consent is, however, not necessary if: 1) the convicted person is a national of the executing state and has his permanent domicile or residence in that state, 2) the convicted person may be deported to the executing state after his liberation as a result of the obligation to leave the Netherlands which is imposed on him on the basis of the Aliens Act 2000, 3) the convicted person has fled or returned to the executing state, because the Netherlands has brought charges against him or he has been convicted by the Netherlands.[40]

The regulation that a convicted person's consent to his or her transfer is unnecessary if he or she is a national of the executing state and has permanent residency there, could create inequality between European citizens. This was illustrated in the interview with a native Dutch national (R10) who had been arrested and imprisoned in the UK for a drug trafficking offense. A transfer was issued by the Dutch state, but the respondent did not want to be transferred: "When you are convicted the WETS-procedure starts automatically. I, thus, had to go back to the Netherlands, even though [I preferred not]. In England, as a prisoner you have more freedom. Fair enough, it is tougher over there, but you spend a considerable time of the day out of your cell." In such case, would it not be more just to give *every* convicted European citizen the option to resist transferal, no matter nationality or residency?

Fourthly, the transfer of the custodial sentence needs to contribute to the resocialization of the convicted person in the executing state.[41] This criterion is presumably fulfilled when the executing state is obliged to recognize the judicial decision, which is when the requested person has

[31] Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties, *Stb.* 2012, 333.
[32] Art 2:2(2) WETS.
[33] *Kamerstukken II* 2010/11, 32885, 3, p. 13-14; J.T.J. Struyker Boudier, 'Van WOTS naar WETS: de overdracht van de tenuitvoerlegging van strafvonnissen' [2012] Ars Aequi 938, 941.
[34] Art 2:24(c) WETS.
[35] Art 4(5) FD 2008/909.
[36] Art 4(5) FD 2008/909.
[37] Art 2:24(a) WETS.
[38] Art 2:24(b) jo 2:25 WETS.
[39] Art 2:24(c) WETS.
[40] Art 2:26(a-c) WETS.
[41] Art 2:24(d) WETS.

the nationality of the executing state and lives there.[42] Besides the nationality of the convicted person and his place of residence, the parliamentary documentation does not clearly name any other criteria for deciding on the most suited place for the resocialization of the convicted person. In his consideration the minister will however take the opinion of the convicted person into account.[43] Furthermore, he may consult the competent authorities of the executing state, but there is no obligation to do so. The reasoned opinion the authorities provide in such a case is also not binding, meaning that if it states that the chances of resocialization are better in the Netherlands, the minister can still forward the judicial decision.[44]

However, the parliamentary documentation does focus on factors which besides resocialization could play a role in the decision to transfer a sentence. For instance, ongoing investigations or prosecutions in which the convicted person is involved as a suspect or witness could be good reasons not to transfer a judicial decision even if this would contribute to the person's resocialization. In addition, if the penalty is imposed for an act which constitutes a severe breach of the Dutch legal order and which has caused public disorder, the minister might decide against transferring the judicial decision. This is because as a result of the transfer the Netherlands would have no more say in matters concerning the execution of the sentence, such as the decisions about conditional release and leave. It might in some cases be preferable that these decisions are taken by the Dutch competent authorities, who can take better account of for instance the interests of the victims living in the Netherlands.[45]

When the Netherlands is the issuing state, our minister of security and justice can make an exception to the speciality principle and allow the executing state to prosecute, penalize or in another way limit the personal liberty of the convicted person for acts committed before the time of the transfer of his sentence and for which he has not been surrendered.[46] The minister will only give his consent if the person concerned could have been surrendered on the basis of the Surrender Act for the act in question.[47] The WETS does not offer a possibility to appeal against the decision of the minister.

b) The obligation to recognize foreign judgments and execute the sentence (executing state)

Law governing enforcement and adaptation of the sentence

The minister of security and justice is formally the competent executing authority, but in practice the Custodial Institutions Agency takes the decisions about executing a foreign custodial sanction.[48] Furthermore, a convicted person may ask the minister to request the state which convicted him to transfer his sentence to the Netherlands or to consent to such a request from the issuing state. The minister may also on his own accord request the state in which the person is convicted to transfer the sentence.[49] However, the competent authority in the state in which the person is convicted does not have to comply with requests to transfer presented by the Dutch minister of security and justice.[50]

[42] *Kamerstukken II* 2010/11, 32885, 3, p. 13-14, 43-44.
[43] Art 2:27(1) WETS; *Kamerstukken II* 2010/11, 32885, 3, p. 13.
[44] *Kamerstukken II* 2010/11, 32885, 3, p. 44.
[45] *Kamerstukken II* 2010/11, 32885, 3, p. 44; *Kamerstukken II* 2010/11, 32885, 7, p. 29.
[46] Art 2:34(1) WETS.
[47] Art 2:34(2) WETS.
[48] Art 2:2(1) WETS; *Kamerstukken II* 2010/11, 32885, 3, p. 13-14; *Struyker Boudier* (n 33) 941.
[49] Art 2:6 WETS.
[50] J.T.J. Struyker Boudier in *T&C Internationaal Strafrecht*, commentary on Article 2:6 WETS, updated until 1 July 2015 (electronic source).

The power to recognize and execute a foreign judicial decision is subjected to several conditions. Firstly, the convicted person needs to be present in either the issuing state or the Netherlands.[51]

Secondly, the minister needs to have given his permission for the transfer of the judicial decision,[52] unless 1) the convicted person has the Dutch nationality and has his permanent domicile or residence in the Netherlands, or 2) the convicted person has the Dutch nationality, no permanent domicile or residence in the Netherlands, but after his liberation he may be deported to the Netherlands as a result of a decision taken by the issuing state.[53] The minister needs to decide on a case by case basis whether to give his consent to the transfer of a sanction.[54] His consent depends on the question whether the convicted person has demonstrable and sufficient connection to the Netherlands and whether the transfer will contribute to the resocialization chances of the convicted person.[55] In the light of this question factors such as the actual place of residence of the convicted person, the time he has lived there, the place where he works and the place of residence of his family are important.[56] Furthermore, the minister might consider economic ties to the executing state or a third state.[57] The possibility to set up a resocialization program during the execution of the custodial sentence could also play a role.[58] However, the detention conditions in the issuing state do not seem to play a role in the decision to execute a custodial sanction, since the Dutch legislator has stated that the purpose of the transfer of a sentence to the Netherlands is not to take that person away from less favorable detention conditions.[59] In case the minister thinks that the execution of the decision in the Netherlands will not contribute to the resocialization of the convicted person, he will inform the competent authority of the forwarding state of his conclusion.[60]

Thirdly, the convicted person needs to have given his consent for the transfer of the judicial decision.[61] Such consent is not required if 1) the convicted person has the Dutch nationality and has a permanent domicile or residence in the Netherlands,[62] 2) the convicted person may after his liberation be deported to the Netherlands as a result of a decision made by the issuing state, 3) the convicted person has fled to the Netherlands or has returned, because the issuing state has brought charges against him or because he has been convicted by the executing state.[63] With regard to the third exception it is important to note that no causal connection needs to exist between the conviction in the issuing state and the return of the convicted person to the Netherlands.[64]

[51] Art 2:3(a) WETS.
[52] Art 2:3(b) WETS.
[53] Art 2:4 WETS.
[54] Struyker Boudier (n 50).
[55] Art 2:6 WETS.
[56] *Kamerstukken II* 2010/11, 32885, 3, p. 8-9; *Struyker Boudier* (n 50).
[57] *Kamerstukken II* 2010/11, 32885, 3, p. 32.
[58] *Kamerstukken II* 2010/11, 32885, 3, p. 8-9; *Kamerstukken II* 2010/11, 32885, 7, p. 10. They refer to the policy framework concerning the transfer of the execution of foreign criminal sentences. This policy framework is also applicable as far as it is in conformity with FD 2008/909. *Kamerstukken II* 2007/08, 31200 VI, 30, p. 4-5. The refusal ground in art 2:14(1)(b) WETS is also based on the idea that the transferred sentence should be long enough to prepare the convicted person for his return to society. *Kamerstukken II* 2010/11, 32885, 3, p. 39.
[59] *Kamerstukken I* 2011/12, 32885, C, p. 8-9.
[60] Art 2:8(7) WETS.
[61] Art 2:3(c) WETS.
[62] See Rb. Den Haag 16 December 2016, ECLI:NL:RBDHA:2016:16623 (District Court of The Hague). In a procedure in 2013 the Court of Appeal Arnhem-Leeuwarden by accident assumed that the convicted person had his permanent domicile or residence in the Netherlands and that for that reason his consent for the transfer was not required. In a decision of 25 June 2013 the sentence of that convicted person was indeed transferred. In the current case the convicted person files an objection against that decision, since his consent should have been required. However, the court is of the opinion that the fact that the requested person has neglected to file such an objection for several years and has stated that at the time he actually wanted to stay in the Netherlands, in fact proves his consent.
[63] Art 2:5(a-c) WETS.
[64] Rb. Den Haag 16 December 2016, ECLI:NL:RBDHA:2016:16623.

The Court of Appeal of Arnhem-Leeuwarden is competent to decide whether the custodial sanction imposed by the issuing state needs to be adapted. This decision is part of the standard procedure for deciding whether to allow the transfer of a sentence to the Netherlands.[65]

If the duration of the custodial sanction imposed is higher than the maximum sentence which could have been imposed on the basis of Dutch law, the duration of the sanction will be reduced to that maximum.[66] So, in other words if France imposes a prison sentence of five years for a theft whereas in the Netherlands four years is the maximum, the French sentence will be reduced to four years When deciding on the maximum sentence which could be imposed on the basis of Dutch law, all circumstances which may raise or reduce this maximum should be taken into account. These are, for instance, the fact that it was an *attempted* crime,[67] because in that case the maximum sentence of offences is reduced with one third, the fact that the convicted person was an accessory, concurrence of criminal acts and recidivism.[68] It is also important to note that the WETS clearly states that an adaption of the sentence in the light of its duration may never aggravate it.[69]

In case a person is convicted for murder in the issuing state and is punished with life imprisonment, the Court of Appeal of Arnhem-Leeuwarden will have to consider whether this sentence could also have been imposed on the basis of Dutch law. In this light it is important to note that no criminal act in Dutch law can only be punished with life imprisonment. An alternative maximum prison sentence is always provided in the legal provisions. Article 289 of the Dutch Penal Code (*Wetboek van Strafrecht, Sr*) states that the maximum custodial sentence for murder is life imprisonment or a maximum prison sentence of 30 years. So, a judge in the Netherlands could impose life imprisonment or a prison sentence of 30 years.[70]

Consequently, when the Court of Appeal of Arnhem-Leeuwarden considers whether the sanction life imprisonment imposed by the issuing state needs to be adapted, it needs to decide which Dutch sentence – a temporary prison sentence of 30 years or life imprisonment - would be most in conformity with the intention of the judge in the issuing state. It needs to take the intentions and considerations of the foreign judge when imposing the life imprisonment sentence into account.[71] In that regard the system of conditional release in the issuing state and the information provided by the issuing state about this system play an important role.[72] This is because the judge in the issuing state might have taken the possibility of conditional release into account when imposing the life sentence. In the Netherlands, however, no system of conditional release of those sentenced to life imprisonment is provided. In these circumstances executing the life imprisonment sentence imposed in the issuing in the Netherlands, would in fact aggravate the imposed sentence, which is not allowed.[73] Adapting the life imprisonment sentence imposed by the issuing state into a temporary sentence of 30 years could then be a better option.

In case the nature of the custodial sanction imposed is incompatible with Dutch law, the custodial sanction will be changed into the most similar punishment or order which can be imposed on the basis of Dutch law.[74] In case of a prison sentence this will most likely not be necessary. However, differences may exist in the application and execution of measures such as a hospital

[65] Art 2:11(3)(c) WETS.
[66] Art 2:11(4) WETS.
[67] Art 45(2) Sr.
[68] *Kamerstukken II* 2010/11, 32885, 3, p. 33.
[69] Art 2:11(7) WETS.
[70] *Kamerstukken II* 2010/11, 32885, 3, p. 33-34.
[71] J.W. Ouwerkerk, 'Van WOTS naar WETS: Overname en overdracht van strafexecutie in de Europese Unie' [2012] Nederlands tijdschrift voor Europees recht 219, 226.
[72] *Kamerstukken II* 2010/11, 32885, 3, p. 34.
[73] *Kamerstukken II* 2010/11, 32885, 3, p. 33-34; *Kamerstukken II* 2010/11, 32885, 7, p. 22.
[74] Art 2:11(6) WETS; *Kamerstukken II* 2010/11, 32885, 3, p. 34.

order with compulsory treatment or committal to a psychiatric hospital in the EU member states. In this case the rule also applies that the adaption of the sanction may not aggravate it.[75]

In his capacity of executing authority, the minister will upon the request of the issuing state inform it of the Dutch applicable rules on *conditional release*.[76] If conditional release rules in the state of conviction are more favorable than the Dutch rules, the Minister of Security and Justice may advance the date of conditional release.[77] However, he may only do this if the date of conditional release in the state of conviction can be determined with certainty or with a high degree of probability.[78] In his capacity of issuing authority the minister can also request the executing state to inform him about its conditional release system.[79] In case the minister does not agree with this system, he could in theory withdraw his request to transfer the sentence as long as its execution in the executing state has not commenced yet.[80] However, on the basis of which criteria the minister decides whether or not he agrees with the system of conditional release in the executing state is not clear.

Time limits for the decision to recognize

The minister needs to make his decision within 90 days after receiving the certificate concerning the recognition of the judicial decision.[81] This term can only be extended in three particular cases. One of them is the situation in which the appropriate translation of the certificate or the judicial decision is not yet provided.[82] Furthermore, if it appears that the certificate is missing, is incomplete or is not in compliance with the judicial decision the issuing state is provided with a reasonable period of time to rectify the situation.[83] Lastly, in case of exceptional circumstances, the term of ninety days may also be extended.[84]

One of the prosecutors interviewed in the empirical part of the research criticizes the term of 90 days. According to him this term is too short. This term also applies if the Court asks prejudicial questions to the CJEU. The latter is often not capable to make a decision in 90 days.

Principle of specialty

When the Netherlands is the executing state, the convicted person may not be prosecuted, penalized or in another way limited in his or her personal liberty for acts committed before the time of the transfer of his sentence and for which he has not been surrendered.[85] Some exceptions to the speciality principle exist of which one is that the competent authority of the issuing state has given its consent.[86]

2.4. FD 2008/947

a) Scope of application

The FD 2008/947 is also implemented in the WETS. Chapter 3 of the WETS contains the legal framework on the conditional sentences, on conditional release and on community services

[75] Art 2:11(7) WETS.
[76] Art 2:8(6) WETS.
[77] Art 15(7) Sr.
[78] Rb. Den Haag 3 March 2017, ECLI:NL:RBDHA:2017:2157.
[79] Art 2:28(1) WETS jo art 1 Implementation decree mutual recognition and execution of custodial sanctions and conditional penalties (*Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*), *Stb.* 2012, 400.
[80] Art 2:30 WETS; *Kamerstukken II* 2010/11, 32885, 3, p. 47.
[81] Art 2:10(1) WETS.
[82] Art 2:10(2)(a) jo 2:8(3) jo 2:8(5) WETS.
[83] Art 2:10(2)(b) jo 2:8(4) WETS.
[84] Art 2:10(2)(c) WETS.
[85] Art 2:17 WETS.
[86] Art 2:17(g) WETS.

(*taakstraffen*). Article 3:1 WETS lays down the scope of application, thus on which specific judgements Chapter 3 WETS is applicable:

- Judgements whereby the execution of the custodial sentence which is imposed on the convict is conditionally suspended (Article 3:1 sub 1 (a)). According to Dutch criminal law, this type of judgement can be classified as a conditional sentence, as referred to in article 14a Sr.[87]
- Judgements on the basis whereof a custodial sentence is executed and conditional release is granted to the convict (Article 3:1 sub 1 (b)). It constitutes those sentences according to which the convict already is conditionally released, so no custodial sentence has to be executed anymore, except when the convict does not comply with the conditions.[88] According to Dutch criminal law, this type of judgement can be classified as a conditional release, as referred to in article 15 Sr.[89]
- Judgements whereby on the basis of an obligation as being referred to in article 3:2 WETS, which must be complied with by the convict in the absence of when a custodial sentence can be executed (Article 3:1 sub 1 (c)). In terms of the Dutch criminal law this type of judgement constitutes a community service, which in the Netherlands can be imposed as an independent primary sentence.[90]
- Judgements whereby the imposition of the sanction on the convict is temporarily suspended (Article 3:1 sub 1 (d)). The suspended sentences are judgements in which the imposition of a sanction is being suspended conditionally. Within the Netherlands this way of dealing with criminal cases does not exist as a regular way of dealing with criminal cases.[91]

Article	Classification of the sentence
Article 3:1 sub 1 (a) WETS	Conditional sentence
Article 3:1 sub 1 (b) WETS	Conditional release
Article 3:1 sub 1 (c) WETS	Alternative sanction
Article 3:1 sub 1 (d) WETS	Suspended sentences

Article 3:1 sub 2 WETS rules that the scope of the judgements also includes decisions based on a particular judgement in which certain conditions as referred to in article 3:2 WETS are imposed on the convict, as long as no contrary follows from another determination. These conditions are:

Article 3:2 sub 1 (a-k) WETS:
a) the command to inform a certain authority about a change of residence or working place;
b) the command to report on certain times to a certain instance;
c) the prohibition to access certain locations, places or demarcated areas;
d) the restriction of the right to leave the executing Member State;
e) the prohibition to contact or make contact with certain people or instances;
f) the command to avoid contact with certain objects which are used by the convict or can be used by the convict to commit a criminal act;
g) the command to compensate the damage caused by the criminal fact or to deliver proof that this obligation is complied with;
h) the command to work together with the rehabilitation or with a social service who is charged with responsibilities against convicts;

[87] J.T.J. Struyker Boudier, 'Commentaar op hoofdstuk 3 WETS' in D.J.M.W. Paridaens and P.A.M. Verrest (eds), *Tekst en Commentaar: Internationaal Strafrecht* (Kluwer, Deventer 2015).
[88] *Kamerstukken II* 2010/11, 32885, 3.
[89] Struyker Boudier (n 87).
[90] Struyker Boudier (n 87).
[91] Struyker Boudier (n 87).

i) the command to be subjected to a therapy or detox;
j) the obligation to perform a community service;
k) obligations concerning the behaviour, residence, education, leisure, or obligations which contain restrictions on or conditions concerning the profession.

All European Member States have declared that they are prepared to supervise the compliance of these conditions.[92] The imposition of a community service (*taakstraf*) is not imposed as a special condition *(bijzondere voorwaarde)* in the Netherlands, but as an independent alternative sanction.

