

Chapter 6

Country Report “the Netherlands”



Michiel Luchtman

6.1 Overview

6.1.1 *Judicial Protection in the Criminal Justice System*

The Dutch Constitution (*Grondwet*) does not entail a provision guaranteeing the rights to a fair trial and an effective remedy, though there are discussions on including such a guarantee in the Constitution. That does not mean, however, that citizens are currently left with empty hands. In the Dutch monist Constitution, Articles 93 and 94 stipulate the following:

Article 93 – Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94 – Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.¹

On the basis of these provisions, Articles 6 and 13 ECHR have direct effect in the Netherlands, meaning that they can be invoked by citizens in legal proceedings and that, should the circumstances arise, conflicting national laws are not to be applied. The relevance of these provisions is tremendous because Dutch courts are not allowed to assess statutory laws in light of the Constitution (in case it would have

¹The Constitution of the Kingdom of the Netherlands 2018, Ministry of the Interior and Kingdom Relations.

M. Luchtman (✉)
Utrecht University, Faculty of Law, Economics and Governance, Utrecht, The Netherlands

a fair trial guarantee).² EU law, incidentally, has its effects in the Dutch legal order by virtue of (the supremacy of) EU law itself, not via the mentioned articles of the Constitution.³

The absence of a constitutional guarantee does not lead to significant loopholes in legal protection. In the Dutch legal system, civil courts have a residual competence and are competent to hear cases where no specific criminal or administrative remedies are available. Civil courts will, on the basis of a long-standing interpretation of Article 112 of the Constitution,⁴ always hear a case when one claims a violation of one's (civil) rights. Violations of those rights constitute a tort (*onrechtmatige daad*, Art. 6:162 Civil Code). As the decisions of civil courts may interfere with decisions in subsequent criminal or administrative procedures, their scope of review is, in principle, a marginal one; the civil courts will only establish a tort if it is proven beyond reasonable doubt (*buiten redelijke twijfel*) that the Dutch state acted unlawfully.

The civil courts' residual competence also opens up the route to pro-active protection via civil summary procedures (*kort geding*). In such procedures, the Dutch state may, for instance, be ordered to do something or to refrain from doing something, for instance transferring a person to the requested state. This residual function plays a particularly important role in cases of international legal assistance (in the wide sense), certainly where acts of the executive are concerned. The Supreme Court (*Hoge Raad* (HR)) has held, incidentally, that in cases where rights guaranteed by the European Convention on Human Rights (ECHR) are in play, the review exercised by these civil courts is 'full' and not a marginal assessment of the actions of the executive. That is because those rights are 'binding on all persons by virtue of their contents'.⁵

The provisions of the ECHR do not make a distinction between purely national and transnational proceedings *per se*. More or less in line with the findings of the European Court of Human Rights,⁶ the Supreme Court has consequently held that Dutch courts are responsible for guaranteeing the fairness of (Dutch) criminal proceedings and thus for the use of foreign materials in such proceedings.⁷ The

²Art. 120 Constitution reads: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

³Supreme Court of the Netherlands, judgment of 2 November 2004, *NJ* 2005/80.

⁴The (unofficial) English version of Art. 112 (1) Constitution reads: 'The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.'

⁵Supreme Court of the Netherlands, judgment of 15 September 2006, ECLI:NL:HR:2006:AV7387.

⁶European Court of Human Rights (ECtHR), judgment of 27 June 2000, Application no. 43286/98 (*Echeverri Rodriguez v. The Netherlands*): '[T]he subsequent use of (...) information [obtained by the investigating authorities from sources such as foreign criminal investigations] can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected. However, the applicant has not substantiated in any way that such reasons existed in the instant case.'

⁷Supreme Court of the Netherlands, judgment of 5 October 2010, ECLI:NL:HR:2010:BL5629, discussed in more detail below. The wordings of the Supreme Court does not appear to be fully in

foregoing does not mean, however, that Dutch courts consider themselves generally competent to assess actions of foreign authorities, as will be discussed in more detail below.

6.1.2 Institutional and Procedural Framework of Transnational Criminal Proceedings

6.1.2.1 Incoming Requests for Assistance

Incoming mutual legal assistance (MLA) proceedings usually involve the prosecution service, the courts (including examining magistrates) and the Minister of Justice and Security. Though there are similarities between the procedures, each type of assistance follows its own procedures.