The Sr is familiar with the general condition (*algemene voorwaarde)*, which constitutes the prohibition to commit another crime within the probation period. This condition does not fall within the scope of the conditions as provided for in the FD 2008/947. The reason therefore is that the FD 2008/947 aims at laying down conditions which are able to be subjected to supervision in the executing Member State, and as a general condition is usually not subjected to supervision this particular condition is not included in the scope of conditions laid down in the FD 2008/947. However, this does not mean that this general condition is not of any importance when a judgement is being executed in the Netherlands. Accordingly, the execution of the judgement in the executing state is, in principle, governed by the law of that state.[93] Within the Netherlands this means that the execution of the judgement includes the automatically applicable general condition connected to the conditional sentence and the conditional release.[94]

Article 3:2 sub 2 WETS rules that any other condition than mentioned in article 3:2 sub 1 WETS can be executed in the Netherlands by way of appointment by a governmental decree (*algemene maatregel van bestuur)*.

In the concerned governmental decree; ‘Implementing Decision Mutual Recognition and execution of custodial and conditional sentences’(*Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties)* yet only the obligation to undergo electronic supervision is appointed, as laid down in article 5 of this governmental decree. The reason that electronic supervision is not included in the list of possible conditions of the FD 2008/947 is because this type of supervision is only just starting to develop in most Member States. The Netherlands is prepared to supervise the imposition of the condition electronic supervision.

b) The procedure

In this subparagraph, the competent authority to recognize and the conditions for recognition are discussed.

The Dutch Public Prosecutors Office (hereafter: DPPO) is the competent authority to recognize the judgement from the issuing Member State pursuant to article 3:3 sub 1 WETS and to transmit a judgement to the executing Member State with the aim of recognition and execution in that state pursuant to article 3:3 sub 2 WETS.

In practice, the prosecutor says (R4), there are certain conditions imposed in other Member States which are not known in the Netherlands. She gives the example of a probationary period of five years. If this is the case this is discussed (informally) by the different parties: “often we discuss this via email. We tell them that we will recognize the judgement if the probationary period is changed to three years instead of five years”. In the Netherlands the probationary period may only take three years. Afters consulting the issuing country, the probationary period is often shortened to three years. The FD offers this possibility in article 9.

Pursuant to article 3:4 WETS, the judgement of the issuing Member State will be recognized if the convict is located in the issuing Member State or in the Netherlands, the DPPO has agreed

[92] Struyker Boudier (n 87).
[93] Struyker Boudier (n 87).
[94] *Kamerstukken II* 2010/11, 32885, 3.

with the transfer of the judgement (unless this consent is not obliged because the convict has his permanent residence or wishes to return to the Netherlands) and if the judgement includes no other obligations than those which are stated in article 3:2 WETS.

Further procedural measures concern the inclusion of a 'certificate' which the issuing state has to add to the judgement which they send to the DPPO (article 3:7 WETS). The DPPO will assess the judgement and certificate and pursuant to article 3:9 WETS will make a decision about the recognition within a period of 60 days.

3. Limitations on mutual recognition provided in the EAW, FD 2008/909 and FD 2008/947 as implemented in the National legal order

3.1. EAW for the purpose of executing a custodial sentence or detention order

a) Safeguards for the requested (convicted) person

Access to lawyer

Next to the fact that some provisions in the Surrender Act explicitly refer to the right to an attorney article 30(1) OLW states that certain articles in the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering, Sv)* concerning the right to legal counsel apply *mutatis mutandis*. Article 50(1) Sv for instance regulates the contact a detainee may have with his lawyer while article 279 Sv concerns the authorization of a lawyer to defend his client in case of his or her absence.

In the light of provisional arrests[95], when the Netherlands acts as the executing state and a requested person is taken into police custody (*inverzekeringstelling*) on the basis of the Surrender Act, he or she has the right to have a lawyer assigned to him for the duration of the police custody,[96] which may last for six days in total.[97] However, the requested person may also choose his own lawyer.[98] Furthermore, in principle, a lawyer has free access to the requested person when he or she is detained.[99] Upon his arrival a lawyer may talk to the requested person for half an hour maximum.[100] They may speak privately and the requested person is also entitled to private correspondence with his lawyer by mail.[101] However, all these forms of contact happen under the necessary regulatory supervision and with consideration of the Centre Regulations of the facility. Furthermore, the contact may not delay the investigations.[102]

The assistance of a lawyer at this point in the proceedings is important in relation to the decision whether or not the requested person should consent to his immediate surrender to trigger the application of the short procedure.[103] In case the short procedure applies the public prosecutor will decide within ten days after the statement of consent is given whether the requested person will be surrendered[104] When making his declaration of consent, the requested person has the right to have his lawyer present. If the requested person appears without one, the public prosecutor or investigative judge who will take his statement needs to inform him of his right to have a lawyer present.[105]

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[95] Art 15 and 17-19 OLW regulate provisional arrests. These arrests can be based on a SIS or Interpol alert according to Art 15 jo 4(1) and (2) OLW. If the actual EAW is received the provisional arrest will be converted into a regular arrest according to Art 21(1) and (3) OLW.

[96] Art 62(1) OLW jo 40 Sv.

[97] Art 17(4) OLW.

[98] Art 30 OLW jo 37-39 Sv.

[99] Art 30 OLW jo 50(1) Sv.

[100] The Ministry of Security and Justice, 'Statement of Rights in case of an arrest on the basis of a European Arrest Warrant', p. 3, <https://www.rijksoverheid.nl/documenten/brochures/2014/10/20/mededelingen-van-rechten-aan-de-verdachte> accessed 24 November 2016.

[101] Art 50(1) Sv.

[102] Art 50(1) Sv.

[103] H. Sanders, *Handboek Uitleverings- en Overleveringsrecht* (1st edn Kluwer, Deventer 2014) 236. For the short procedure see Art 39 – 43 OLW.

[104] Art 40(1) OLW.

[105] Art 39(4) OLW.

If the requested person is remanded in custody a lawyer needs to be assigned to him as well.[106] This measure may be imposed for a maximum of twenty days. If after this term no EAW has been received yet, the requested person will be released.[107] The lawyer will be assigned for the duration of this measure or for the duration of the court proceedings.[108]

The empirical research shows that appointing the appropriate lawyer with enough knowledge of surrender proceedings is not as easy as it might seem. A requested person is visited by a lawyer that is assigned to him by the Board of the Legal Aid Counsel. This lawyer is picked from a list of lawyers who are on standby duty, which in Dutch is called the *piketlijst.* However, the *piketlijst* has stayed the same since the Surrender Act entered into force, meaning that no lawyers have been added to, nor removed from the list. According to the interviewed lawyers (R5, R6), most of the lawyers on the *piketlijst* do not have sufficient knowledge of surrender proceedings to provide necessary legal assistance to the requested person. This is not surprising; their training does not (sufficiently) include these kinds of proceedings. Consequently, after the lawyer has seen and spoken to the requested person for the first time, he or she often refers his client to a colleague who is not on the *piketlijst* and is more specialized in surrender proceedings. Because of this extra step it can take more than a day before the person is sufficiently informed on the proceedings by a lawyer.
If it is almost weekend or if the requested person must appear before the public prosecutor the following day, he or she might not get to see a lawyer the day he or she arrives at the police station, either – unless he or she is so lucky to have his or her family arrange for an attorney to assist him (R5). The interviewed lawyer (R5) explains this course of affairs referring to the police not seeing its necessity. Since the trial is over and the judge has rendered a verdict, the only thing left to be done is the execution of the punishment, and the police believes that there is no possibility of an infringement of the *nemo tenetur* principle – the only question the requested person must answer is what kind of procedure he wants to follow: the short or the long one. Still, the assistance of a lawyer is important in making this decision especially because the police cannot inform the requested person about the differences, as they are not familiar with them.

The same rules as stated above concerning the right to a lawyer apply when the requested person is placed in police custody after a regular arrest or when the provisional arrest has been converted into a regular arrest.[109] This police custody can last until the moment the Court of Amsterdam decides about the detention in custody (*gevangenhouding*),[110] which it does before closing the court hearing.[111] This means that the attorney assigned during the police custody is usually the one representing the requested person during the court hearings.[112]

When the requested person is heard by the court, he or she has the right to be assisted by a lawyer.[113] If no attorney has been appointed yet, one needs to be assigned.[114] In addition, the requested person may also authorize his lawyer to defend him in his absence.[115]

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[106] Art 62(2) OLW.
[107] Art 19(b) OLW. The competent authority, which could be the court, the investigative judge or the public prosecutor, may also release the requested person before the twenty days are over.
[108] *Sanders* (n 103) 238-239. However, the requested person may also choose his own attorney. Art 30 OLW jo 37-39 Sv.
[109] Art 30 OLW jo 37-39 Sv; *Sanders* (n 103) 249.
[110] Art 21(8) OLW.
[111] Art 27(2) OLW.
[112] V.H. Glerum and V. Koppe, *De Overleveringswet. Overlevering door Nederland* (Sdu Uitgevers, Den Haag 2005) 110; *Sanders* (n 103) 249.
[113] Art 25(3) OLW.
[114] Art 24(3) OLW.

The Surrender Act does not regulate the assignment of a lawyer after the decision on the execution of the EAW is taken. For instance, it remains silent on the right to a lawyer during preliminary relief proceedings which can be initiated to prove the existence of humanitarian grounds which may suspend the actual surrender of the requested person.[116]

In Dutch practice, as becomes clear from the empirical data, the requested person always has an attorney during the proceedings before the court so it does not happen that an attorney is assigned at that stage (R3, R5, R6).

The Act implementing Directive 2013/48 has been approved by Parliament and published in the Bulletin of Acts and Decrees.[117] It does not make a distinction between an execution and prosecution EAW in relation to the right to an attorney. The date on which this Act enters into force will be decided on by Royal Decree.[118]
As a result of this act the right to assistance of a lawyer will be explicitly mentioned in certain provisions of the Surrender Act which state that the requested person is questioned.[119] Furthermore, the new Act states that the requested person has the right to the assistance of a lawyer during the surrender proceedings in the Netherlands, which he or she can waive under certain circumstances.[120] After a person is arrested, an attorney is appointed to him.[121] Assistance means that the requested person is as much as possible allowed to communicate with his attorney if he or she requests this.[122] Furthermore, on the request of the requested person the lawyer may be present during the questioning and participate in it.[123] Participation can include, asking questions or requesting clarifications. The Surrender Act does not regulate the way the lawyer should offer assistance during questionings. This is up to the lawyer to determine, but he needs to stay within the limits of the disciplinary law and article 272 Sv on the enforcement of order during the hearing.[124]Article 45 Sv (article 50 Sv old) is declared applicable *mutatis mutandis*.[125]

Before the requested person is questioned for the purpose of taking a decision on police custody, he or she is allowed to consult his lawyer for half an hour tops.[126] However, the public prosecutor only needs to wait for two hours for the arrival of the attorney.[127] After that time he or

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[115] Art 30(1) OLW jo 279 Sv jo 331 Sv.
[116] Glerum & Koppe (n 112) 111. Art 24 Legal Aid Act (*Wet op de Rechtsbijstand*) could provide the possibility to gain legal counsel.
[117] Wet van 17 november 2016, houdende implementatie van richtlijn nr. 2013/48/EU van het Europees Parlement en de Raad van 22 oktober 2013 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en het recht om een derde op de hoogte te laten brengen vanaf de vrijheidsbeneming en om met derden en consulaire autoriteiten te communiceren tijdens de vrijheidsbeneming (PbEU L294), *Stb.* 2016, 475. See also Wet van 17 november 2016, houdende wijziging van het Wetboek van Strafvordering en enige andere wetten in verband met aanvulling van bepalingen over de verdachte, de raadsman en enkele dwangmiddelen, *Stb*. 2016, 476. The latter Act amends article 43a OLW which is introduced by the first Act.
[118] Art III Wet van 17 november 2016, houdende implementatie van richtlijn nr. 2013/48/EU van het Europees Parlement en de Raad van 22 oktober 2013 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en het recht om een derde op de hoogte te laten brengen vanaf de vrijheidsbeneming en om met derden en consulaire autoriteiten te communiceren tijdens de vrijheidsbeneming (PbEU L294). The same goes for the Wet van 17 november 2016, houdende wijziging van het Wetboek van Strafvordering en enige andere wetten in verband met aanvulling van bepalingen over de verdachte, de raadsman en enkele dwangmiddelen.
[119] See for instance Art 17(4) and 21(8) OLW.
[120] Art 43a(1) OLW jo 28a jo 28c(2) Sv.
[121] Art 43a(2) jo 28b(1)(second sentence) OLW jo 39 Sv.
[122] Art 43a(1) OLW jo 28(4) Sv.
[123] Art 43a(1) OLW jo 29a(1) Sv; *Kamerstukken II* 2014/15, 34157, 3, p. 53.
[124] *Kamerstukken II* 2014/15, 34157, 3, p. 53.
[125] Art 43a(1) OLW. The same goes for Art 37, 38, 43-45 and 124 Sv.
[126] Art 43a(4) OLW.
[127] Art 43a(3) OLW.

she may start questioning the requested person. The requested person may under certain circumstances waive his right to an attorney if this happens on a voluntary and unambiguous basis.[128]

Currently, the Surrender Act does not provide and regulate the right to legal counsel when the Netherlands is the *issuing state*. However, after the Act implementing Directive 2013/48 enters into force, a new provision will be added to the Surrender Act which states that a requested person who has been arrested may request that a lawyer is appointed in the issuing state.[129] The lawyer in the issuing state will provide information and advice with the purpose of assisting the attorney in the executing state in the surrender proceedings.[130] When the Netherlands is the executing state and the Dutch public prosecutor receives such a request from the requested person, he immediately informs the issuing judicial authority of this request.[131] When the issuing public prosecutor in the Netherlands receives a notification from the executing authority that the requested person wishes to appoint an attorney in the Netherlands, the issuing public prosecutor will immediately provide the necessary information (for appointing an attorney) to the requested person.[132]

Access to documents, translation and the right to information
Regarding access to documents, when the public prosecutor requests the Court of Amsterdam to decide on the execution of an EAW, a copy of this request will be served on the requested person as well as a copy of the EAW, the ancillary translation and any complementary information that the issuing state has send to the public prosecutor.[133] In case the requested person does not sufficiently understand the language in which the EAW is written or the ancillary translation, he will be provided with a written translation of at least all the relevant parts of the EAW in a language which he understands. Relevant parts of the EAW are for instance the parts describing who is the issuing state, on which decision the EAW is based and the duration of the sentence which still needs to be served.[134]

Attorneys might receive the EAW and additional information of the executing state only one day before the hearing (R5, R6). “The next day I am going to my client to inform him about this information, but that is most of the time without the interpreter, because the interpreter is only present during the hearing. […] When a client does not speak English, it is very difficult to discuss the content of the additional information” (R5). It is surprising that no translator is present during the consultation with the lawyer, as this is one of the rights named in the brochure handed over. One attorney (R6) further wonders whether the prisoner can be properly informed of his or her rights and the procedure only some moments before the hearing, with time to discuss the content lacking. If necessary, the interpreter translates the additional information during the court hearing (R5).

Furthermore, any changes or supplementations of the request to the court by the public prosecutor which are the result of a subsequently received EAW will also be served on the

[128] Art 43a(1) OLW jo 28a(1) jo 28c(2) Sv.
[129] Art 21a OLW.
[130] Art 21a OLW.
[131] Art 21a OLW.
[132] Art 48a OLW.
[133] Art 23(3) OLW.
[134] Art 23(3) OLW. These two sentences were added to art 23(3) OLW by the Act of 28 February 2013 on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (*PbEU* L 280/1), *Stb.* 2013, 85. See also *Statement of Rights* (n 100) 2; *Kamerstukken II* 2011/12, 33355, 3, p. 16.

requested person.[135] The Surrender Act sets no time limit within which the documents need to be served on the requested person.

The interviewees stated that the requested person gets the EAW in English or in the language of the executing country (R3, R5, R6). "“Generally speaking we get all the information in Dutch or in English. This is what we have agreed about in the FD", the prosecutor comments (R3). According to the lawyer: "the EAW is in the language of their home country and often also in English."

In addition, the requested person will be notified[136] when information is added to his surrender file.[137] If during the hearing it appears that the public prosecutor has failed to serve the requested person with certain information or to notify him of the fact that information was added to his file, the proceedings need to be stayed to allow the public prosecutor to correct his mistake.[138] However, the surrender file of the requested person usually contains more documents than the ones referred to above, such as documents concerning the detention measure imposed. The Surrender Act does not include a general right to inspect and receive a copy of the complete surrender file, but in practice the requested person may inspect and copy the file on his request.[139]

Lastly, in case article 12(d) OLW applies which covers the situation in which the requested person has not been personally served with the verdict, the person against whom the EAW is issued and who has not previously received any official information about the existence of the criminal proceedings against him, may either directly or through a public prosecutor ask the issuing judicial authority for a copy of the verdict on which the EAW is based.[140]

The empirical research shows that many documents, like the official record of the arrest (*proces-verbaal aanhouding*), the official report of taking the person into police custody (*proces-verbaalinverzekeringsstelling*) and the remand in custody (*inbewaringstelling*), are written in Dutch. The police officers attempt to explain the content of these documents to the requested person orally, for which they sometimes ask the help of an interpreter (R5, R6).

The Surrender Act does not provide the requested person with the right to have access to (translated) documents when the Netherlands is the issuing state. The provisions in the Dutch Code of Criminal Procedure[141] on access to procedural documents *(processtukken*) and their translation are also not declared applicable mutatis mutandis by the Surrender Act. Furthermore, surrender procedures are excluded from the scope of article 6 ECHR.[142]

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[135] Art 23(3) OLW.
[136] A notification is sufficient. The information does not have to be served on the requested person, which means that he or she does not receive a copy. Glerum & Koppe (n 112) 27; Sanders (n 103) 254.
[137] Art 23(3) OLW.
[138] Glerum & Koppe (n 112) 28. However, if it is reasonable to assume that the interests of the requested person were not affected because of the omission, suspension is not necessary. This is for instance the case if the requested person knew of the content of the documents. Rb. Amsterdam 30 July 2004, ECLI:NL:RBAMS:2004:AQ6063. The same goes for the situation in which the public prosecutor neglected to notify the requested person. Rb. Amsterdam 18 March 2005, ECLI:NL:RBAMS:2005:AT2566.
[139] Glerum & Koppe (n 112) 27.
[140] Art 12a(1) OLW.
[141] See Art 30-32a Sv.
[142] Application no 41138/05 *Monedero Angora v Spain*, Decision (3rd Section) of 7 October 2008, CE:ECHR:2008:1007DEC004113805; Rb. Amsterdam 25 March 2016, ECLI:NL:RBAMS:2016:2382; Rb. Amsterdam 22 December 2016, ECLI:NL:RBAMS:2016:8717. See also Conclusion AG Aben in HR 14 October 2014, ECLI:NL:PHR:2014:2134; A.H. Klip, 'Monedero Angora/Spain' (case note) [2009] Nederlands Juristenblad 523.