6.1.2.1.1 Extradition Proceedings⁸

As the oldest form of international cooperation, extradition law clearly bears the trademarks of the dual character of extradition procedures. The procedure is a complicated interplay between the Minister of Justice and Security, the Public Prosecution Service (which upon transmission of the request by the Ministry seizes the extradition court and then acts as the representative of the Dutch state and also, to a certain extent, as that of the requesting state),⁹ the extradition chamber of the district court (*Rechtbank*) and, possibly, the Supreme Court (*Hoge Raad*).¹⁰ Whereas the extradition court assesses whether extradition may be declared admissible (*toelaatbaar verklaren*), the Minister takes the decision to grant extradition (*uitlevering toestaan*). The Minister is bound by a negative admissibility ruling of the extradition courts. The Minister’s decision is not subject to administrative review (Art. 8:5 *Algemene Wet Bestuursrecht* (Awb)/General Administrative Law Act (GALA)). That is why the civil courts offer residual redress against the decision of the Minister (district courts, appellate courts and the Supreme Court). On average,

line with those of the European Court of Human Rights in the previous footnote: ‘[D]e taak van de Nederlandse strafrechter [is] ertoe beperkt te waarborgen de wijze waarop van de resultaten van dit onderzoek in de strafzaak tegen de verdachte gebruik wordt gemaakt, geen inbreuk maakt op zijn recht op een eerlijk proces, zoals bedoeld in art. 6, eerste lid, EVRM.’

⁸I have disregarded the expedited extradition procedure in this chapter; see Art. 41 *et seq.* Extradition Act.

⁹Glerum and Rozemond (2015), p. 182.

¹⁰Appeal on legal grounds (*cassatie*) against the admissibility decision is possible with the Supreme Court of the Netherlands; Art. 31 (1) EA. If granted, the Supreme Court must do what the district court should have done. It then acts as the competent extradition court.

extradition procedures in which all stages of the proceedings were followed last for about 1.5 years.

The whole process is streamlined by specialized units within the executive and, sometimes, the judiciary. Within the Ministry, a special centralized department handles international criminal cooperation, specifically extradition and mutual legal assistance. This central authority is the *Afdeling Internationale Rechtshulp in Strafzaken* (AIRS). It is complemented by ten decentralized Centres for International Legal Assistance in criminal matters (*Internationale Rechtshulpcentra* (IRCs)), vested within local branches of the Dutch Prosecution Service.¹¹ These centres comprise of representatives of the Prosecution Service and the police. All incoming/outgoing requests for assistance are, as a rule, routed via these specialized services.¹² Requests for mutual legal assistance are, moreover, registered in the *Landelijke uniform registratiesysteem inzake internationale rechtshulp in strafzaken* (LURIS). In the wake of the so-called *Van Laarhoven* case,¹³ the mutual responsibilities of the involved actors have recently been reiterated and clarified in the *Protocol Samenwerking bij Internationale Rechtshulp*.¹⁴

As opposed to outgoing requests for extradition (*inlevering*), incoming requests must always be based on a treaty.¹⁵ That treaty requirement is said to be a constitutional right for individuals¹⁶ as the existence of a treaty expresses a minimum level of trust in the legal system of the other state. A treaty presupposes both the presence of equivalent standards in the other state as well as the basis for a rule of non-inquiry (*vertrouwensregel*). More recent case law implies that certainly for non-absolute rights, the mutual applicability of fundamental rights treaties guaranteeing a right to an effective remedy has limited the scope of review of Dutch authorities further.¹⁷

After an initial check of the request,¹⁸ the Ministry will forward it to the Prosecution Service, who subsequently seizes the court. According to Article 26 of the Extradition Act (EA), the extradition court must examine, first, the identity of the person claimed. It also examines whether all required documents, as required by the treaty, have been produced (*genoegzaamheid van de stukken*) and whether all formal conditions prescribed by the treaty and law are fulfilled. The latter entails, particularly, an examination of the conditions for extradition (including the condition of qualified double criminality) and the presence of refusal grounds for which the courts are competent.¹⁹ Because the procedure in extradition cases has close links

¹¹On the IRC's, see also Van Wijk (2017), p. 120 *et seq.*

¹²More information is found (only in Dutch, astonishingly) via <https://www.internationalerechtshulp.nl/>, (Accessed 4 June 2019).

¹³*Infra* note 181.

¹⁴The Protocol is attached to *Kamerstukken II* 2019/20, 31753, 191.

¹⁵Art. 2 (3) of the Constitution; Articles 2 and 51a EA.

¹⁶Swart (1997), p. 93.

¹⁷In extenso, Kraniotis (2016), p. 165 *et seq.*

¹⁸Articles 19 and 20 EA.

¹⁹Glerum and Rozemond (2015), p. 182.

to the criminal procedure, a great number of relevant provisions of the Code of Criminal Procedure (CCP, *Wetboek van Strafvordering*) apply accordingly to it, including the right to silence.²⁰

Though it is not entirely clear, the examination by the court does not entail the advisory part of its work.²¹ Extradition courts also advise the Minister, when extradition is declared admissible, in his or her decision-making process.²² The latter process includes an assessment of the (often optional or conditional) grounds for refusal, included in the treaty, case law or the Extradition Act.²³ As said, the Minister is not bound by a positive decision of the extradition court to grant extradition. He or she is, however, bound by a negative decision of that court.²⁴

The division of labour between the courts and the executive is not always clear-cut. As a rule of thumb, anything that has not been attributed specifically to the courts falls within the competences of the Minister.²⁵ The latter is said to be better placed to deal with assessing the state of affairs in a foreign state, in terms of both the capabilities to assess the local circumstances as well as the legal consequences to be attached to it. The Minister is also better placed to discuss and negotiate the content of guarantees that may have to be assured or to deal with the policy implications of extradition cases.²⁶ The examination by courts, by contrast, is limited to what follows directly from the documents presented by the requesting state or, alternatively, all other factors that can be ascertained by the court without further thorough investigation.²⁷ Issues of detention/deprivations of liberty in the course of the procedures rest, of course, with the courts.

The division of labour is particularly complicated for human rights defences. In a number of recent judgments, the Supreme Court seized the opportunity to clarify and reiterate its case law.²⁸ The starting point is that where requests are based on extradition treaties, the requested state must be trusted to respect the guarantees

²⁰See Art. 29 EA, in conjunction with, *inter alia*, Art. 271 CCP.

²¹Cf. The Procureur-General to the Supreme Court, Opinion of 17 April 2012, ECLI:NL:PHR:2012:BW2489, para 39–43.

²²Art. 30 (2) EA.

²³Examples are found in Art. 4 (prosecution of nationals for purposes of prosecution) EA, Art. 8 EA (death penalty), Art. 10 EA (discriminatory prosecution or hardship), and art. 7 European Extradition Treaty (exception of territoriality).

²⁴Art. 33 (2) EA.

²⁵Glerum and Rozemond (2015), pp. 191–192.

²⁶Cf. District Court The Hague, judgment of 31 August 2017, ECLI:NL:RBDHA:2017:9893, as cited in Supreme Court of the Netherlands, judgment of 23 February 2018, ECLI:NL:HR:2018:289.

²⁷Cf. Supreme Court of the Netherlands, judgment of 5 September 2006, LJN AY3440, para 4.4.

²⁸The following paragraphs are a summary of Supreme Court of the Netherlands, judgment of 21 March 2017, ECLI:NL:HR:2017:463. See also Supreme Court of the Netherlands, judgment of 30 October 2018, ECLI:NL:HR:2018:2019 (prosecution—imminent flagrant denial of justice; use of statements obtained from co-defendants in violation of Art. 3 ECHR), in which the Supreme Court has clarified that extradition treaties not only include specific bi- or multilateral extradition treaties, but also the thematic treaties, listed in Art. 51a EA.

embedded in the ECHR or the International Covenant on Civil and Political Rights (ICCPR) in the course of its criminal proceedings. This rule is not absolute, however. Relevant case law mainly deals with the conflicts between the duty to extradite and violations of Articles 3 and 6 ECHR. Dutch courts follow the Strasbourg standards, yet in applying these standards, Dutch case law has developed a complicated division of competences, involving the extradition courts, the Minister and the civil courts.

With respect to Art. 3 ECHR, the Minister is allowed—even obliged—to refuse extradition in cases where reasonable grounds (*gegronde vermoedens*) are established that said Article 3 will be violated after extradition to the requested state. The extradition court is only competent to hear cases of completed violations of Article 3 ECHR and only where these violations have occurred in the course of the proceedings, which led to the extradition request by or on behalf of agents of the requesting state.²⁹ The latter limitation, obviously, significantly reduces the scope of review by the extradition courts.