After the requested person is arrested[143] or provisionally arrested[144], he promptly receives a written statement in which he is informed of his right to receive a copy of the EAW, his right to legal counsel, his right to interpretation and translation and his right to be heard.[145] This statement should not just mention that the requested person has these rights, but also what they entail under Dutch Law and more specifically in the light of the surrender proceedings.[146]

According to one of the interviewed prosecutors (R3), there is, indeed, a brochure available for requested persons. In this brochure, the rights of the requested person are explained. However, none of the interviewed lawyers is aware of the existence of the brochure (R5, R6) – they only know about the general brochure in which the rights of a suspect are explained, but this is not specifically designed for prisoners in surrender procedures. According to the lawyers requested persons do not get a brochure at all. This is due to the requested person being 'no ordinary suspect' who has to be informed about his or her rights. Consequently, the police often forget to give them a brochure. Unless the attorney explains the procedure, the first moment a suspect is informed about it is when brought before the prosecutor, who will then explain it (R5, R6). Both lawyers have examples in which requested persons, arrested just before the weekend (hence the police did not summon an attorney) did not get to speak to a lawyer before being brought to the prosecutor and, thus, did not receive information. Some requested persons were locked up for a whole weekend on the title of a EAW without a clue about the reason for being in jail (R5, R6). The prosecutor (R4), moreover, questions whether the information in the brochure is sufficient, considering that it does not stipulate if and how executing the EAW in the country of origin is possible.
According to the detained respondents (R8, 9 and 10) most information they had on their case and the procedures, came from exchange between inmates. "They generally put the foreigners together, so everyone is, more or less, in the same boat." (R8).

It has to be provided in a language the requested person understands if he does not sufficiently understand the Dutch language.[147] So, in the Netherlands, every requested person receives a brochure in a language which he or she understands and in which the abovementioned rights are laid down and explained.[148] In addition, the brochure states that the requested person has the right to remain silent.[149] Furthermore, if the (assistant) public prosecutor decides that the requested person needs to stay at the (police) station, the requested person is notified of his right to inform a family member or fellow resident about his detention. In case the requested person does not have the Dutch nationality, he or she may ask the investigation officer to inform the consulate or the embassy of his or her country of origin about this detention.[150]

In case the requested person wishes to consent to his surrender to trigger the application of the short procedure, he first needs to be informed of the consequences of his consent.[151] This includes the fact that with giving consent he forsakes the protection of the speciality principle and the possibility to claim in front of the court that a refusal ground exists.[152]

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[143] Art 21(1) jo 17(3) OLW.
[144] Art 17(3) OLW.
[145] Art 17(3) OLW.
[146] Art 5(1) Directive 2012/13 on the right to information in criminal proceedings (PbEU 142/1); *Kamerstukken II* 2013/14, 33871, 3, p. 6, 20-21.
[147] Art 17(3) OLW.
[148] *Statement of Rights* (n 100).
[149] *Statement of Rights* (n 100) 1.
[150] *Statement of Rights* (n 100) 2.
[151] Art 39(5) OLW.
[152] Art 39(5) OLW. See also V.H. Glerum in *T&C Internationaal Strafrecht*, Article 39 OLW, comments e-f, updated until 1 July 2015 (electronic source).

After the Act implementing Directive 2013/48 enters into force, the requested person will also be explicitly informed of his right to an attorney in the executing state and of his right to request the appointment of an attorney in the issuing state.[153] In addition, article 17(3) OLW will also explicitly include the right of the requested person to inform a person about his detention.[154] If the requested person does not have the Dutch nationality, he needs to be notified of his right to inform the consular post of his state of nationality that he has been deprived of his liberty.[155]

The Surrender Act does not state that the requested person has the right to be informed of his rights when the Netherlands acts as the issuing state.

If the requested person is questioned after his (provisional) arrest he is entitled to the assistance of an interpreter. The interpreter can also offer assistance during contact with the lawyer.[156]

If the requested person does not sufficiently understand the Dutch language, the court proceedings will be conducted with the assistance of an interpreter.[157] Furthermore before closing the investigation the presiding judge will ask the requested person whether he wants to be present at the pronouncement of the judgement. If that is the case, the presiding judge will summon the interpreter to appear at the date and time of the judgement[158] to translate the judgement for the requested person.[159]

The Surrender Act does not provide the requested person with the right to an interpreter when the Netherlands is the issuing state.

Two detained Dutch nationals complained of the obligation to have an interpreter during the court case. "What a nonsense, my English is better than that [of the] woman [interpreter] and then she has to translate for me? I understand that [it] can be important for people who do not speak the language, though.." (R8) The other respondent (R10) found the interpreter an 'unnecessary costs'.

Article 25 OLW implements article 14 FD EAW. Consequently, the requested person will be heard about the execution of the European arrest warrant during the court hearing,[160] unless the short procedure is followed.[161] Furthermore, the requested person is heard on other occasions such as before he is placed in police custody[162] and, if possible, before he is remanded in custody[163].

In addition, he is heard when his time in detention is prolonged while he awaits the date of his actual surrender.[164] The Surrender Act does not provide the requested person with the right to be heard when the Netherlands acts as the issuing state.

Hearing the requested person pending the decision

[153] Art 17(3)(b) OLW.
[154] Art 17(3)(e) OLW jo 27c (3)(g) jo 27e(1) Sv. See also Art 17(3)(last sentence) OLW jo 27e jo 488b Sv.
[155] Art 17(3)(e) OLW jo 27c(3)(h) jo 27e(2) Sv. See also Art 17(3)(last sentence) OLW jo 27e jo 488b Sv.
[156] *Statement of Rights* (n 100) 1.
[156] Art 23(3) OLW.
[157] Art 30 OLW jo 275 Sv jo 276 Sv.
[158] Art 30 OLW jo 325 Sv.
[159] Art 30 OLW jo 362(3) Sv.
[160] Art 25 jo 26(2) OLW. See also *Kamerstukken II* 2002/03, 29042, 3, p. 23.
[161] In case the short procedure applies, the case will not appear before the Court of Amsterdam. See Art 41 OLW.
[162] Art 17(4) OLW and art 21(8) OLW.
[163] Art 18(2) OLW.
[164] Art 34(3) OLW.

Article 53(1) OLW states that the public prosecutor shall, as far as possible, comply with a request from the issuing authorities to hear a requested person prior to his surrender.[165] However, some authors argue that article 53 OLW is only applicable in case the request of the issuing state concerns the questioning of a *suspect*. So, only in case of prosecution EAWs is the Dutch public prosecutor allowed to arrange the hearing of the requested person.[166]

Article 552n and 552o Sv as well as article 4(1-3) of the EU convention on mutual legal assistance 2000 apply in case the requested person is heard on the basis of article 53(1) OLW.[167] Article 4(1) of the Convention states that the formalities and procedures of the issuing state for hearing a person should be applied as much as possible.[168] This means that the issuing judicial authority may appoint a person who will assist the official questioning the requested person. This appointed person may also ask the requested person questions.[169] Furthermore, on the basis of article 4(2) of the Convention, the questioning of the requested person will take place as soon as possible, taking as much account as possible of the procedural deadlines and other deadlines indicated by the issuing Member State, which needs to explain the reasons for the set deadlines. Lastly, in case the executing state cannot fully or at all question the requested person in conformity with the requirements set by the issuing state, the executing state will promptly inform the authorities of the issuing state of this and will indicate the conditions under which it could be possible to question the person.[170]

Article 57(a) OLW is the mirror image of article 53 OLW.[171] It states that the public prosecutor may request the executing state to hear the requested person, before his surrender, in his presence or in the presence of someone appointed by him.[172]

As stated earlier, in practice there is not always an interpreter present to assist when the requested person consults his lawyer (R5, R6). However, a court case will not begin without an interpreter (R3, R5, R6): "if the interpreter is not present, the hearing will not begin. (…) Even if prisoners speak Dutch very well, still we will wait for an interpreter because the legal terminology will be hard to understand in Dutch" (R6, lawyer).

b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order

Mandatory ('shall refuse')

A person may not be surrendered if conditions of a mandatory refusal ground are fulfilled. Most of the optional refusal grounds in the FD EAW have been implemented as mandatory refusal grounds in the Dutch Surrender Act. The most important mandatory refusal grounds in the Surrender Act for the purpose of this project are article 11 OLW concerning a breach of fundamental rights[173] and article 12 and 12a OLW on *in absentia* judgements. Other mandatory refusal grounds are for

[165] This article implements art 18(1)(a) FD EAW. *Kamerstukken II* 2002/03, 29042, 3, p. 33.

[166] An argument for this is that the explanatory memorandum of the OLW only refers to *suspects* in the light of art 53 OLW. Furthermore, some authors state that art 18(1) FD EAW limits the possibility offered by art 19 FD EAW to prosecution EAWs. If the requested person is not a suspect, a separate request for assistance needs to be issued. Sanders 2014, p. 459-460. See also Glerum & Koppe (n 112) 116; V.H. Glerum in *T&C Internationaal Strafrecht*, Article 53 OLW, updated until 1 July 2015 (electronic source).

[167] Art 53(2) OLW. Art 19 FD EAW has been implemented in this article. *Kamerstukken II* 2002/03, 29042, 3, p. 33.

[168] *Kamerstukken II* 2002/03, 29042, 3, p. 33. An exception to this rule may be made if these formalities and procedures violate fundamental principles of Dutch law.

[169] Glerum & Koppe (n 112) 118; *Sanders* (n 103) 461.

[170] Art 4(3) of the EU Convention on mutual legal assistance 2000.

[171] *Kamerstukken II* 2002/03, 29042, 3, p. 33.

[172] Again some argue that art 57(a) OLW may only be used in case of prosecution EAWs. *Sanders* (n 103) 464.

[173] V. H. Glerum, *De weigeringsgronden bij uitlevering en overlevering: Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (Wolf Legal Publishers, Nijmegen 2013) 195.

instance the nationality exception[174], the double criminality test[175], *ne bis in idem*[176], the fact that the prosecution is statute-barred[177] and the age of the requested person[178].

Optional ('may refuse')
Optional refusal grounds grant the executing judicial authority discretion in deciding whether or not the surrender of the requested person will be refused when the criteria of a particular refusal ground are fulfilled.[179] Article 13 OLW states that the requested person will not be surrendered if the crime was committed '…in whole or in part on the territory of the Netherlands or outside the Netherlands on board a Dutch vessel or aircraft…'.[180] Furthermore, the requested person will not be surrendered if the crime was committed '…outside the territory of the issuing state, while on the basis of Dutch law the prosecution of the act would not have been possible if the offence had been committed outside the Netherlands.'[181] These refusal grounds are formulated as obligatory refusal grounds, but as a result of the exception in article 13(2) OLW they are *de facto* optional refusal grounds. On the basis of this exception, the public prosecutor may request the court to waive the application of the refusal ground. The court will only deny such a request if is not based on reasonable grounds. In addition, the execution of an EAW will be refused if the Netherlands has already started criminal proceedings for the same act.[182] However, on the basis of article 9(2) OLW the minister of security and justice could decide to suspend the criminal proceedings in the Netherlands, which would again open up the possibility to execute the EAW.

According an interviewed judge 80-90% of the EAWs are actually executed. In only a small percentage a refusal ground is successfully invoked. After *Aranyosi and Căldăraru*[183] there is a growing number of cases in which the poor detention circumstances in the issuing state are raised as an argument against surrender. These attempts, however, are rarely successful.

c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?

Article 11 OLW states that the execution of an EAW shall be refused in case surrender will lead to a flagrant breach of one or more of the fundamental rights in the ECHR. The first draft of article 11 OLW did not constitute a general human rights refusal ground, but merely reflected the non-discrimination clause in recital 12 of the FD EAW.[184] However, in the House of Representatives the fact that no general refusal ground regarding fundamental rights existed was severely criticized. This criticism was primarily based on concerns regarding the principle of mutual trust. The question was posed whether the fundamental rights situation and the process of law in other member states met the appropriate standards, which would justify mutual trust and the lack of a refusal ground based on fundamental rights.[185]

The then minister of justice was of the opinion that the criticism directed at the fundamental rights situation in other member states was relatively harsh and, in addition, that a general fundamental rights refusal ground would have no added value. He stated that on the basis of article

[174] Art 6 OLW.
[175] Art 7 OLW.
[176] Art 9(1)(b-e) OLW. See Glerum (n 173) 533.
[177] Art 9(1)(f) OLW.
[178] Art 10 OLW.
[179] See for instance Rb. Amsterdam 15 November 2016, ECLI:NL:RBAMS:2016:7718. About the meaning of optional refusal grounds in the system of extradition see *Glerum* (n 173) 46-47.
[180] Art 13(1)(a) OLW.
[181] Art 13(1)(b) OLW.
[182] Art 9(1)(a) OLW.
[183] Case C-404/15 and C-659/155 PPU *Aranyosi & Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.
[184] *Kamerstukken II* 2002/03, 29042, 1-2, p. 6.
[185] *Kamerstukken II* 2003/04, 29042, 5, p. 12-15.

94 Gw, the Dutch judge is already obliged to assess possible violations of the ECHR.[186] Even though this is correct, two amendments were still introduced by members of the House of Representatives which attempted to include a more general human rights refusal ground in the Surrender Act.[187] Both were denied, since they obliged the executing judicial authority to assess *in abstracto* whether the issuing state acts in compliance with one or more provisions in the ECHR. In other words, the executing judicial authority would have to assess and decide whether the issuing state *in general* acts in compliance with the ECHR.[188] Already in the advice of the Council of State regarding the first version of article 11 OLW such an *in abstracto* test was criticized, since it would be contrary to the principle of mutual recognition and mutual trust.[189] The minister of justice referred to this advice and decided that a fundamental rights refusal ground would only be acceptable if it consisted of an *in concreto* test and demanded a flagrant breach of fundamental rights.[190] Consequently, the current version of article 11 OLW was introduced in a ministerial memorandum of amendment, which included the requirement of a flagrant breach.[191] The explanation given in the memorandum also states that article 11 OLW implies an *in concreto* test, which means that the designated court should not assess the general human rights situation in a state. Instead it needs to focus on the concrete and individual situation of the person concerned and on the question whether his surrender would result in a flagrant violation of his fundamental rights.[192]

Article 11 OLW refers to violations of the ECHR. However, this provision was adopted before the CFR became legally binding. Considering the fact that applying the Surrender Act constitutes the implementation of Union law as referred to by article 51(1) CFR, it is reasonable to assess fundamental rights defences not only in the light of the ECHR, but also in the light of the CFR.[193] The Court of Amsterdam has also begun to do so.[194]

Past violations

To a certain extent the refusal ground relating to *in absentia* judgements addresses the situation in which a person did not have the chance to exercise his right to be present and to defend himself during his trial.[195] In other words, unless one of the exceptions to this refusal ground applies, surrender will be refused if the requested person did not attend his trial in person.[196] Furthermore, article 11 OLW does not only cover possible future violations of fundamental rights after the surrender of the requested person, but past or completed violations as well.[197] In the case law the Court of Amsterdam also refers to past and future violations of fundamental rights in the light or article 11 OLW.

However, the question remains what the inclusion of past violations under the scope of article 11 OLW means in practice. Do past violations only play a role in determining whether a risk of a

[186] *Kamerstukken II* 2003/04, 29042, 12, p. 22.
[187] *Kamerstukken II* 2003/04, 29042, 9; *Kamerstukken II* 2003-2004, 29042, 16.
[188] *Kamerstukken II* 2003/04, 29042, 27, p. 21-22.
[189] *Kamerstukken II* 2003/04, 29042, B, p. 2-3.
[190] *Kamerstukken II* 2003/04, 29042, 27, p. 22.
[191] *Kamerstukken II* 2003/04, 29042, 21.
[192] *Kamerstukken II* 2003/04, 29042, 21, p. 2-3.
[193] V.H. Glerum in *T&C Internationaal Strafrecht*, Article 11 OLW, comments 1(a) and 2(b), updated until 12 June 2016 (electronic source).
[194] See for instance Rb. Amsterdam 6 October 2016, ECLI:N:RBAMS:2016:6316; Rb. Amsterdam 10 January 2017, ECLI:NL:RBAMS:2017:331.
[195] *Kamerstukken II* 2003/04, 29042, 3, p. 16.
[196] Art 12 OLW.
[197] Glerum (n 193) 2e; Sanders (n 103) 380. They base this finding on the parliamentary documentation. See *Handelingen II* 2003/04, 30, p. 2158.

future violation exist and if so does it have a decisive role? Or do past violations by themselves provide sufficient justification to refuse the execution an EAW?

With regard to article 3 ECHR the rule in extradition procedures[198] is that the court does not allow the extradition if the torturous acts were committed in relation to the case for which extradition is requested and by officers of the requesting state.[199] In this light, the Supreme Court decided that extradition should also be refused if the officers of the requesting state incited the torture of the requested person.[200] If the torture took place in relation to another case, the Minister of Security and Justice may take this into account when he takes the final decision on the extradition request. Such information could be relevant in the light of the question whether a real threat exists that the requested person will be tortured after his extradition.[201]

Whether the rule also applies in case of execution EAWs and more specifically in the context of article 11 OLW is not clear. The Court of Amsterdam stated in one of its cases that past violations of the requested person's rights under article 3 ECHR could not by themselves justify a refusal to execute the EAW. These past violations could, however, play a role in the assessment of a possible violation of article 3 ECHR after the surrender.[202] However, in this case it is unclear whether the past violations of article 3 ECHR in the issuing state had occurred in relation to the case for which the EAW was issued.

This connection was clear in another case in which the lawyer of the requested person stated that his client was subjected to a flagrant violation of article 3 ECHR during his arrest by the authorities of the issuing state. The lawyer also referred to the applicable rule in extradition law and claimed that the past violation of the fundamental rights would justify a refusal to execute the EAW on the basis of article 11 OLW. The court did, however, merely state that the past violation of article 3 ECHR was not sufficiently substantiated to allow a refusal on the basis of article 11 OLW.[203] It did not clarify whether the applicable rule in extradition procedures also applies in surrender proceedings for the execution of a sanction or what consequences the conclusion that a past flagrant violation of article 3 ECHR had indeed occurred, would have had in the light of article 11 OLW. It is therefore fair to conclude that at the moment it is not clear whether a past violation of the requested person's rights under article 3 ECHR in the case for which the EAW is issued, would justify the automatic refusal of the EAW.[204]

An interviewed lawyer (R5) adds to the above matter that it is very difficult to prove a past violation, as it is not possible to hear witnesses during the hearing.

In case of extradition requests for the execution of a sanction the leading principle is that the executing judge assumes the correctness of the conviction in the light of article 6 ECHR. However, a flagrant denial of the right to a fair trial during the proceedings which resulted in the conviction is

[198] The rules in the Extradition Act apply.
[199] This rule seems to apply in case of requests for extradition relating to prosecution and to requests relating to the execution of sanctions. HR 15 October 1996, ECLI:NL:HR:1996:ZD0547; HR 17 April 2012, ECLI:NL:HR:2012:BW2489; HR 11 July 2014, ECLI:NL:HR:2014:1680; Rb. Amsterdam 18 August 2016, ECLI:NL:RBAMS:2016:5265.
[200] HR 11 July 2014, ECLI:NL:HR:2014:1680.
[201] V.H. Glerum and N. Rozemond, 'Uitlevering' in R. van Elst and E. van Sliedregt (eds), *Handboek internationaal strafrecht: Internationaal en Europees strafrecht vanuit Nederlands perspectief* (2nd edn Kluwer, Deventer 2015) 229.
[202] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2011:BR4144. This case concerned an EAW for the purpose of prosecution and for the purpose of execution. If the rule in extradition law is applicable in surrender proceedings, it will probably apply with regard to both prosecution and execution EAWs.
[203] Rb. Amsterdam 25 October 2011, ECLI:NL:RBAMS:2011:BU3612.
[204] Glerum (n 173) fn 886.

a justified reason to make an exception to this leading principle and to refuse the extradition.[205] The Court of Amsterdam has not yet explicitly stated that the exception to mutual trust in extradition cases also applies in surrender cases.