With respect to Article 6 ECHR or Article 14 ICCPR, the same rule applies: it is in principle the Minister who is competent. The standards to be applied are those of Strasbourg. Extradition courts are, however, competent to deal with *completed* flagrant denials of justice in extradition procedures for the purpose of *execution*. If established, extradition must be refused.

Additionally, in cases of extradition for the purposes of *prosecution* and for those states who are a party to the ECHR or the ICCPR, it must be assumed that violations of one's human rights can be brought before the courts of the requesting state. Those courts must, after all, ensure the fairness of the trial. Consequently, possible *future* violations of said articles are not a matter for the extradition courts. It is possible, however, that the latter express their concerns in their advice to the Minister, who may ask the requesting state for guarantees. Moreover, as the fairness of the procedure can only be established after the judgment(s) of the court(s) of the requesting state, *completed* violations of Article 6 ECHR or 14 ICCPR will generally neither fall within the competence of extradition courts.

The foregoing is different only where it has been established, on the basis of a substantiated defence, that (a) the person claimed will risk a flagrant denial of justice after extradition and (b) effective remedies, as meant in Article 13 ECHR or Article 2 (3) ICCPR, are not available in the requesting state. (Only) in those cases are the extradition courts allowed to declare inadmissible extradition for purposes of prosecution. It is clear that these situations do not occur frequently.³⁰ This is not only because of the high thresholds of the Strasbourg court itself³¹ but also because of the fact that irregularities in ongoing investigations, even if they hamper specific defence

²⁹Supreme Court of the Netherlands, judgment of 11 July 2014, ECLI:NL:HR:2014:1680.

³⁰For a rare example, see the aforementioned case of the Supreme Court of the Netherlands of 30 October 2018, *supra* note 28.

³¹With respect to the flagrant denial test, see ECtHR, judgment of 17 January 2012, Application no. 8139/09 (*Othman v. U.K.*), para 259.

rights, do not necessarily affect the fairness of the proceedings as a whole. In many cases, it is the *use* of such materials as evidence that will ultimately disqualify the procedures as ‘unfair’. There have been a number of cases where this distinction was made in relation to ‘entrapment defences’ by US officials, preceding US extradition requests.³²

In all other situations than the ones just mentioned, it is, therefore, the Minister who decides. The decision of the latter is, as said, a decision that (or the execution of which) can be challenged via civil summary procedures (*kort geding*).³³ As must be stressed again, these procedures are not the same as the preceding, mandatory proceedings by the extradition courts. They are of a civil law nature because of an alleged tort by the Dutch government. All matters that are within the competence of the Minister can be challenged, including, for instance, the alleged/apparent violation of the speciality principle by the requesting state.³⁴ It is also possible that issues are raised that have already been dealt with by the extradition courts. In those cases, new, convincing circumstances will have to adduced to the court for the remedy to have any effect. Civil courts do not have to assess facts and circumstances that were already addressed by the extradition courts.³⁵

In general, the scope of review is limited. This is different when it comes to fundamental rights that are protected by international treaties. Not even a treaty duty to extradite can set aside the power of Dutch courts to review any action on behalf of the Dutch state that may affect the rights bestowed upon individuals by directly applicable treaty provisions.³⁶ To that extent, the powers of the civil courts are ‘full’ and encompass more than only a review of the reasonableness of the actions of the executive. That implies that courts are, for instance, allowed to comprehensively assess the scope and precision of the guarantees that have been issued by the requesting state to prevent future violations of Article 3 ECHR. As this assessment is of a factual nature, the scope of review by the Supreme Court will be limited.³⁷

6.1.2.1.2 Transfer of Custodial Sanctions

With respect to the transfer of the enforcement of prison sentences, a preliminary issue concerns the fact that the dichotomy ‘requesting’ vs ‘requested’ state does not equal the distinction between the ‘sentencing’ and the ‘administering’/‘enforcement’

³²Cf. Supreme Court of the Netherlands, judgment of 4 September 2018, ECLI:NL:HR:2018:1426; Supreme Court of the Netherlands, judgment of 23 April 2019, ECLI:NL:HR:2019:671.

³³See also Kraniotis (2016), Glerum and Rozemond (2015), pp. 184–185.