However, one particular case seems very relevant for the matter of execution EAWs and past violations of article 6 ECHR. In this case the lawyer stated that her client had not been provided with the possibility to consult a lawyer before signing the plea agreement on which the conviction was based. So, in fact she claimed that a past breach of article 6 ECHR had taken place. The Court of Amsterdam was, however, of the opinion that the lawyer had not sufficiently substantiated her argument concerning the plea agreement and the way it was established. Hence her argument that article 11 OLW was applicable was not accepted. Furthermore, the Court of Amsterdam stated that the requested person could have brought these arguments concerning the flagrant violation of article 6 ECHR before the criminal judge in the issuing state.[206]

So, on the basis of this case it seems that a past violation of article 6 ECHR could lead to a refusal to execute an EAW on the basis of article 11 OLW if two conditions are fulfilled. Firstly, the requested person must prove that a flagrant violation of article 6 ECHR took place during the proceedings which lead to his or her conviction.[207] Secondly, he needs to claim and sufficiently substantiate that no remedies were available to him in the issuing state to address the flagrant violation of his rights under article 6 ECHR during the criminal proceedings which lead to his conviction.[208]

Violations of procedural safeguards in surrender proceedings

Except when a case involves the execution of *in absentia* judgements or a possible flagrant violation of article 6 ECHR in the issuing state after the surrender has taken place,[209] article 6 ECHR is in principle not applicable to surrender proceedings.[210] Consequently, the execution of an EAW cannot be refused on the basis of article 11 OLW when certain procedural safeguards are not provided to the requested person during the surrender procedure.

Furthermore, no other specific refusal ground exists in the Surrender Act which justifies the refusal of the execution of an EAW in case of violations of procedural safeguards granted to the requested person in surrender proceedings. It is also unlikely that a violation of a procedural safeguard would result in a bar of the prosecution, since the standard that needs to be met is very high.[211]

The Surrender Act itself also fails to clarify which (other) possible consequences a violation of one of the procedural safeguards could have. It does follow from the case law that in some situations the decision on the execution of the EAW can be suspended. For instance, if during the hearing it appears that the public prosecutor has failed to serve the requested person with certain information or to notify him of the fact that information is added to his file, the proceedings, in

[205] HR 21 January 2003, ECLI:NL:HR:2003:AF1913; HR 31 January 2006, ECLI:NL:HR:2006:AU9152; HR 21 maart 2017, ECLI:NL:HR:2017:463. See also *Glerum* (n 173) 179.
[206] Rb. Amsterdam 27 April 2012, ECLI:NL:RBAMS:2012:BW8962.
[207] See also Rb. Amsterdam 1 August 2014, ECLI:NL:RBAMS:2014:5530.
[208] Rb. Amsterdam 27 April 2012, ECLI:NL:RBAMS:2012:BW8962.
[209] Klip (n 142).
[210] Rb. Amsterdam 17 October 2006, ECLI:NL:RBAMS:2006:BD2936; Rb. Amsterdam 26 November 2015, ECLI:NL:RBAMS:2015:8786; Rb. Amsterdam 25 March 2016, ECLI:NL:RBAMS:2016:2382. See also Conclusion AG Aben in HR 14 October 2014, ECLI:NL:PHR:2014:2134.
[211] It demands a serious violation of the principles of due process of law. HR 19 December 1995, ECLI:NL:HR:1995:ZD0328; Rb. Amsterdam 18 March 2005, ECLI:NL:RBAMS:2005:AT2566. See also V.H. Glerum, 'Uitlevering en Overlevering' in P.A.M. Mevis and others (eds.), *Handboek Strafzaken* (Kluwer, Deventer last updated 18 August 2010) (electronic source) chapter 91.24.

principle need to be stayed in order for the public prosecutor to correct his mistake.[212] In addition, if the requested person does not sufficiently understand the Dutch language, the court proceedings will not be continued until an interpreter is present.[213]

Risk of future violations

Most fundamental rights arguments are raised on the basis of article 11 OLW. In the occasional case a possible future violation of the requested person's fundamental rights is considered under the heading of another refusal ground, such as article 13 OLW. In that particular case, the lawyer of the requested person stated that the Court of Amsterdam should consider the poor detention conditions in the issuing state when deciding on a request of the public prosecutor on the basis of article 13(2) OLW.[214] He also explicitly stated that he did not wish to bring his arguments on the basis of article 11 OLW. Article 13(2) OLW allows the public prosecutor to request the court to make an exception to the application of the refusal ground in paragraph 1 on the basis of which the execution of the EAW can be refused when the crime in question is completely or partially committed on Dutch territory. The Court of Amsterdam may only deny the request of the public prosecutor to waive the application of this refusal ground if the request if the request is unreasonable. Hence the court may only apply a marginal test to the request of the public prosecutor. In this light it concluded that the fundamental rights arguments of the lawyer and his referral to a judgement of the ECtHR were insufficient to decide that the request of the public prosecutor to waive the application of the refusal ground in article 13(1) was unreasonable.

However, as stated before, most fundamental rights defenses are based on the general fundamental rights refusal ground in article 11 OLW. The following paragraphs describe the legal framework within which the Court of Amsterdam makes his decision when confronted with the argument that surrendering a person would subject him or her to flagrant violations of his or her fundamental rights in the issuing state.

Article 3 ECHR

The starting point of the Court of Amsterdam is that it is in the first place the responsibility of the issuing state to ensure that the requested person will not be subjected to treatment which constitutes a violation of article 3 ECHR. However, this obligation on the issuing state does not exonerate the executing state, as a member of the EU and the ECHR, from its own responsibility to prevent that the requested person is subjected to such treatment as a result of its decision to execute an EAW. The same goes for the argument that member states have concluded cooperation agreements, such as the FD EAW, and the fact they accepted the obligation to surrender a person on the basis of the principle of mutual trust. The Court states that the fact that a state has accepted the obligation to surrender a person (and this obligation is based on mutual trust) does not exonerate it from its obligation to protect human rights. After all, article 6 TEU, 4 CFR and 19(2) CFR are primary sources of law whereas the FD is a secondary source. On the basis of this hierarchy the executing state needs to fulfill the obligations and responsibilities with regard to the protection of fundamental rights as they follow from article 6 TEU and 4 and 19(2) CFR.[215] However, it is difficult for the Netherlands to sufficiently fulfill these obligations, if the principle of mutual trust prevents judges in surrender cases to assess whether the surrender would violate any of the obligations which follow

[212] Glerum & Koppe (n 112) 28. However, if it is reasonable to assume that the interests of the requested person have not been affected because of the omission, suspension is not necessary. This is for instance the case if the requested person knew of the content of the documents. Rb. Amsterdam 30 July 2004, ECLI:NL:RBAMS:2004:AQ6063.

[213] Art 30 OLW jo 275 Sv jo 276 Sv.

[214] Rb. Amsterdam 1 March 2013, ECLI:NL:RBAMS:2013:BZ3240.

[215] In this light the Court of Amsterdam also refers to consideration 13 of the FD EAW. Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.

from the above mentioned articles in the CFR. Hence the application of the principle of mutual trust seems to be limited by the obligation and responsibility of the executing state to prevent the surrender of a person to a state which might violate his or her fundamental rights.[216] This responsibility of the executing state is based on the case law of the ECtHR and it even includes a duty to investigate potential violations of article 3 ECHR.[217]

In principle, article 11 OLW contains two criteria which need to be fulfilled in order to refuse the execution of an EAW. Firstly, the establishment of a real risk that the fundamental rights of the requested person will be violated after his surrender. Secondly, a mere breach of fundamental rights is not sufficient. The requested person needs to run the risk of being subjected to a flagrant breach of his fundamental rights.[218]

With regard to the requirement of a real risk the court applies an *in concreto* test which means that the execution of an EAW cannot be refused for the mere reason that in general surrendering persons to the issuing state could result in violations of article 3 ECHR.[219] Instead the court assesses whether on the basis of substantial grounds it is proven that a real risk exists that the requested person will be subjected to a violation of article 3 ECHR after his surrender.[220] This test is based on the case law of the ECHR and it entails that the mere possibility of a violation of article 3 ECHR in the case of the requested person is insufficient to conclude that a real risk exists.[221]

In the light of article 3 ECHR a refusal of an EAW is possible if there is a real risk that a person will be placed in a detention facility in which he or she has less personal space than 3 square meters and no compensating factors for this lack of personal space this exist. These compensating factors could relate to for instance the length of the detention, sanitary or hygienic circumstances, the possibility to leave the cell and the availability of medical and social facilities.[222] Furthermore, ill-treatment needs to meet a certain minimal level of severity to fall under the scope of article 3 ECHR. Whether this is the case depends on several circumstances, among which, the length of the treatment, its physical and mental effects or in some cases, the victim's gender, age or state of health.[223]

The burden of proof is on the requested person, which means that he or she needs to prove the existence of substantial grounds and provide the facts and circumstances on the basis of which it is plausible to conclude that a real risk exists that his or her surrender will lead to a violation of article 3 ECHR.[224] A difference in meeting this burden of proof exists with regard to the situation in which the issuing state is a member of the EU and/or a party to the ECHR and the situation in

[216] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.
[217] Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.
[218] In some cases the Court of Amsterdam also sets the condition that no effective remedy to contest the fundamental rights violations is available in the issuing state. See for instance Rb. Amsterdam 8 June 2007, ECLI:NL:RBAMS:2007:BF0221.
[219] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.
[220] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.
[221] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448. The Court of Amsterdam refers to the *Saadi* case of the ECtHR. Application no 37201/06 *Saadi v Italy*, Judgment (Grand Chamber) of 28 February 2008, CE:ECHR:2008:0228JUD003720106.
[222] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.
[223] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.
[224] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.

which the issuing state is a third state. In case of the former, the standard for standard to prove that a real risk exists is higher.[225]

Considering that the court applies an *in concreto* test the information which the requested person provides has to show his specific situation in order to prove that a real risk exits. The requested person can resort to different kinds of information among which general information about the situation in the issuing state with regard to fundamental rights violations, information about his or her personal circumstances and information about the situation of the group to which the requested person belongs if this group is in a vulnerable position with regard to possible human rights violations.[226] More concrete the court considers for example case law of the ECtHR, reports describing the human rights situation in a state among which CPT-reports and country reports from the US Department of State, information received from the issuing state on detention conditions, (comparative) studies into detention conditions by, for instance, a university and reports from psychologists who treat the requested person.[227]However, up until now the Court of Amsterdam has only on the very rare occasion refused the surrender of a person on the basis of article 11 OLW.[228] It is therefore difficult to establish what type and amount of information the court wants to have before it orders a refusal on the basis of article 11 OLW.

Next to the existence of a real risk, article 11 OLW also sets the criterion of a *flagrant* violation of fundamental rights. This criterion was included in article 11 OLW to enforce the case law of the ECtHR[229] and the Dutch Supreme Court[230].[231] According to the parliamentary documentation in general a *flagrant breach* means a manifest or apparent breach as well as an evident or indisputable breach.[232]

It is very difficult to prove that there would be a flagrant denial of fundamental rights in a certain country, the interviewed lawyers say (R5, R6).

The Court of Amsterdam has not explicitly defined the meaning of flagrant in cases in which the argument of a possible violation of article 3 ECHR is raised on the basis of article 11 OLW. The reason for this is that such an argument often fails before the court needs to consider the meaning of 'flagrant', since the requested person has not provided sufficient facts and circumstances which prove a real risk of a violation of article 3 ECHR.[233] However, the Court of Amsterdam has stated in conformity with the case law of the ECtHR and the Dutch Supreme Court that in general a violation of article 3 ECHR, can be considered 'as a by its nature flagrant breach of an absolute right.'[234] In other words, a mere violation of article 3 ECHR is sufficient and the requested person does not have to prove that the breach will be manifest and evident.[235]

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[225] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.

[226] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.

[227] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.

[228] Rb. Amsterdam 1 July 2005, ECLI:NL:RBAMS:2005:AT8580 is one of the exceptions. It concerned a violation of article 6 ECHR.

[229] Application no 14038/88 *Soering v United Kingdom*, Judgment (Plenary) of 7 July 1989, CE:ECHR:1989:0707JUD001403888.

[230] HR 20 May 2003, ECLI:NL:HR:2003:AF3308.

[231] *Kamerstukken II* 2003/04, 29042, 21, p. 3; *Kamerstukken I* 2003/04, 29042, C, p. 14.

[232] *Handelingen II* 2003/04, 30, p. 2157-2158.

[233] See for instance Rb. Amsterdam 17 September 2010, ECLI:NL:RBAMS:2010:BN7964.

[234] Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390; Rb. Amsterdam 30 December 2015, ECLI:NL:RBAMS:2010:BO1448. See also *Glerum* (n 173) 200; *Glerum* (n 193) 2b.

[235] Rb. Amsterdam 22 February 2011, ECLI:NL:RBAMS:2011:BP5390; Rb. Amsterdam 30 December 2015, ECLI:NL:RBAMS:2010:BO1448.

With regard to life imprisonment the Netherlands has only implemented article 5(2) FD EAW with regard to situations in which it acts as the issuing state. Consequently, the issuing public prosecutor needs to declare in the EAW or in addition to the EAW that if the criminal act for which the EAW is issued carries the sentence of life imprisonment Dutch law provides the possibility of granting a pardon to the imposed punishment or order.[236]

In its capacity of executing state, the Netherlands cannot ask the issuing state for a similar guarantee before surrendering the requested person. The parliamentary documentation is silent on the reason not to include this possibility in the Surrender Act. However, the fact that a life-long sentence has been imposed[237] or could be imposed[238] by the issuing state can also be raised in the light of article 11 OLW and article 3 ECHR. The Court of Amsterdam has dealt with several of these cases, but in no instance did the (possible) imposition of the sentence life-imprisonment lead to a refusal to surrender. In such cases the court considered the possibility of a (periodical) review of the life-long sentence in the executing state and sometimes also referred to the trust it should have that the executing state would fulfill its obligations under the ECHR.[239]

On the basis of the *Aranyosi* and *Câldâraru* judgements[240] the Court of Amsterdam has established a two-step test to assess the argument that surrendering the requested person will subject him to treatment which violates article 3 ECHR or article 4 CFR.

Firstly, the court considers whether *in abstracto* a real risk exists of inhuman or degrading treatment of individuals detained in the issuing Member State.[241] In other words, the court assesses whether a real risk of inhuman or degrading treatment exists, because of detention conditions in general in the issuing state.[242] In that light it takes account of the fact that according to the ECtHR the detention conditions must have attained a minimum level of severity to fall under the scope of article 3 ECHR.[243] Whether this is the case depends on the concrete circumstances. In addition, it follows from the case law that the standard of protection set by article 3 ECHR and article 4 CFR is leading in the decision of the Court of Amsterdam. This means that when another organization such as the CPT sets a higher standard of protection, for instance that each detainee should have 4 m^2 personal space, the court will use the standard of 3 m^2 set by the ECtHR.[244]

With regard to the type of evidence on the basis of which a general real risk can be proven, it follows from the case law that the Court of Amsterdam

> "…must rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are

[236] Art 45(1)(b) OLW. In the light of the *Murray* judgement of the ECtHR and several decisions of Dutch courts, which state that the current execution system of the sentence life imprisonment in the Netherlands is not in conformity with article 3 ECHR, certain to this system have been proposed. Application no 10511/10 *Murray v the Netherlands*, Judgment (Grand Chamber) of 26 April 2016, CE:ECHR:2016:0426JUD001051110; *Kamerstukken II* 2015/16, 29279, 325. See also HR 5 July 2016, ECLI:NL:HR:2016:1325.

[237] In case of an execution EAW. Rb. Amsterdam 18 May 2012, ECLI:NL:RBAMS:2012:BX3381.

[238] In case of a prosecution EAW. Rb. Amsterdam 24 Oktober 2014, ECLI:NL:RBAMS:2014:7037; Rechtbank Amsterdam 30 December 2015, ECLI:NL:RBAMS:2015:9647; Rechtbank Amsterdam 30 December 2015, ECLI:NL:RBAMS:2015:9798.

[239] Rb. Amsterdam 18 May 2012, ECLI:NL:RBAMS:2012:BX3381; Rb. Amsterdam 24 Oktober 2014, ECLI:NL:RBAMS:2014:7037.

[240] Case C-404/15 and C-659/155 PPU *Aranyosi & Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.

[241] Rb. Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081; Rb. Amsterdam 5 July 2016, ECLI:NL:RBAMS:2016:4596.

[242] Rb. Amsterdam 28 April 2016, ECLI:NL:RBAMS:2016:2630.

[243] Rb. Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081.

[244] Rb. Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081; Rb. Amsterdam 5 July 2016, ECLI:NL:RBAMS:2016:4596.

deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN."[245]

In its decisions the Court of Amsterdam often refers to CPT reports.[246] Other reports on detention conditions have also played a role in the decision making process, such as reports from the European Prison Observatory[247] or reports from the National Ombudsman[248]. The same goes for decisions from the ECtHR[249] and foreign courts, such as the decision from the *Hanseatisches Oberlandesgericht Bremen* which stated that a general real risk exists in Latvia[250]. Besides the fact that for instance CPT reports and ECtHR case law are often referred to by the Court of Amsterdam, it has not explicitly established some kind of hierarchy between the types or sources of information that can be used. It weighs all the information it has against each other and then makes a decision.

Whether the information provided, including ECtHR judgements, CPT reports and decisions from foreign courts, is of a recent date is relevant to determine whether the information is *updated* information. [251] In one of its cases the court decided that the recent decision of the *Oberlandesgericht Bremen* which stated that a general real danger existed in Latvia could not be used to come to the same conclusion, since the decision of the *Oberlandesgericht* was partly based on ECtHR case law concerning detention periods in 2005. This was not 'properly updated' information.[252]

Statements of the requested person or his relatives about the detention conditions in the issuing state as well as newspaper articles or media reports are often not considered as objective, reliable, specific and properly updated sources of information.[253]

The second step is an *in concreto* test in the light of which the court assesses "…whether substantial grounds exist on the basis of which it can assume that the requested person will be subjected to the risk of inhuman or degrading treatment, because of the conditions for his detention envisaged in the issuing member state…". [254] It needs to request the issuing authorities for the necessary complementary information concerning the detention conditions which the requested person will face.[255] According to the *Aranyosi* and *Câldâraru* judgements the issuing state is obliged to reply.[256] In the Netherlands the situation has not yet occurred that the issuing state did not provide the requested information. Furthermore, the Court of Amsterdam does not seem to set a specific time limit within which the issuing state must have provided the requested necessary information. It

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[245] Case C-404/15 and C-659/155 PPU *Aranyosi & Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198, para 89; Rb. Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081.

[246] Rb. Amsterdam 8 September 2016, ECLI:NL:RBAMS:2016:5712; Rb. Amsterdam 13 September 2016, ECLI:NL:RBAMS:2016:6014; Rb. Amsterdam 6 October 2016, ECLI:NL:RBAMS:2016:6316; Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.

[247] Rb. Amsterdam 13 September 2016, ECLI:NL:RBAMS:2016:6014.

[248] Rb. Amsterdam 6 October 2016, ECLI:NL:RBAMS:2016:6316.

[249] Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.

[250] Rb. Amsterdam 13 September 2016, ECLI:NL:RBAMS:2016:6014.

[251] Rb. Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081. A CPT report on its visits to detention centers in 2013 was too old. Rb. Amsterdam 5 July 2016, ECLI:NL:RBAMS:2016:4597; Rb. Amsterdam 2 August 2016, ECLI:NL:RBAMS:2016:4875; Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.

[252] Rb. Amsterdam 13 September 2016, ECLI:NL:RBAMS:2016:6014.

[253] Rb. 26 May 2016, ECLI:NL:RBAMS:2016:3123; Rb. Amsterdam 7 June 2016, ECLI:NL:RBAMS:2016:3409.

[254] Rb. Amsterdam 28 April 2016, ECLI :NL :RBAMS :2016 :2630.

[255] Rb. Amsterdam 28 April 2016, ECLI :NL :RBAMS :2016 :2630; Rb. Amsterdam 2 May 2016, ECLI:NL:RBAMS:2016:2629; Rb. Amsterdam 5 July 2016, ECLI:NL:RBAMS:2016:4596.

[256] Case C-404/15 and C-659/155 PPU *Aranyosi & Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198, para 97.

has however stated that the obligation to delay the decision on the execution of an EAW to request the issuing state for information on detention conditions can be considered as an exceptional circumstance on the basis of article 17(7) FD EAW. It therefore justifies the inability to take a decision about the EAW within 90 days. Consequently, article 22(4) OLW is interpreted in such a way that it allows the suspension of the decision term of 90 days when the court needs to ask the issuing state for additional information about its detention conditions.[257]

With regard to the *in concreto* test information about the question in which prison the requested person will probably be placed is important. Absolute certainty in this regard is, however, not required. For instance, in one particular case the issuing authority had stated that it was most probable that the requested prison would be placed in a certain prison and, according to the court, only in case of serious evidence to the contrary should it conduct investigations to verify this statement.[258] However, in another case the court concluded on the basis of the information received from the issuing state that the requested person would be placed in a prison in Lisbon and that it was unclear whether and when he would be transferred. Considering the already established general real risk of inhuman and degrading treatment in the prison in Lisbon, the court decided that a real risk existed for the requested person and therefore it postponed the decision on the execution of the EAW.[259] The fact that it is unclear in which prison the requested person will be placed after his surrender can therefore be sufficient for the court to decide that the *in concreto* test is fulfilled.[260]

Furthermore, the expected personal space of the requested person in the detention facility in the issuing state and the (recent) case law of the ECtHR on this matter are important factors. If the personal space will be less than 3 m^2 this gives rise to a strong presumption that the detention circumstances will be humiliating in the light of article 3 ECHR and 4 CFR. This presumption can however be refuted by the issuing authorities with sufficiently detailed and substantiated information regarding circumstances, including short, occasional and minor reductions of personal space, sufficient freedom of movement outside the cell and adequate out-of-cell activities and confinement in what is, when viewed generally, an appropriate detention facility, which could compensate the lack of personal space.[261] Usually such a strong presumption can only be rebutted if the enumerated requirements are cumulatively met.[262]

In case the personal space would be 3 m^2 or more, other detention conditions are still of importance. The court acknowledged that because of and in combination with other detention conditions, such as a lack of ventilation and lighting or poor sanitary and hygiene conditions a violation of article 3 ECHR and 4 CFR could still be possible.[263] In one particular case it decided on the basis of a CPT report, a report from the Romanian organization APADOR-CH and the fact that international organizations and the Romanian Ombudsman can access and monitor the detention conditions of the prison, that no such combination of poor detention conditions had been proven to exist.[264] However, in another case the court stated that the Romanian authorities had not provided sufficient information about the freedom of movement of the requested person and the amount of time he could spend outside his cell or the heating arrangements in his cell. Consequently, the court postponed the decision on the execution of the EAW.[265]

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[257] Rb. Amsterdam 28 April 2016, ECLI:NL:RBAMS:2016:2630.
[258] Rb. Amsterdam 2 May 2016, ECLI:NL:RBAMS:2016:2629.
[259] Rb. Amsterdam 6 December 2016, ECLI:NL:RBAMS:2016:9099.
[260] Rb. Amsterdam 20 December 2016, ECLI:NL:RBAMS:2016:9130.
[261] Rb. Amsterdam 28 April 2016, ECLI :NL :RBAMS :2016 :2630; Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.
[262] Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499; Application no 7334/13 *Muršić v Croatia*, Judgment (Grand Chamber) of 20 October 2016, CE:ECHR:2016:1020JUD000733413, para 132, 135.
[263] Rb. Amsterdam 2 May 2016, ECLI:NL:RBAMS:2016:2629.
[264] Rb. Amsterdam 2 May 2016, ECLI:NL:RBAMS:2016:2629.
[265] Rb. Amsterdam 25 October 2016, ECLI:NL:RBAMS:2016:7499.

"The defense must have reliable, accurate and recent information about the general prison conditions in every Member State" (R6). Sources that pass the test are CPT- reports and jurisprudence of the ECtHR. The interviewed prosecutor (R3), highlights that "problems can become magnified by emphasizing on a small number of reports". He further explains that the conditions in a prison often reflect the conditions in a country. "It would be good to take into account the local conditions of the country in question."

On the basis of the *Aranyosi* and *Câldâraru* judgement the Court of Amsterdam stated in its judgement of April 2016 that the existence of a concrete risk for the requested person should, in principle, be considered as a temporary situation and that the issuing state should be provided with a reasonable term to rectify the situation. As a result, the court postponed the decision about the execution of the EAW until it would receive complementary information on the basis of which it could conclude that no real risk for inhuman or degrading treatment exists for the requested person.[266] In January 2017 the Court of Amsterdam decided that the purpose of the reasonable term is not to allow the issuing state to extend its detention capacity in the future or to improve its general detention conditions, but to allow the issuing authorities to provide complementary information on the basis of which the concrete danger for the requested person can be excluded under the current detention capacity and detention conditions. It also stated that whether the reasonable term is exceeded depends on the concrete circumstances of the case. In that particular case, the reasonable term was considered to be exceeded after nine months. The court ended the surrender proceedings by disallowing the request of the public prosecutor to consider the EAW.[267] So, it is important to note that when the two-steps which follow from the *Aranyosi* and *Câldâraru* judgement are fulfilled and the issuing state does not provide the required complementary information within a reasonable term, the Court of Amsterdam will not refuse the execution of the EAW on the basis of article 11 OLW, but instead it will disallow the request of the public prosecutor to consider the EAW.

The Netherlands transfer requested persons to countries to which other European countries have stopped transferring, due to the bad prison conditions. According to the NGO (R7) 'we want to be *het braafste jongetje van de klas*' (we want to be the teacher's lapdog). This is, according to the NGO, due to the fact that the Netherlands do not want to put pressure on good trading relations.

Even though the test given in the Aranyosi[1] case clarifies how to prove a real risk of inhuman or degrading treatment, this has not made it easier to prove it. The Dutch court applies a very strict test in deciding whether or not sources are reliable enough to be used to prove the real risk of inhuman or degrading treatment. NGO reports or media reports often do not pass the test of the *Aranyosi and Căldăraru* judgment, unless they explicitly prove a breach in one particular prison to which the requested person would be transferred. The court gives great value to information provided by the country in question (R1). Unfortunately, this information is hard to get at. The defence might get it by asking an attorney in executing states or by approaching the executing state for a country report (R6).

Once the requested person is surrendered to the issuing state, the executing state does not have enough control over the prisoner anymore. Consequently, the prosecutor (R3) questions the usefulness of guarantees about the prison conditions in a certain prison. According to him it is impossible to make sure that there will not be inhuman or degrading treatment in a later stage: "for example, the prisoner spits the guard in his face and he is surrendered to another prison in which the conditions are worse." So even if the particular case did pass the test *in abstracto* and *in concreto*, there is a chance of inhuman and degrading treatment because the prisoner can be easily

[266] Rb. Amsterdam 28 April 2016, ECLI:NL:RBAMS:2016:2630.
[267] Rb. Amsterdam 26 January 2017, ECLI:NL:RBAMS:2017:414.

surrendered to another prison which was not subjected to this previously mentioned test. Only when the defence is able to prove a general danger, the court is obliged to find out whether there is a concrete danger for this specific suspect (the *concreto* test). This means that the defence must take the first step to prove it. The clerk (R2) criticizes this passive role of the court in the past and suggests that the court should play a more pro-active role. "The court should assess ex officio whether there is a general risk of inhuman or degrading treatment in the issuing Member State, if the circumstances of the case so warrant," he says. "After all, absolute rights are at stake." The clerk adds that the court in recent times has shown a willingness to engage in an ex officio assessment of the general risk.

In case the issuing country does not send additional information about the detention circumstances the decision about the surrender is suspended for a 'reasonable term', the judge (R1) says. He comments on the non-execution of an EAW: "I think that the court has to leave the possibility open that a flagrant denial of a fair trial can result in a surrender impediment. (…) That is why the CJEU has thought of a solution: if it [the breach] has not been taken away within a reasonable term, we [Court of Amsterdam] may end the procedure. (…) We are, however, not allowed to refuse to execute the EAW, because the grounds in the FD EAW (and the OLW) are limited. (…) Therefore we do not see another possibility than to declare the request of the public prosecutor to take a decision on execution of the EAW inadmissible."
There is, however, no clarity among the respondents about how long the 'reasonable term' may be. A lawyer (R6) suggests that the reasonable term depends on how long the prison sentence is. In the period it takes to get the right information, the requested person can either be kept in prison (in case there is a flight risk) or can be released from it. In deciding if there is a flight risk, the prosecutor (R3) names several factors: the content of a criminal record, whether or not a person has a family in the executing country, the behaviour of the requested person when he was arrested, the criminal act he is arrest for, etc. In case a person is released from prison, this freedom is very limited. "It is questionable," says the attorney (R5), "if it is fair that a person must wait in 'freedom' for two years before he is transferred to the issuing country to serve a sentence for only six months."

Article 8 ECHR

The claim needs to be sufficiently substantiated.[268] Article 8(2) ECHR only allows an interference with the right to family life when such an interference has a basis in national law. In Dutch surrender proceedings the Surrender Act fulfills this requirement.[269] Furthermore, an interference needs to be justified and necessary.[270] In that light the Court of Amsterdam conducts a proportionality test in which it weighs the interference with the right to family life caused by the execution of the EAW against the interests served with the surrender of the person, such as public safety, the prevention of criminal acts and disorderliness,[271] and in some international drug smuggling cases also the protection of the health of others.[272] When conducting the proportionality test the Court of Amsterdam takes the possible temporary nature of the interference[273] and the gravity of the crimes of which the requested person is accused or has been convicted[274] into

[268] Rb. Amsterdam 23 September 2011, ECLI:NL:RBAMS:2011:BT2715.
[269] Rb. 10 December 2010, ECLI:NL:RBAMS:2010:BO8104.
[270] Rb. Amsterdam 15 August 2008, ECLI:NL:RBAMS:2008:BF1887; Rb. Amsterdam 28 November 2008, ECLI:NL:RBAMS:2008:BG6606.
[271] Rb. Amsterdam 28 November 2008, ECLI:NL:RBAMS:2008:BG6606.
[272] Rb. Amsterdam 15 August 2008, ECLI:NL:RBAMS:2008:BF1887; Rb. 10 December 2010, ECLI:NL:RBAMS:2010:BO8104.
[273] For instance, in case of a return guarantee. Rb. Amsterdam 28 November 2008, ECLI:NL:RBAMS:2008:BG6606; Rb. 10 December 2010, ECLI:NL:RBAMS:2010:BO8104; Rb. Amsterdam 14 April 2016, ECLI:NL:RBAMS:2016:2388.
[274] Rb. 10 December 2010, ECLI:NL:RBAMS:2010:BO8104; *Glerum* (n 193) 3e.

consideration. Furthermore, the question whether the issuing state provides an effective remedy to the requested person which allows him to raise possible violation of his rights under article 8 ECHR in the issuing state can also play a role.[275] In one of its cases the Court of Amsterdam concluded that legal remedies were available to the requested person in the issuing state with which he could contest his pre-trial detention. By using those remedies he could raise the same arguments on the basis of article 8 ECHR which could lead to his release.[276] Up until now a violation of article 8(1) ECHR has never resulted in the refusal of the execution of an EAW on the basis of article 11 OLW.[277]

Similar to when in a possible violation of article 3 ECHR is raised, the Court of Amsterdam does not explicitly assess the criterion of a 'flagrant breach' when considering the arguments raised by the defense which are based on article 11 OLW jo article 8 ECHR. These arguments are usually already dismantled by the decision that the interferences caused by the execution of the EAW have a basis in law and are justified and necessary.[278] After that the District Court has no reason to discuss whether or not the breach is 'flagrant' and what this criterion means exactly.[279]

Every consulted legal actor in the empirical part of this research declares that an appeal on the right to family life has so far never resulted in a refusal to surrender the requested person (R1, R3, R5). The judge (R1), however, keeps the option open: "there can be exceptional cases in which the right to family might be of greater importance than combating serious crime" and "we should consider it when the case at hand calls for it". According to the prosecutor (R3) article 8 ECHR hardly plays a role in deciding if the requested person has to be surrendered. "And how could it?", he says, "everyone has a family. And how to assess if one's family-life is of greater importance than the family-life of another person?"

In relatively recent case law the court has considered a fundamental rights defense on the basis of article 7 CFR. Its considerations are to a large extent similar to the ones in the previously discussed cases in which the court focused on article 8 ECHR. The court first refers to the criteria in article 52(1) CFR and then considers whether these are fulfilled.[280] Firstly, it establishes that the interferences which the surrender of a person can cause with the rights in article 7 CFR have a basis in law, namely the Surrender Act. Surrendering individuals is also a necessary limitation to the rights in article 7 ECHR and genuinely meets the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, especially considering the importance of surrender procedures to combat (cross-border) crime and to prevent impunity. The court then conducts a proportionality assessment in which it considers whether the interests served with surrendering the person are not disproportionate in relation to the interference with the rights in article 7 CFR. When conducting this proportionality test the court takes the temporary nature of the limitation into account, which it also does when it considers a defence which is based on article

[275] Rb. Amsterdam 8 June 2007, ECLI:NL:RBAMS:2007:BA9965; Rb. Amsterdam 14 April 2016, ECLI:NL:RBAMS:2016:2388.

[276] Rb. Amsterdam 14 April 2016, ECLI:NL:RBAMS:2016:2388.

[277] The ECtHR has also stated in the light of the importance of extradition agreements for fighting (international and cross-border) crime that only in exceptional cases private or family life will outweigh the legitimate aim pursued by extradition. See for instance Application no 27279/95 *Launder v the United Kingdom*, Decision of the ECcHR (Plenary) of 8 December 1997; Application no 9742/07 *King v the United Kingdom,* Decision (4th Section) of 26 January 2010, para 29.

[278] Rb. 8 June 2007, ECLI:NL:RBAMS:2007:BA9965; Rb. Amsterdam 15 August 2008, ECLI:NL:RBAMS:2008:BF1887; Rb. Amsterdam 28 November 2008, ECLI:NL:RBAMS:2008:BG6606; Rb. 10 December 2010, ECLI:NL:RBAMS:2010:BO8104. See also Rb. Amsterdam 14 April 2016, ECLI:NL:RBAMS:2016:2388.

[279] Glerum (n 173) fn 884.

[280] Rb. Amsterdam 6 October 2016, ECLI:NL:RBAMS:2016:6316; Rb. Amsterdam 10 January 2017, ECLI:NL:RBAMS:2017:331.

8 ECHR. However, contrary to the cases discussed in relation to article 8 ECHR, the court also explicitly refers to the concrete personal interests of the requested person and his family, including a spouse and (unborn) children, and it puts emphasis on the question whether factors exist in the concrete case which differentiate the requested person from requested persons in comparable situations.[281] However, in none of these cases did the interference with article 7 ECHR lead to a refusal to execute the EAW on the basis of article 11 OLW.

Article 6 ECHR

In case the requested person is sentenced in default and he has the right to a retrial or appeal procedure in the issuing state during which the merits of the case will be reexamined and new evidence can be admitted, the right to a fair trial is of importance.[282] The conditions for surrendering a person convicted *in absentia* can be found in article 12 and 12a OLW.

Besides *in absentia* judgements article 6 ECHR is less relevant for execution EAWs as the trial in question has already taken place. This paragraph will for the purpose of completeness shortly describe the criteria for refusals on the basis of future violations of article 6 ECHR. In this regard the Court of Amsterdam has established a two-fold test. Firstly, the requested person needs to prove that it is likely (*aannemelijk*) that his surrender will result in a flagrant breach of article 6 ECHR.[283] On the basis of concrete and individual facts and circumstances he needs to show the existence of a justified suspicion that his surrender will result in a flagrant denial of his fundamental rights.[284] Secondly, the requested person needs to prove with sufficient arguments that no effective remedy in the light of article 13 ECHR against this flagrant breach is available to him in the issuing state.[285] In relation to the second part of the test, the court follows the case law of the ECtHR and the CJEU in the Jeremy F.[286] case.[287] This case states that the fact that all EU member states are party to the ECHR constitutes the basis for mutual trust on the basis of which the member states assume that in all national orders the same effective protection of fundamental rights recognized under Union law exist and therefore effective remedies are available to the requested person in the issuing state to address and contest aspects of the criminal proceedings.[288] Thus the requested person needs to argue convincingly that such an effective remedy is not available to him after his surrender to the issuing state.[289]

Speciality principle

The speciality principle is codified in article 14 OLW. It roughly contains three prohibitions.
Firstly, a person may after his surrender not be prosecuted, punished or have his personal freedom otherwise curtailed for acts committed before the time of his surrender and for which he was not surrendered. Some exceptions to this prohibition exist. For instance, the prohibition does not apply

[281] Rb. Amsterdam 6 October 2016, ECLI:NL:RBAMS:2016:6316; Rb. Amsterdam 10 January 2017, ECLI:NL:RBAMS:2017:331.
[282] In case the conditions in Article 12(d) OLW are fulfilled, the EAW is considered to be a prosecution EAW and not an execution EAW. Rb. Amsterdam 1 September 2015, ECLI:NL:RBAMS:2015:6723.
[283] Rb. Amsterdam 18 September 2009, ECLI:NL:RBAMS:2009:BL1598; Rb. Amsterdam 11 March 2014, ECLI:NL:RBAMS:2014:5186.
[284] Rb. Amsterdam 20 March 2015, ECLI:NL:RBAMS:2015:1583.
[285] Rb. Amsterdam 18 September 2009, ECLI:NL:RBAMS:2009:BL1598; Rb. Amsterdam 11 March 2014, ECLI:NL:RBAMS:2014:5186; Rb. Amsterdam 20 March 2015, ECLI:NL:RBAMS:2015:1583.
[286] Case C-168/13 PPU *Jeremy F.*, Judgment of the Court (2nd Chamber) of 30 May 2013, EU:C:2013:358.
[287] Rb. Amsterdam 11 March 2014, ECLI:NL:RBAMS:2014:5186; Rb. Amsterdam 20 March 2015, ECLI:NL:RBAMS:2015:1583.
[288] Rb. Amsterdam 11 March 2014, ECLI:NL:RBAMS:2014:5186; Rb. Amsterdam 20 March 2015, ECLI:NL:RBAMS:2015:1583.
[289] Rb. Amsterdam 18 September 2009, ECLI:NL:RBAMS:2009:BL1598.

if the public prosecutor has given his consent for an exception.[290] The public prosecutor will grant authorization if surrender for the acts in question would be possible on the basis of the Surrender Act. So, in other words, the public prosecutor needs to apply the same test as the District Court of Amsterdam does when considering the new EAW. This means that he should also request a return guarantee for the requested person, if necessary.[291]

Secondly, the re-surrender of a requested person to another EU member state for acts committed before the time of his surrender to the issuing state is not allowed. Exceptions to this prohibition exist as well.[292]

Thirdly, the requested person may not be surrendered to the authorities of a third state for acts committed before the time of his surrender, unless the Dutch minister of security and justice has given his authorization.[293] The minister will provide this authorization if the extradition of the requested person to the third state is possible on the basis of the applicable extradition treaty between the Netherlands and the third state and the Dutch Extradition Act. So, if the criteria in the applicable treaty and the Extradition Act are fulfilled, the minister will grant his permission.[294]

The requested person has no possibility of appeal in relation to the decision of the public prosecutor or the minister of security and justice to make an exception to the speciality principle. However, he can go to the judge in preliminary relief proceedings.[295] Starting such proceedings does not suspend the execution of the decision of either the public prosecutor or the minister of security and justice.