³⁴Glerum and Rozemond (2015), p. 185, with further references.

³⁵Cf. Supreme Court of the Netherlands, judgment of 11 July 2014, ECLI:NL:HR:2014:1680, para 3.4.5.

³⁶Supreme Court of the Netherlands, judgment of 15 September 2006, ECLI:NL:HR:2006:AV7387 (Kesbir II).

³⁷Supreme Court of the Netherlands, Kesbir II, *ibid.*

state. Moreover, the sentenced person himself may initiate a transfer. In this subsection, the focus is on the position of the Netherlands as the enforcement state, either upon request or on its own initiative.³⁸ As with extradition cases, such an inward transfer (*overname*) is possible only on the basis of a treaty.³⁹

The Netherlands is a party to the relevant multilateral treaties of the Council of Europe. The relevant statutory provisions are found in the Enforcement of Criminal Judgments (Transfer) Act (*Wet Overdracht Tenuitvoerlegging Strafvonnissen* (WOTS)).

As with extradition cases, incoming requests will normally be routed via the Ministry of Justice and Security. The competent division within that Ministry is the International Transfer of Criminal Judgments Department (*Afdeling Internationale Overdracht Strafvonnissen* (IOS)) of the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen* (DJI)). At this early stage, an important decision must be made already. Article 43 WOTS provides the Minister with the power to initiate, upon his direction (*aanwijzing*), continued enforcement proceedings, instead of what was originally the default route: the exequatur procedure. Obviously, the applicable treaty needs to enable both routes. Within the EU, continued enforcement has meanwhile become the default procedure.⁴⁰ Should the consent of the sentenced person be required by a treaty, then such a ministerial direction is possible only where this consent has been given in writing.

Already upon receipt of the request, a series of important policy considerations are made. The core of the Dutch transfer policy is to facilitate the reintegration of Dutch nationals (or ‘equivalent persons’), not to relieve them from poor foreign detention conditions.⁴¹ Moreover, the Netherlands will not cooperate in those cases where foreign judgments are considered as being contrary to the fundamental principles of a proper criminal procedure (*beginselen van een behoorlijke strafprocedure*). That means, by implication, that the policy is not a primarily humanitarian approach, rather a rule of law approach.

Dutch IOS will consequently check the length of the remaining sanction and assess the person’s ties with the Netherlands.⁴² Its assessment entails a wide

³⁸I will focus specifically on the foreign requests to the Netherlands to take over the execution of the sentence. For the cases wherein Dutch authorities request a transfer to the Netherlands, see the relevant provisions of Art. 17 WOTS.

³⁹Art. 3 WOTS. By implication, this means that outward transfers do not need a treaty basis, which has invoked criticism. Treaties are after all an indication of the quality of a foreign legal order. Moreover, there is the obvious difference with extradition law, under which persons claimed do enjoy the protection of a Treaty (cf. Art. 4 of the Constitution); cf. Sanders (2015), p. 449; Lamp (2000), p. 368 *et seq.*, p. 418 *et seq.*

⁴⁰*Kamerstukken II* 2013/14, 33742, 3, pp. 1–4; see also *Kamerstukken II* 2007/08, 31200 VI, 30.

⁴¹These policies are public, see *Kamerstukken II* 2007/08, 31200 VI, 30.

⁴²See Custodial Institutions Agency, ‘Information sheet for foreign prisoners in the Netherlands: WOTS’, March 2013, https://www.dji.nl/binaries/information-sheet-for-foreign-prisoners-in-the-netherlands_tcm41-120866.pdf, (Accessed 6 June 2019), and Dienst Justitiële Inrichtingen, ‘Procedure bij internationale strafoverdracht naar Nederland met de WOTS’, March 2013, <https://>

discretionary power, both when it comes to the factual assessment of, for instance, whether the person has sufficiently strong ties with the Netherlands and concerning legal issues, for instance whether the sanction has been imposed on discriminatory grounds⁴³ or whether there have been human rights violations in the sentencing state.⁴⁴

Should the Minister turn down the foreign request, then the sentenced person has the possibility to start civil procedures. The same goes for the decision of the Minister to initiate continued enforcement proceedings.⁴⁵

6.1.2.1.3 Continued Enforcement

In cases of continued enforcement, the Minister (IOS) will forward the request—after an initial check—to the Advocate General of the Court of Appeal Arnhem-Leeuwarden, which has a special chamber for penitentiary issues (*penitentiaire kamer*). According to Article 43b WOTS, this chamber assesses—also on the basis of the applicable treaty—the conditions for taking over the execution of the custodial sanction (including an assessment of double criminality), the presence of (mandatory) refusal grounds and, where necessary, the need to adjust—within the framework of the treaty—the sentence imposed in the sentencing state.