Suspension of the execution of an EAW for humanitarian reasons

Article 23(4) FD EAW is implemented in article 35(3) OLW. According to the latter provision, the actual surrender of a person may be suspended when serious humanitarian reasons, such as the poor state of health of the requested person, exist. Other examples of humanitarian reasons are provided in the parliamentary discussions[296] and include for instance the situation in which the requested person has a terminally ill child or the situation in which the partner of the requested person will die within a short period of time.[297] The District Court of The Hague also decided that the fact that the requested person is engaged in an ongoing divorce procedure and has high debts (*schuldlasten*) is not sufficient to suspend the actual surrender of the requested person.[298]

The public prosecutors at the Court of Amsterdam are competent to suspend the actual surrender of the requested person for humanitarian reasons.[299] It is also up to the public prosecutor to decide how long the suspension will be.[300] The Court of Amsterdam has also stated that article 35(3) OLW

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[290] Art 14(1)(f) OLW.

[291] Art 14(3) OLW; Sanders (n 103) 410; *Kamerstukken II* 2002/03, 29042, 3, p. 18. See also Rb. Amsterdam 27 April 2012, ECLI:NL:RBAMS:2012:BW8884.

[292] Art 14(2)(a-c) OLW.

[293] Art 14(4) OLW.

[294] *Kamerstukken II* 2002/03, 29042, 3, p. 18; *Sanders* (n 103) 414.

[295] *Kamerstukken II* 2002/03, 29042, 12, p. 33. The District Court of Amsterdam stated that the requested person should be granted reasonable time to start preliminary relief proceedings before authorization is granted to the issuing state. In other words, the public prosecutor should refrain from acting in a manner which does not allow the claimant to use his right to start preliminary proceedings at all or in time. Rb. Amsterdam 27 April 2012, ECLI:NL:RBAMS:2012:BW8884; V.H. Glerum and N. Rozemond, 'Overlevering' in R. van Elst and E. van Sliedregt (eds), *Handboek internationaal strafrecht: Internationaal en Europees strafrecht vanuit Nederlands perspectief* (2nd edn Kluwer, Deventer 2015) 267; *Glerum* (n 211) chapter 91.25.

[296] *Kamerstukken II* 2003/04, 29042, 27, p. 23-24; *Handelingen II* 2003/04, 30, p. 2158-2159. See also Glerum & Koppe (n 112) 39; Sanders (n 103) 30; *Kamerstukken II* 2003/04, 29042, 22; *Handelingen II* 2003/04, 31, p. 2181.

[297] *Kamerstukken II* 2003/04, 29042, 27, p. 23-24; *Handelingen II* 2003/04, 30, p. 2158-2159.

[298] Rb. 's-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558.

[299] *Kamerstukken I* 2003/04, 29042, C, p. 16; Rb. Amsterdam 22 December 2016, ECLI:NL:RBAMS:2016:8715.

[300] Rb. Amsterdam 22 December 2016, ECLI:NL:RBAMS:2016:8715.

concerns the situation after the decision on the execution of the EAW is taken and is therefore not relevant for any decision that needs to be made in the surrender procedure itself.[301] The public prosecutor can however ensure the court during the hearing in the surrender procedure that it will use its competence to suspend the actual surrender of the requested person in article 35(3) OLW.[302]

A requested person can start preliminary relief proceedings against the decision to surrender him on a certain date. During these proceedings the court can assess whether serious humanitarian reasons exist which justify a delay of the actual surrender.[303] However, because of the broad margin of discretion of the public prosecutor in making a decision, the court may only apply a marginal test in these proceedings.[304] This means that it may only assess whether the decision that no serious humanitarian reasons exist which could suspend the actual surrender of a requested person is reasonable.[305]

The case law which follows from these preliminary relief proceedings is also relevant in the light of the fact that the Surrender Act does not clarify in which manner and on the basis of which criteria the public prosecutor needs to make his decision regarding the existence of serious humanitarian reasons. However, the case law indicates several factors which the court considers to assess if the decision of the public prosecutor was reasonable and whether surrender will severely endanger the life or health of the requested person. These factors are 1) whether the issuing state has guaranteed that it can and will provide the medical, psychological and psychiatric care the requested person needs, also when this person is detained in the issuing state,[306] 2) whether there are reasons to believe that the issuing state will not live up to its promises or enforce its guarantees,[307] 3) whether the issuing state has guaranteed that a custodial sentence will not be enforced, if the requested person turns out to be unfit for detention[308], 4) whether the Dutch public prosecutor has performed a sound investigation into the medical situation of the requested person[309]. Furthermore, the starting point for the court is to presume that the issuing state can provide the same standard of care as the Netherlands, including the situation in which the requested person is placed in detention, and that the issuing state can diagnose and treat the complaints of the requested person in the same way as the Netherlands.[310] In addition, the mere fact that in the course of the surrender proceedings the requested person faces increasing pressure of suffering

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[301] Rb. Amsterdam 8 October 2004, ECLI:NL:RBAMS:2004:AR4218. See also Rb. Amsterdam 27 May 2005, ECLI:NL:RBAMS:2005:AT7051; Rb. Amsterdam 24 October 2008, ECLI:NL:RBAMS:2008:BG6043; Rb. Amsterdam 26 August 2011, ECLI:NL:RBAMS:2011:BR7022.

[302] See for instance Rb. Amsterdam 6 March 2007, ECLI:NL:RBAMS:2007:BA9847.

[303] *Kamerstukken II* 2003/04, 29042, 3, p. 27.

[304] In some cases the court does not speak of a 'broad discretion', but a 'certain margin of discretion'. See for instance Rb.'s-Gravenhage 26 November 2009, ECLI:NL:RBSGR:2009:BK4694.

[305] Rb.'s-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558; Rb. 's-Gravenhage 19 November 2010, ECLI:NL:RBSGR:2010:BP0119.

[306] Rb. 's-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558; Rb. 's-Gravenhage 19 November 2010, ECLI:NL:RBSGR:2010:BP0119; Rb Den Haag 7 February 2013, ECLI:NL:RBDHA:2013:BZ5130.

[307] Rb. 's-Gravenhage 26 November 2009, ECLI:NL:RBSGR:2009:BK4694; Rb. 's-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558; Rb. 's-Gravenhage 19 November 2010, ECLI:NL:RBSGR:2010:BP0119.

[308] Rb.'s-Gravenhage 19 November 2010, ECLI:NL:RBSGR:2010:BP0119.

[309] Rb.'s-Gravenhage 26 November 2009, ECLI:NL:RBSGR:2009:BK4694. In this case at hand the public prosecutor had promised to evaluate the medical situation of the requested person, but only after approximately three months did the public prosecutor actually take the appropriate actions. See also Rb.'s-Gravenhage 25 August 2009, ECLI:NL:RBSGR:2009:BK032; Rb. 's-Gravenhage 3 September 2009, ECLI:NL:RBSGR:2009:BK0276. It follows from these two decisions that the fact that the requested person did not subject himself to the ordered psychiatric tests worked against him. The court stated that without a proper medical examination, no ground existed to rule that important medical reasons barred the actual transfer of the requested person.

[310] Including suicide risks see Rb. 's-Gravenhage 26 November 2009, ECLI:NL:RBSGR:2009:BK4694; See also Rb. 's-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558; Rb. 's-Gravenhage 19 November 2010, ECLI:NL:RBSGR:2010:BP0119; Rb. Amsterdam 13 December 2016, ECLI:NL:RBAMS:2016:8435.

(*lijdensdruk*) and psychological problems is not sufficient to conclude that surrender will endanger the health or life of the requested person.[311]

The lawyers (R5, R6) explained that it is possible to suspend the actual surrender of a person because of health problems, but this rarely happens in practice. There have been cases in which the requested person was terminally ill. In these case the person is not surrendered to the issuing state.

Suspension of execution of an EAW in order to execute the sentence related to another offence
Article 24(1) FD EAW has been implemented in article 36(1) OLW which states that the decision concerning the time and place of the actual transfer will be deferred as long as a criminal judgement delivered against the requested person by a Dutch judge is still enforceable, in whole or in pArticle The competent authorities to make the decision to suspend the actual surrender of the requested person are the public prosecutors at the Court of Amsterdam.[312] Article 36(1) OLW differs from article 24(1) FD EAW, since it lays down an *obligation* to defer the actual surrender and not a discretionary competence.[313] This means that only after the enforceable criminal judgement delivered by a Dutch judge against the requested person for a different criminal act than the one for which the EAW is issued, has been executed, the decision concerning the time and place of the surrender will be decided. The reason for turning article 24(1) FD EAW into an obligation is not provided in the parliamentary documentation related to the Surrender Ac

3.2. FD 2008/909

a) Safeguards for the convicted person

Access to lawyer
The convicted person may lodge an objection at the Court of Appeal Arnhem-Leeuwarden against the intention of the minister to transfer the execution of his sentence to the executing member state.[314] The investigation and proceedings will take place in chambers (*raadkamer*).[315] During the investigation the convicted person will be heard or at least summoned. If the convicted person does not have a lawyer yet, one will be assigned to him.[316] This lawyer can assist him during the investigation by the court.[317]

When the Netherlands is the executing state, a lawyer will be assigned to the convicted person when he is placed in police custody.[318] Furthermore, the WETS states that when the convicted person is remanded in custody, a lawyer will be assigned to him if he does not have one yet.[319]

Access to documents, translation and the right to information and opinion of the convicted person to the transfer
If the Dutch minister of security and justice has the intention to transfer a sentence to another state, he will notify the convicted person of this in writing.[320] In case the convicted person lodges an objection against this intention of the minister at the Court of Appeal Arnhem-Leeuwarden, he and

[311] Rb. 's-Gravenhage 12 November 2010, ECLI:NL:RBSGR:2010:BO4558.
[312] Rb. Amsterdam 29 October 2004, ECLI:NL:RBAMS:2004:AR4914; Rb. Amsterdam 1 April 2009, ECLI:NL:RBAMS:2009:BJ0752.
[313] See *Kamerstukken II* 2002/03, 29042, 3, p. 27.
[314] Art 2:27(3) WETS; Struyker Boudier (n 33) 941.
[315] Art 21-25 Sv apply according to art 2:27(6) WETS. G. de Jonge, 'Een kwestie van vertrouwen: vraagtekens bij de 'export' van gevangenen naar hun EU-thuisland', [2012] *Strafblad* 225, 230.
[316] Art 2:27(5) WETS.
[317] Art 2:27(6) WETS jo 23(3) Sv. Only if this would severely damage the interests of the investigation, this right is not applicable according to art 2:27(6) WETS jo 23(6) Sv.
[318] Art 2:19(6) WETS jo 40 Sv; *Kamerstukken II* 2010/11, 32885, 3, p. 42.
[319] Art 2:20(2) WETS; *Kamerstukken II* 2010/11, 32885, 3, p. 42.
[320] Art 2:27(1) WETS. An exception is made when the convicted person in not in the Netherlands or requested the transfer of the judicial decision himself (art 2:27(2) WETS).

his lawyer should have access to the documents concerning the case that have been provided by the public prosecutor to the court in these proceedings.[321] The final decision of the Court of Appeal will be communicated to the convicted person in writing.[322] If the Court of Appeal declares the objection of the convicted person unfounded[323] and the minister decides to forward the judicial decision, he will inform the convicted person of this decision if the convicted person is in the Netherlands. The minister will do this by providing the convicted person with a form set up in conformity with the model in article 2 of Implementation decree mutual recognition and execution of custodial sanctions and conditional penalties (*Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*)[324].[325] If the convicted person is in the receiving state, the Minister will sent the form to the competent authority of that state who will then provide it to the convicted person.[326]
If the Netherlands is the executing state and the convicted person is in the Netherlands,[327] the minister will notify him of the receipt of the certificate and judicial decision from the executing state. He will do this by providing the convicted person with the form sent by the forwarding state, which must have been set up in conformity with the model in article 2 of Implementation decree mutual recognition and execution of custodial sanctions and conditional penalties.

The form informs the convicted person of the decision to transfer his sentence to the Netherlands. It also notifies the convicted person of the fact that the sentence will be governed by the law of the executing state, which is the Netherlands. Furthermore, the authorities of the executing state are competent to decide on the applicable procedure for enforcing the sanction, including the application of the grounds for early or conditional release. In addition, the competent executing authority has to deduct the period of the sentence which is already served from the total duration of the custodial sanction imposed. Lastly, the convicted person is informed of the fact that an adaptation of the sentence by the competent authority in the executing state may only take place if the sentence is incompatible with the law of the executing state in terms of its duration or nature. The adapted sentence may also not aggravate the sentence imposed by the issuing state.
If the convicted person is in the Netherlands, the minister will notify him of his decision to transfer the sentence in a language which he or she understands and by providing him with a form.[328] This form again needs to be set up in compliance with the model laid down in article 2 of Implementation decree mutual recognition and execution of custodial sanctions and conditional penalties. If the convicted person is in the receiving state, the Minister will send the form to the competent authority of that state who will then forward it to the convicted person.[329] Furthermore, in case the convicted person lodges an objection against the intention of the minister to transfer his sentence, he has the right to a translator during the procedure in case he does not sufficiently understand the Dutch language.[330]

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[321] Art 2:27(6) WETS jo 23(5) Sv. An exception may be made if the investigation would be severely damaged by the application of this right (art 23(6) Sv).
[322] Art 2:27(7) WETS.
[323] Art 2:27(7) WETS. In case the Court of Appeal finds the objection founded, the minister may not transfer the sentence of the convicted person to another state.
[324] Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties, *Stb.* 2012, 400. This form is similar to attachment II to the Framework Decision.
[325] Art 2:28(8) WETS.
[326] Art 2:28(8) WETS; J.T.J. Struyker Boudier in *T&C Internationaal Strafrecht,* commentary on Article 2:28 WETS, updated until 1 July 2015 (electronic source).
[327] If he is in the issuing state, that state will inform him of the decision. J.T.J. Struyker Boudier in *T&C Internationaal Strafrecht,* commentary on Article 2:9 WETS, updated until 1 July 2015 (electronic source).
[328] Art 2:28(8) WETS.
[329] Struyker Boudier (n 326).
[330] Art 2:27(6) WETS jo 23(4) Sv. An exception may be made if the investigation would be severely damaged by the application of this right. Art 23(6) Sv.

The WETS does not regulate the translation of documents into a language which the convicted person understands in case the Netherlands is the executing state. It does however state in article 2:23(3) that a person who has been placed in police custody or is remanded in custody needs to be treated in the same way as suspects who are subjected to these measures on the basis of the Dutch Code of Criminal Procedure. A similar provision exists in the Surrender Act.[331] It follows from the literature about these provisions that the person in custody can be subjected to certain measures, such as an order to take his fingerprint[332].[333] The question is whether Article 2:23(3) WETS also grants the convicted person the same rights as a person in police custody or a person who is remanded in custody on the basis of the Dutch Code of Criminal Procedure. If this is the case then on the basis of article 59(7) Sv the convicted person needs to receive a written notification stating at least the grounds for the police custody and the period of validity of the order in a language which he understands. The same goes for a person who is remanded in custody on the basis of article 78(6) Sv. However, if such a notification also needs to be provided in WETS proceedings, the question is why this obligation has not simply been included in article 2:23(1) WETS, which states that the convicted person has to receive a copy of the police custody order or remand in custody which includes the ground for issuing the order. The situation is further complicated by the fact that contrary to the Surrender Act, the WETS does not include a provision in which it enumerates provisions in the Dutch Code of Criminal Procedure which apply mutatis mutandis.[334]

Whether the rules on the translation of documents as they were codified in the Dutch Code of Criminal Procedure by the implementation Act of Directive 2010/64 apply is not clear.[335] The scope of this implementation act is in principle limited to suspects and excludes convicted persons who are no longer involved in any appeal procedures.[336] Furthermore, this implementation act does not specifically state that the rights in question should be granted to convicted persons involved in WETS proceedings whereas it does make such a specific reference with regard to surrender proceedings. Hence we can conclude that the WETS does not regulate the right to translation of documents and it is unclear whether the provisions in the Dutch Code of Criminal Procedure which cover this right apply mutatis mutandis.

The convicted person is also allowed to give his opinion with regard to the intention of the minister to transfer his sanction to another state.[337] However, this right is limited, since it only applies if the convicted person is present in the Netherlands and has not requested the transfer of the execution of his sentence himself.[338] The opinion is included in the certificate which is forwarded to the executing state.[339] It is however not binding, meaning that the minister may ignore it and transfer the sanction contrary to the wish of the convicted person.[340] In addition, if necessary because of the age or mental/physical condition of the convicted person, the opinion concerning the possible transfer of the execution of his sentence may be provided by his or her lawyer.[341]

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[331] Art 61 OLW.

[332] Art 62 Sv.

[333] J.T.J. Struyker Boudier in *T&C Internationaal Strafrecht*, Article 2:23 WETS, comment 1, updated until 1 July 2015 (electronic source); V.H. Glerum in *T&C Internationaal Strafrecht*, Article 61 OLW, comment 1, updated until 1 July 2015 (electronic source).

[334] It does have one with regard to the procedure on forwarding a judicial decision (art 2:27(6) WETS).

[335] Act of 28 February 2013 on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (*PbEU* L 280/1) (*Wet van 28 februari 2013 tot implementatie van richtlijn nr. 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolking en vertaling in strafprocedures (PbEU L 280/1)*), *Stb.* 2013, 85.

[336] *Kamerstukken II* 2011/12, 33355, 3, p. 6-7.

[337] Art 2:27(1) WETS.

[338] Art 2:27(2) WETS.

[339] Art 1 Implementation decree mutual recognition and execution of custodial sanctions and conditional penalties.

[340] *Kamerstukken II* 2011/12, 33355, 3, p. 45.

[341] *Kamerstukken II* 2010/11, 32885, 3, p. 64. The explanatory memorandum states that the reference to the possibility that a lawyer provides the opinion of the convicted person, because of his or her age or mental state, does not have to be

However, if the Netherlands is the executing state and the convicted person is present in the Netherlands, the WETS does not provide him with the right to give his opinion about the transfer.

Right to be heard

As stated in the previous paragraph the convicted person in principle has the right to give his opinion about the intention of the minister to transfer his sentence. In addition, the convicted will be heard, or at least summoned, by the Court of Appeal of Arnhem-Leeuwarden if he lodges an objection against the intention of the minister to transfer his sentence.[342]

When the Netherlands is the executing state, the convicted person does not have the right to be heard. As already mentioned before, the minister of security and justice will not ask for the opinion of the convicted person and when the request for transfer is brought before the Court of Appeal of Arnhem-Leeuwarden the convicted person will not be heard or presented with the opportunity to voice his opinion either. The possibility for the Court of Appeal to hear the convicted person was excluded, because according to FD 2008/909 a decision about the transfer of the judicial decision should be made on the basis of the information in the certificate and the judicial decision itself. In case the Court of Appeal would need complementary information, the minister could ask the competent issuing authority for this information.[343]

b) Consent of the executing state

As stated before in section 2.3.a.ii the Dutch minister of security and justice may only transfer a sentence if the executing state has given its consent.[344] This consent is however not required if 1) the convicted person is a national of the executing state and has his permanent domicile or residence in that state or 2) the convicted person is a national of the executing state, does not have his permanent domicile or residence there, but may be deported to the executing state after his liberation as a result of the obligation to leave the Netherlands, imposed on him on the basis of the Aliens Act.[345]

c) Interplay with the FD EAW

The WETS is applicable if the return guarantee in article 6(1) of the Surrender Act was provided *before* the entering into force of the WETS, but the actual return of the person takes place *after* its entering into force.[346] If this situation occurs the Court of Amsterdam may only request *a return* guarantee for its own nationals or those who are placed on equal footing.[347] Under the old procedure which is laid down in the Enforcement of Criminal Judgments (Transfer) Act (*Wet Overdracht Tenuitvoerlegging Strafvonnissen*),[348] the court demanded a *double* guarantee including both a *return* guarantee as well as a so-called *conversion* guarantee. The latter allows the executing state to convert the sentence imposed by the issuing state in compliance with the conditions in the Convention on the Transfer of Sentenced Persons. In principle this meant that the foreign sentence could be converted into a sentence which would have been imposed in the Netherlands for a similar act.[349]

However, even though the Netherlands may no longer ask for the conversion guarantee under the WETS, article 2:11(5) WETS states that if a return guarantee has been granted on the basis of

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implemented, because it falls under the current rules on legal representation. See also *Kamerstukken II* 2010/11, 32885, 7, p. 25.

[342] Art 2:27(5) WETS. This provision states that he will at least be summoned.

[343] *Kamerstukken II* 2010/11, 32885, 3, p. 35.

[344] Art 2:24(b) WETS.

[345] Art 2:24(b) jo 2:25 WETS.

[346] Art 5:2(4) WETS.

[347] Art 6(1) and (5) OLW.

[348] Enforcement of Criminal Judgments (Transfer) Act 10 September 1986 (*Wet overdracht tenuitvlerlegging strafvonnissen)*, *Stb.* 1986, 464. This Act still applies between the Netherlands and third states.

[349] *Kamerstukken II* 2010/11, 32885, 3, p. 15-16; Rb. Amsterdam 18 March 2014, ECLI:NL:RBAMS:2014:4487; Rb. Amsterdam 9 November 2012, ECLI:NL:RBAMS:2012:BY2931.

article 6(1) OLW, the Court of Appeal of Arnhem Leeuwarden will examine whether the imposed custodial sanction matches the sanction which the Netherlands would have imposed for the act in question. This court will adapt the sanction to the extent that this is necessary while taking into account the views of the issuing state and the severity of the act.[350] So, an appropriate conversion of the foreign sentence in case a return guarantee has been granted by the issuing state and the requested person returns to the Netherlands for the execution of his sanction is still possible.[351]

d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a convicted person)

Most of the optional refusal grounds in article 9 FD 2008/909 have been implemented as mandatory refusal grounds in article 2:13 WETS. Mandatory means that the executing authority is obliged to refuse the recognition of the judicial decision if the criteria of the refusal ground are fulfilled. These refusal grounds are listed below and concern situations in which the recognition of the judicial decision would be incompatible with Dutch law.[352] The most important one for the purpose of this project is the refusal ground relating to *in absentia* judgements.[353] Others are the lack of a certificate, an incomplete certificate or one that is not in conformity with the judicial decision[354], not meeting the conditions in article 2:3 WETS[355], the age of the convicted person[356], immunity provisions[357], *ne bis in idem*[358], execution of the sanction is time barred,[359] the double criminality requirement.[360] With regard to the double criminality requirement the Netherlands has issued a declaration in conformity with article 7(4) FD 2008/909[361] and implemented the double criminality requirement as a mandatory refusal ground.[362] The Dutch government had at the time multiple reasons for deciding against the abolition of the double criminality requirement for certain criminal acts. It was of the opinion that the double criminality requirement is not necessary to establish a well-functioning cooperation mechanism with other states, because in principle the convicted person is incarcerated in the state in which he is convicted. Hence if the Dutch minister refuses to execute the foreign judicial decision, because the double criminality requirement is not fulfilled, this will not allow the convicted person to escape the execution of his sentence. Furthermore, limiting the scope of the double criminality test is not in conformity with the aim of the FD which is the resocialization of the convicted person. It is hard to ensure resocialization in the Netherlands if

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[350] However, the sanction may in no case be aggravated (art 2:11(7) WETS).

[351] *Kamerstukken II* 2010/11, 32885, 3, p. 16; *Kamerstukken II* 2010/11, 32885, 4, p. 5; *Kamerstukken II* 2010/11, 32885, 8, p. 2-3.

[352] *Kamerstukken II* 2010/11, 32885, 3, p. 10.

[353] Art 2:13(h) WETS.

[354] Art 2:13(1)(a) WETS. Before refusing the recognition of the judicial decision, the competent authority of the issuing state needs to have been given the opportunity to provide information on the matter (art 2:13(2) WETS).

[355] Art 2:13(1)(b) WETS. These regard the presence of the convicted person in the executing or issuing state, his consent and the consent of the minister of security and justice are not complied with Before refusing the recognition of the court decision, the competent authority of the issuing state needs to have been given the opportunity to provide information on the matter (art 2:13(2) WETS).

[356] Art 2:13(1)(c) WETS.

[357] Art 2:13(1)(d) WETS.

[358] Art 2:13(1)(e) WETS.

[359] Art 2:13(1)(g) WETS.

[360] Art 2:13(1)(f) WETS.

[361] F. Teeven former State Secretary for Security and Justice in the Netherlands, 'Notification of implementation of the above Framework Decision by the Netherlands' COPEN217, 1 October 2012, file:///C:/Users/3888908/AppData/Local/Google/Chrome/Downloads/Netherlands%20(5).pdf accessed 18 October 2017.

[362] Art 2:13(1)(f) WETS. With regard to the double criminality requirement as laid down in art 7(3) FD 2008/909 the CJEU has stated that this requirement is met when the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State. Case C-289/15 *Grundza*, Judgment of the Court (5th Chamber) of 11 January 2017, EU:C:2017:4.

the conduct for which the sentence is imposed does not constitute a criminal act on the basis of Dutch law. In addition, executing a sentence imposed for conduct which does not constitute a criminal act in the Netherlands is not in conformity with public order.[363]

The optional refusal grounds are laid down in article 2:14 WETS. Optional means that the competent authority is granted certain discretion to weigh the different interests in each concrete case, which may lead to a decision not to refuse the recognition of the judicial decision even if this is possible.[364]The recognition of the judicial decision may be refused if:

1. The act for which the custodial measure has been imposed is considered to be committed wholly or partially on Dutch territory or outside the Netherlands on board of a Dutch vessel or aircraft.[365] Or the act for which the custodial sentence has been imposed was committed outside the territory of the issuing state and on the basis of Dutch law no prosecution would be possible if the act would have been committed outside the Netherlands.[366]
2. When the judicial decision is received, less than six months of the imposed custodial measure still need to be executed.[367]

Article 9(1)(j) FD EAW states that the executing state may refuse to enforce a sentence if before a decision is taken in accordance with Article 12(1), it makes a request, in accordance with Article 18(3), and the issuing State does not consent, in accordance with Article 18(2)(g), to the person concerned being prosecuted, sentenced or otherwise deprived of his or her liberty in the executing State for an offence committed prior to the transfer other than that for which the person was transferred. However, this provision has not been implemented as a refusal ground in either article 2:13 or 2:14 WETS.

Furthermore, the minister of security and justice may together with the issuing authority agree to a partial recognition of the judicial decision.[368] This is only possible if the issuing authority is able to explain which part of the sentence is not affected by an applicable refusal ground. In addition, the minister of security and justice may subject the partial recognition to the condition that after the execution in the Netherlands, the sentence is not further executed in the issuing state.[369]

e) What role do (possible) fundamental rights violations have in the in the FD 2008/909?

Past violations

Contrary to the Surrender Act, the WETS does not contain an explicit refusal ground based on fundamental rights. However, it follows from the parliamentary documentation that the minister will refuse the recognition and execution of a foreign verdict in case concrete indications exist that during the procedure which resulted in the verdict fundamental rights were flagrantly violated.[370] This refusal ground exists, because the Netherlands cannot execute a foreign verdict which violates its own and international standards for the execution of a sanction. In such cases the Netherlands does not have the right to detain the person concerned.[371]

A concrete indication that flagrant violations of fundamental rights took place during the proceedings which led to the judicial decision can be a judgement of the ECtHR in which the Court states that such a flagrant violation indeed took place in the issuing state.[372] The mere statement of

[363] *Kamerstukken II* 2010/11, 32885, 3, p. 10.
[364] *Kamerstukken II* 2010/11, 32885, 3, p. 10.
[365] Art 2:14(1)(a)(1°) WETS. The recognition may only be refused after the competent authority of the issuing state has been given the opportunity to provide information on the matter (art 2:14(2) WETS).
[366] Art 2:14(1)(a)(2°) WETS. The recognition may only be refused after the competent authority of the issuing state has been given the opportunity to provide information on the matter (art 2:14(2) WETS).
[367] Art 2:14(1)(b) WETS.
[368] Art 2:12(2) WETS.
[369] Art 2:12(2) WETS.
[370] *Kamerstukken I* 2011/12, 32885, C, p. 10.
[371] *Kamerstukken I* 2011/12, 32885, C, p. 10.
[372] *Kamerstukken I* 2011/12, 32885, C, p. 10.

the convicted person that his fundamental rights were violated is not sufficient to refuse the execution of the judicial decision. Furthermore, it is the minister of security and justice who has the power to refuse the execution of the foreign judicial decision, because of a flagrant violation of fundamental rights and not the Court of Appeal of Arnhem Leeuwarden.[373] The latter may only consider the possible existence of mandatory refusal grounds.[374]

However, the parliamentary documentation also states that this refusal ground will only be of limited relevance for WETS proceedings. This is for instance because, it may be expected of the suspect that he raises his fundamental rights arguments during the criminal procedure itself and before the judge who decides on the merits of his case. In case this judge does not agree with his arguments, he can go to the court in Strasbourg. In this light it is unlikely that a convicted person will complain about violations of his fundamental rights during the proceedings on the transfer of his sentence.[375]

Furthermore, the WETS contains an obligatory refusal ground relating to *in absentia* proceedings.[376] If the convicted person was not present at his trial in the issuing state which resulted in the judicial decision, the Netherlands will refuse its recognition and execution unless one of the exceptions, such as representation by his or her lawyer at the trial, applies.[377] The exceptions are based on the case law of the ECtHR.[378]

Violations of procedural safeguards

The WETS does not contain a refusal ground on the basis of which the Dutch minister may refuse to recognize and execute a custodial sanction, because a procedural safeguard, such as the right to an attorney, has been violated during the transfer proceedings. Furthermore, the ECtHR has also stated in relation to the Convention on the Transfer of Sentenced Persons that article 6 ECHR is in principle not applicable to these transfer proceedings.[379] The general rule is also that article 6 ECHR is not applicable if the procedure does not involve the determination of the applicant's civil rights and obligations or of a criminal charge against him within the meaning of Article 6 of the Convention.[380] Hence it is unlikely that article 6 ECHR is applicable to WETS proceedings.[381]

Risk of future violations

As stated before the transfer of the custodial sentence to the executing state needs to contribute to the resocialization of the convicted person in the executing state.[382] Besides the nationality of the convicted person and his place of residence, the parliamentary documentation does not clearly name any other criteria for deciding on the most suited place for the resocialization of the convicted person. However, if it is relevant for the question of the future social reintegration of the convicted person the minister may probably take the risk of future violations of human rights in the executing state into account. No explicit refusal ground on the basis of possible future violations exists though, but as stated before the ECHR is directly applicable in the Netherlands.[383]

[373] *Kamerstukken I* 2011/12, 32885, C, p. 10.
[374] Art 2:11(3)(a) WETS.
[375] *Kamerstukken I* 2011/12, 32885, C, p. 9.
[376] Art 2:13(1)(h)(1°-3°) WETS.
[377] Art 2:13(1)(h)(2°-3°) WETS.
[378] *Kamerstukken II* 2010/11, 32885, 3, p. 38.
[379] Application no 27801/05 *Smith v Germany*, Judgment (5th Section) of 1 April 2010, CE:ECHR:2010:0401JUD002780105; Application no 27804/05 *Buijen v Germany*, Judgment (5th Section) of 1 April 2010, CE:ECHR:2010:0401JUD002780405; Conclusion AG Aben in HR 14 October 2014, ECLI:NL:PHR:2014:2134.
[380] Application no 41138/05 *Monedero Angora v Spain*, Decision (3rd Section) of 7 October 2008, CE:ECHR:2008:1007DEC004113805.
[381] See also Conclusion AG Aben in HR 14 October 2014, ECLI:NL:PHR:2014:2134.
[382] Art 2:24(d) WETS.
[383] Art 93 Gw.

When the Netherlands is the executing state the minister will also consider whether the transfer of the sentence to the Netherlands contributes to the person's social rehabilitation. The legislator has stated that in this regard that the purpose of the transfer of a sentence to the Netherlands is not to take that person away from less favorable detention conditions. Less favorable detention conditions do therefore not seem to be a reason to assume that the execution of the sanction by the Netherlands will contribute to the resocialization of the convicted person.[384]

3.3. FD 2008/947

a) Safeguards of the convicted person

This subparagraph discusses subsequently the safeguards concerning the consent of the sentenced person, the provision of information to the sentenced person, the language of the certificate and the legal representation.

In the context of safeguards of the convicted person, there are no procedures designated in the Dutch legislation which safeguard that the consent of the sentenced person must be given for the transfer of the judgement.

According to the empirical part of this research, if a requested person says that he does not want to be transferred to this country, the public prosecutor will not transfer this person (R4). This is the so-called consent requirement (*instemmingsvereiste*). According to this public prosecutor the consent requirement is not explicitly named in the law; if a requested person agrees with his punishment, the Dutch prosecutor automatically assumes that the person agrees with the transfer. If the requested person does not want the sanction to be executed in the executing state, the sentence will not be transferred.

There are safeguards implemented in the WETS to ensure the information provision to the sentenced person on issues relating to the application of the FD. Article 3:10 sub 3 WETS requires the DPPO to inform the convict about his decision to recognize or refuse a judgement. This information has to be provided written as well as motivated. It is possible for the competent authority in the issuing state to revoke the certificate, after the authority is informed about the decision of the DPPO. The convict will be informed about the decision of the DPPO, only after the period in which it is possible for the issuing state to withdrawal the certificate has terminated.

There is no legal obligation in the WETS to provide the concerned person with information about the possibility to be transferred to another Member State in particular to a Member State in which the sentenced person is lawfully and ordinarily residing. The public prosecutor (R4) says that the provision of information is very limited. "Information about this can be found on the Internet or should be provided by the lawyer" (R4). The public prosecutor therefore does not give any information about the possibility to be transferred to another Member State. The prosecutor (R4) admits that it would be an improvement if the requested person that has his lawful and ordinary residing in another Member State would always be informed of this possibility.

However, in several judgements concerned with a foreign suspect from another European country, the judge referred to the existence of the WETS and the possibility for the suspect to be extradited on the basis of this Act. In the motivation of a judgement of the Court of First Instance of Rotterdam, the judge referred to the existence of the possibility to transfer community services to other European Member States.[385]

The certificate which is combined with the judgement has to be translated into Dutch or English.[386] The Netherlands has made a declaration on the basis of article 23 sub 1 of FD 2008/947

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[384] *Kamerstukken I* 2011/12, 32885, C, p. 8-9.

[385] Rb. Rotterdam, 7 June 2015, ECLI:NL:RBROT:2015:4814 (District Court of Rotterdam). 'Considering the WETS, the possiblity exists to transfer community punishment orders (*taakstraffen*) to other member states of the European Union.'

[386] Article 3:8(3) WETS.

that it accepts certificates which are in English.[387] The format of the certificate, as referred to in article 6 FD 2008/947, is translated into Dutch and laid down in article 3 of the Implementing Decision Mutual Recognition and execution of custodial and conditional sentences. Sub e of the certificate contains questions about information of the person on which the judgement is applicable. One of the questions asks which language or languages the concerned person understands.

Accordingly, article 3:8 sub 3 WETS states that if the certificate is not set in Dutch or English, the public prosecutor requests the competent authority in the issuing state yet to translate the declaration. The public prosecutor is bound by a certain period to decide about the recognition, this period contains sixty days after the certificate is received, as laid down in article 3:9 sub 1 WETS. An exception can be made to postpone this period, namely until a translation is available, article 3:9 sub 2 (b).

The experience of the prosecutor (R4) is that the certificates are most of the times in English. However, sometimes countries send their documents in Spanish of French: "we have never send these documents back, but we do say we want to receive these documents in English."

Chapter 3 of the WETS does not contain an obligation to provide legal representation for the person concerned during the proceedings involving mutual recognition of a judgement imposing probation decisions or alternative sanctions. This information is moreover confirmed by a public prosecutor (R4) working within the field of the WETS.

b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize

The application of double incrimination is Article 10(1) of the FD 2008/947 excludes to a certain extent the application of double incrimination. The Netherlands has made the declaration to derogate from article 10(1) of FD 2008/947 which to a certain extent excludes this application of the double criminality requirement. Although FD 2008/947 does not concern custodial sentences, the sentences which it do include can result in custodial sentences. The conditional and alternative sanctions which fall within the scope of the FD can result in profound and long forms of measures depriving a person of his or her liberty. Against this background, the Netherlands made a declaration as referred to in article 10(4) of the FD 2008/947 to derogate from article 10(1) FD 2008/947, and will therefore continue to evaluate whether the conditional or alternative sanction is imposed on an omission which is also punishable according to Dutch law.[388] When there is no criminality according to Dutch law, the recognition of the judgement must be refused on the basis of article 3:12, 1(f) WETS. The competent authority to decide about whether the act or omission for which the sanction was imposed is punishable according to Dutch law is the Appeal Court of Arnhem-Leeuwarden.[389]

Within the framework of mutual recognition a positive decision to acknowledge and execute the judgement is the primary rule. This primary rule knows some exceptions.[390] The grounds to refuse mutual recognition are provided for article 3:12 WETS. Although the FD 2008/947 only contains optional refusal grounds, the WETS makes a distinction between mandatory and optional refusal grounds. The mandatory refusal grounds concern the cases in which recognition of the judgement must be refused, the optional refusal grounds concern the cases in which there is discretion to make a consideration of the interests in each concrete case which can eventually result in the decision to refuse recognition.[391]

The mandatory refusal grounds are laid down in article 3:12 sub 1 a-h WETS. This article rules that the Public Prosecutor shall refuse the recognition of the judgements if:

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[387] J.T.J. Struyker Boudier, 'Commentaar op artikel 3:1 Wet van 12 juli 2012' in D.J.M.W. Paridaens and P.A.M. Verrest (eds.*), Tekst & Commentaar: Internationaal Strafrecht* (Kluwer, Deventer 2015).

[388] *Kamerstukken II*, 2010/11, 32885, 3.

[389] Art 67 Judiciary (Organization) Act (*Wet op de rechterlijke organisatie*); Art 2:11(3) WETS.

[390] *Kamerstukken II*, 2010/11, 32885, 3, p. 9.

[391] *Kamerstukken II*, 2010/11, 32885, 3.

a. The certificate is not correctly submitted, is incomplete or apparently not in accordance with the judgement and a request, as referred to in article 3:8 sub 4, is not met within a reasonable period;
b. When the conditions for recognition are not met, as referred to in article 3:4;
c. The convicted had not yet reached the age of 12 when the crime was committed;
d. The execution of the judgement is incompatible with an, according to the Dutch law, applicable immunity;
e. The execution of a judgement is incompatible with a principle which is the basis of article 68 Sr and article 255 sub 1 Sv; [392]
f. The fact which the judgement is about, in the case the fact is committed in the Netherlands, is not punishable according to the Dutch criminal law;
g. according to the Dutch law, jurisdiction could be carried out over the fact concerned in the judgement and the time limit of the right to execute the imposed sentence would be expired according to Dutch law;
h. The certificate shows that:
1º the convicted is not in person or via an according to national law competent representative informed, in accordance with the law of the issuing state, of the right to contest his case, and of the terms in which the remedy has to be used;
2º the convicted is not appeared in person during the court hearing which lead to the judgement; unless it is mentioned in the certificate that the convict, in accordance with the procedural regulations of the issuing state:
i. The imposed obligation concerns a medical or therapeutic treatment which cannot be executed in accordance with Dutch law nor within the framework of the Dutch system of healthcare.

The Netherlands made mandatory refusal grounds from the following optional refusal grounds as laid down in Article 11 FD 2008/947: Article 11(1)(a) FD 2008/947 concerning the certificate which is added to the judgement is made mandatory in Article 3:12 sub 1(a)WETS; Article 11(1)(b) 2008/947 concerning the compliance of certain criteria is made mandatory in Article 3:12 sub 1(b) WETS; Article 11(1) (c) 2008/947 concerning safeguards of the *ne bis in idem* principle is made mandatory in Article 3:12 sub 1(e)WETS; Article 11(1)(d) 2008/947 is made mandatory in Article 3:12 sub 1(f) WETS; Article 11(1)(e) 2008/947 concerning the statute-barred enforcement of the sentence is made mandatory in Article 3:12 sub 1(g)WETS; Article 11(1)(f) 2008/947 concerning immunity is made mandatory in Article 3:12 sub 1(d)WETS; Article 11(1)(g) 2008/947 concerning the age of the sentenced person is made mandatory in Article 3:12 sub 1(c)WETS; Article 11(1)(h) 2008/947 concerning trial *in absentia* is made mandatory in Article 3:12 sub 1(h)WETS; and Article 11(1)(i) 2008/947 concerning medical/therapeutic treatment is made mandatory in Article 3:12 sub 1(i)WETS.

Article 3:12 sub 2 WETS rules the public prosecutor only refuses the recognition on the basis of article 13:2 sub 1 a,b,e and i, after the competent authority of the issuing Member State has been given the opportunity to provide information concerning the case. If this new information does not provide for any new views of the public prosecutor, then he will refuse the recognition.[393]

The optional refusal grounds are laid down in article 3:13 sub 1 a-b WETS. This article rules that the public prosecutor can (*kan)* refuse recognition if:
a. the crime for which the sentence is imposed:
1º is considered to be committed whole or partially on Dutch territory or outside the Netherlands on board of a Dutch vessel or aircraft; or

[392] Art 68 Sr and art 255 sub 1 Sv contain a ruling which protect the *ne bis in idem* principle.
[393] Struyker Boudier (n 387).

2º is committed outside the territory of the issuing state, while according to Dutch law no prosecution may be set in case the crime would be committed outside the Netherlands.
b. the imposed community service *(taakstraf)* has a shorter duration than eighty hours, or the imposed duty or the probation period has a shorter duration than six months.

The refusal ground under article 13 sub 1 under b, can be used in cases when it is foreseeable that the efforts which have to be made to recognition and execute this community service are not in a balanced relation with the duration of the imposed community service. The possibility of this refusal ground is referred to in consideration 18 of the preamble of the FD 2008/947, which states that the recognition may be refused if the imposed obligation concerns a community service, which normally is executed within six months. In the Netherlands it is assumed that a community service with a duration of eighty hours can be performed within a period of six months.[394]

The Dutch law does not specifically regulate the consent of the offender to issue the transfer decision and to recognize it. A provision on a requirement of consent is thus lacking. Moreover, the judge is not given any particular role within the framework of recognition of judgements in which a probation measure or alternative sanction is imposed. The reason for this is that the underlying idea of the FD 2008/947 constitutes the belief that the offender himself/herself has asked for imposition of a conditional or alternative sentence, at least, has declared to be prepared to comply with the imposed conditions or with the alternative sanction and thus agrees with its transfer.[395]

Although no specific article exists providing a ruling on the consent of the offender, practice shows that the view of the offender is given consideration. A respondent working within this field (R4) explained that the judgement will only be sent to another Member State if the offender has returned or wants to return to that Member State. The respondent explained that she will not issue the request if the offender declares that he does not want to be transferred. It can be said that the initiative of the offender will be the main drive for FD 2008/947 to apply.[396]

The situation that the convict will be transferred to the country where the custodial or conditional sentences will be executed cannot occur without the consent of the convict. For this reason, the Dutch government did not regard it necessary to appoint a specific involvement for a judge regarding the legal protection in the procedure concerning the transfer of conditional or alternative sentences.[397]

Imposition of article 9(2)-(4) FD 2008/947

Article 9(2)-(4) FD 2008/947 contains a provision which provides regulation on the
maximum duration of probation measure, alternative sanction or probation period when adaptation of the duration of the measure or period is necessary. This provision is imposed through the article 3:11 WETS, which lays down the regulation on the adaption of maximum duration of probation measure, alternative sanction or probation period

The possibilities to adjust a sanction are limited to those cases in which there is incompatibility with the executing state about the nature and or duration of the sanction. Because many differences exist throughout Europe concerning the rules on conditional and alternative sanctions, flexibility is required in adjusting a sentence to make transfer of the execution possible.[398]

Article 3:11 sub 1º WETS states that when the probation measure, alternative sanction or probation period has a longer duration than the maximum duration which is allowed on the basis of Dutch law, DPPO will lower the duration to that maximum. The decision concerning the

394 Struyker Boudier (n 387).
395 *Kamerstukken II* 2010/11, 32885, 3, p. 23.
396 *Kamerstukken II* 2010/11, 32885, 3, p. 23.
397 *Kamerstukken II* 2010/11, 32885, 3, p. 23.
398 *Kamerstukken II* 2010/11, 32885, 3.

compatibility of the imposed conditional or alternative sanction in a foreign state with the Dutch law is solely appointed to the DPPO. Because this institution is regarded to have all the required knowledge on this topic, the legislator did not find it necessary to appoint a specific role to the judge in this process.[399]

Article 3:11 sub 2 WETS rules that when the nature of the obligation which is imposed on the convict, or when the custodial sentence which can be imposed when this obligation is not complied with, is incompatible with Dutch law, the DPPO will adjust this obligation or custodial sentence in such a way that the execution of this obligation will be possible in the Netherlands in a way which corresponds as much as possible with the obligation or the custodial sentence as imposed in the executing state. An example of this possibility of adjustment concerns the in the foreign state imposed community service (*taakstraf*), because in the Netherlands the community service concerns an independent sentence. So when a community service is imposed as a special condition to a sentence in a foreign state, the public prosecutor in the Netherlands will adjust this special condition into an independent sentence, which will be executed according to the Dutch law on community services.[400] Article 3:11 sub 3 WETS rules that the adjustment will in no case concern an aggravation of the obligation, the probation period, the duration in which the obligation has to be executed or the custodial sentence, imposed in the executing state.

The Netherlands made a declaration that as an executing State it will refuse to assume the responsibility provided for in article 14(1) (b) and (c) FD 2008/947. [401]
The categories of these cases are laid down in article 3:16 WETS. It consists of those cases in which the competence to execute the judgement can be transferred back to the issuing Member State.

These cases include those the case that the convict evades supervision of his/her imposed conditions or when the convict no longer has his/her residence in the Netherlands (article 3:16 sub 1 under a WETS), or when new criminal proceedings are brought against the convict in the issuing member state and the competent authority of that member state has request the transfer (article 3:16 sub 1 under b WETS). Sub 2 of article 3:16 WETS lays down the cases in which the right to execute the judgement in the Netherlands ends. These cases concern; when the judgement is acknowledged, however the the certificate is withdrawn by the competent authority in the issuing member state (article 3:16 sub 2 under a WETS), the responsibility for the execution by the DPPO is transferred to the issuing Member State in case of application of the first sub (article 3:16 sub 2 under b WETS). The justification for ending the right to execute when the certificate is withdrawn by the issuing state, is the fact that the certificate forms the basis for the recognition and thus when this is withdrawn the basis to perform will be expired.[402]

c) What role do (possible) fundamental rights violations have in the FD 2008/947?

The WETS does not allow for a specific provision on a general ground for refusal or suspension based on fundamental rights. It moreover does not provide for the possibility of refusing recognition and enforcement because of violations of fundamental rights has occurred in the issuing country. Article 3:12 WETS sub 1(e) does contain the *ne bis in idem* principle, pursuant to which the public prosecutor will not recognize a judgement when the execution of the sentence has already taken place.

The Netherlands does not specifically provide for a possibility to refuse recognition and enforcement of a judgement or suspension thereof due to a violation of procedural safeguards in the course of the mutual recognition proceedings.

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[399] *Kamerstukken II* 2010/11, 32885, 3.
[400] J.T.J. Struyker Boudier, 'Commentaar op artikel 3:15, 3:16 WETS' in D.J.M.W. Paridaens and P.A.M. Verrest (eds.), *Tekst en Commentaar: Internationaal Strafrecht* (Kluwer, Deventer 2015).
[401] Struyker Boudier (n 400).
[402] Struyker Boudier (n 400).

The WETS contains several provisions on procedural safeguards. The mandatory refusal grounds include refusal grounds which concern procedural issues. In article 3:12 1 sub a WETS, the recognition will be refused if the certificate is not submitted, not complete, apparently not in accordance with the judgement and not within a reasonable period to the request. Furthermore, article 3:12 h sub 1° and 2° WETS concern procedural issues. As sub 1° prohibits the recognition in case the convict is, not in accordance with the law of the executing state in person or via an according to national law competent representative, informed of his right to contest the case, and the terms in which that appeal must be used. Sub 2° prohibits the recognition if the convict is not appeared during the trial which lead to the judgement, unless it is mentioned in the certificate that the convict, in accordance with the procedural regulations of the executing state; was summoned in time and in person and informed about the time and place of the trial which lead to the judgement or was informed about the trial and had authorized a lawyer which conducted a defence at the court hearing or after the judgement was brought under his knowledge and he was expressly informed about his right on a default judgement or an appeal procedure.

In the interviews the prosecutor (R4) is asked why fundamental rights play such a minor role at this stage. She answers the following: "It makes a great difference that we are not talking about detention. This FD is all about how to stimulate resocialisation, right to family life. I would rather argue that it enhances the fundamental rights!" She therefore reacts negatively on the question if there should be a refusal ground concerning fundamental rights, because she does not see a possibility to find out if these fundamental rights have been violated. If a person has agreed to be transferred to another country in which the execution of their sentence of community service is, she assumes that they will keep the imposed terms and will not be imprisoned. Consequently, the fundamental rights of these convicted persons will not be violated.

4. In sum: how legal reality relates to the empirical conclusions

This report has shown that although in terms of its status, its embeddedness in the Dutch legal order, its functioning and execution, the underlying research on the state of affairs in casu the application of the EAW in the Netherlands (and in particular: the transfer of prisoners according to the principle of mutual recognition of judicial decisions in criminal matters and the protection of individuals' fundamental rights) is quite positive, some empirical findings show that there is still room for progress.

A first and overarching observation from the empirical part of this research concerns the **discrepancy between legal and empirical reality**. The assumption that underlies the EAW – namely that member states mutually trust upon each other's legal systems to uphold and guarantee fundamental human rights – contrasts with empirical reality in an important way.

As this research has shown, the assumed *trust is often not there*; the assumption of trust, thus, in everyday legal praxis could at best be rephrased as 'doubt' and at worst as 'distrust' towards certain countries' legal systems. This is due to the perception among the Dutch legal actors interviewed, that other countries' socio-economic and political positions might find their reflection in the prison conditions in those member states. Moreover, trust would imply that things like corruption are effectively dealt with in every member state, which not every legal actor is convinced of. Last but not least, culturally different interpretations of, for example, the word hygiene, can have great impact on the extent to which judges (for instance) actually *believe* or *have trust in* mutual recognition of prison conditions being conform the standards set by fundamental rights instruments like the ECHR and CFR. This trust and confidence, however, is of fundamental importance for the working of the EAW, as Morgan (2004) already claimed before us:

> '(…) mutual recognition can only operate effectively in a spirit of confidence, whereby not only the judicial authorities, but all actors in the criminal process

> see decisions of the judicial authorities of other Member States as equivalent to their own and *do not call in question their judicial capacity and respect for fair trial rights*.' [403]

The most important reason for this doubt or distrust is that *human rights may actually* ***not*** *be upheld*, or not to the extent Dutch legal actors would expect them to. Although in the Netherlands, article 11 of the OLW provides for grounds to refuse a EAW if fundamental human rights are not duly respected, the burden of proof is experienced by the interviewed lawyers as very heavy. Refusals generally do not reach the requirements; a 'flagrant denial' of human rights is very hard to prove. Since the *Aranyosi* and *Câldâraru* judgements it is possible to ask questions considering, for example, prison conditions in issuing states. The fact that this possibility is quite often resorted to in the Netherlands proves that legal actors indeed have doubts on the guaranteed respect for fundamental rights by other countries.

Detained respondents R8 and R10 felt that executing countries adapt their punishments to those of the issuing state. If the issuing state applies a very long prison sentence, the executing country cannot but follow that judgement to some extent, if not to 'lose face'. "The fact that I got the maximum punishment in the Netherlands is due to Europe. In England [where he was judged on first instance] they have bizarre high punishments, and the Netherlands go with that flow as we are the lapdog of Europe. If I would have been caught in the Netherlands, I would have gotten six to eight years, but they cannot sell that verdict to the English who gave me 35 years" (R8). Although their observations reflect a lack of understanding of how justice works in the EU, it cannot be discarded as irrelevant. Misunderstandings like this do affect the felt legitimacy of the transfer by its subjects.

Another overarching observation concerns the **legitimacy of the EAW**, as felt by the individuals subjected to it. This has everything to do with their *access to information* which is not always up to standard. The examples in this report show in detail how certain information was not available or not accessible to the prisoners interviewed in this research. Their point is well summarized by interviewed detainee R10 who comments on the provision of information:

> 'The Netherlands are not really doing anything for you… Of course it is my own fault, but some legal advice would have been nice. Especially right after you've been arrested, you feel anxious and insecure. I have been detained before, but being detained in a foreign country is different. […] Moreover, [by investing more energy in giving good information] you will prevent that people are going to say: But I did not know that!'

Practical concerns in the Dutch legal system may play havoc with the regulations that should guarantee the timely and sufficient providing of information. Actors that are readily available to provide information may not be available in time (e.g. lawyers) or may not be up to date about EAW regulations (e.g. police officers). Even if information is correctly and timely given, the kind of information might not be (sufficiently) understandable in terms of wording, sort of information (oral, on paper, language et cetera), or timing. Detained respondents, consequently, commented that they got most of their information from fellow detainees. If that is so, we can imagine a great risk of faulty or no longer up to date information.
This lack of proper information may lead to the fact that individuals subject to a transfer for the execution of their sentence, believe they have more rights than they actually do. They may believe

[403] C. Morgan (2004) The European Arrest Warrant and Defendants' Rights: An Overview. In: Blekxtoon, R. (ed.), *Handbook on the European Arrest Warrant*. Cambridge: Cambridge University Press. (our emphasis)

that they will appear before a Dutch judge who will re-evaluate their sentence. As an example: one of the interviewed detainees assumed that the Dutch judge would 'finally take all the circumstances into consideration' once he would arrive in the Netherlands. He thought that he would 'finally get a normal (read: shorter) sentence' and was disappointed when the judgement remained unchanged. Both detainees interviewed on their experiences surrounding their transfers were of the opinion that they would not have had such high prison sentences if they would have been sentenced in the Netherlands. This points towards a lack of knowledge or understanding, on the side of the detainee, of the fact that the transfer of convicted persons is a formal (WETS) procedure; the detainee will not appear before a judge on arrival in the Netherlands and, thus, the execution of his sentence is merely transferred; not re-evaluated. In the information given to transferred persons more explanation – in whatever form: written, orally or other – is necessary to make sure the transferred individual knows what he or she can and cannot expect from the procedure, if only in order to ensure the felt legitimacy of the transfer to the person subjected to it.

We conclude, thus, that the empirical realities of a) legal actors not always feeling mutual trust (but rather 'doubt' or 'distrust') despite legal reality defining mutual trust as a fait accompli, due to b) fundamental rights being insufficiently guaranteed in practice according to some legal actors, and c) individuals subjected to a transfer not always being sufficiently knowledgeable about their position in the surrender proceedings in order to effectively claim their rights (and, hence, not feeling the decisions taken on their case to be legitimate) should be addressed further. If the AFSJ aims to be more than an empty shell to its citizens, it is of the utmost importance that information on EAW procedures is (timely) available, understandable, and embedded in an overall understanding by the individual subjected to a EAW, of his or her legal position within this procedure – a far-stretching goal to which this research project has aimed to make a modest contribution.