The results of its assessment are laid down in a motivated judgment (*oordeel*) to the Minister, who then takes the final decision. Where the Court of Appeal has advised negatively, the Minister is bound by that judgment; a direction cannot follow, and the request must be turned down.⁴⁶

In other cases, the Minister is free to grant the request and to issue the direction (*aanwijzing*). However, as most of the preparatory work has already been done before the case is sent to the Advocate General, a positive judgment will usually lead to a positive answer by the Dutch authorities to their foreign colleagues and, in case the latter still wish to uphold the request, the actual transfer of the person, who will then be placed in a penitentiary facility (*gevangenis*).⁴⁷

6.1.2.1.4 Exequatur Procedures

The WOTS originally designated exequatur procedures as the default procedure. As with continued enforcement, the role of IOS is strong, particularly in the early stages

www.dji.nl/binaries/wots-infoblad-procedure-voor-nederlandse-gevangenen-in-het-buitenland_tcm41-120870.pdf (Accessed 6 June 2019).

⁴³Art. 5 WOTS.

⁴⁴Cf. Sanders (2015), p. 454.

⁴⁵Sanders (2015), p. 441.

⁴⁶Art. 43b (6) WOTS.

⁴⁷See the documents mentioned in *supra*, note 42.

of the procedure. The aforementioned policy issues also need assessment in exequatur proceedings. After the ties with the Netherlands have been established and other formalities have been checked, IOS will send the request to the competent public prosecutor,⁴⁸ who is then asked to give a ‘strafmaatadvies’, i.e. a preliminary assessment of the request and the sanction that he would have demanded in the case of the sentenced person.⁴⁹ On the basis of all obtained data, the Minister will then take the decision to continue procedures or not.

When procedures are continued, usually arrangements for the actual transfer will be set in motion, and upon arrival in the Netherlands, the transferred person will be provisionally apprehended and detained in a *Huis van Bewaring*.⁵⁰ Moreover, upon receipt of the request by the Minister, the competent prosecutor will seize the court (*Rechtbank*) within 2 weeks.⁵¹ The court will then assess the identity of the sentenced person, the completeness of the file, the possibility of the execution of the foreign decision in the Netherlands (which is not the same as the assessment of whether a transfer is deemed appropriate)⁵² and other relevant circumstances.⁵³ The court is not allowed to enter into the merits of the case,⁵⁴ save for an examination of the circumstances that are also of relevance for the assessment of double criminality or have to do with the personal circumstances of the sentenced person.⁵⁵ This is, of course, also why it is important that the sentenced person is present during the hearing, even before the transfer procedures are finally concluded.⁵⁶

Human rights considerations for which the court is competent are considered at this stage as well.⁵⁷ Flagrant denials of justice in the sentencing state may, for instance, lead to liability of the Dutch state on the basis of Article 5 ECHR.⁵⁸ Obviously, there is a significant tension between a refusal on the basis of, for instance, the fairness of the trial in the sentencing state (*ordre public*) and the goals of the transfer procedure itself, which is perceived to be in the interests of society as a whole and the sentenced person in particular. To my knowledge, it has never occurred that human rights have led to a refusal in transfer proceedings.

⁴⁸Art. 15 WOTS.

⁴⁹Art. 16 WOTS.

⁵⁰Art. 8 WOTS.

⁵¹Art. 18 WOTS.

⁵²*Kamerstukken II* 1983/84, 18129, 3, p. 33.

⁵³Art. 28 (1) WOTS.

⁵⁴Art. 28 (3) WOTS.

⁵⁵Cf. Art. 28 (5) WOTS.

⁵⁶Cf. Art. 27 WOTS.

⁵⁷Art. 30 (1)(d) WOTS. Some elements are in the hands of the Minister, see for instance Art. 5 WOTS (discriminatory prosecution or sentence).

⁵⁸See also: Supreme Court of the Netherlands, judgment of 1 July 2008, ECLI:NL:HR:2008:BC9545; Kraniotis (2016), p. 192 *et seq.*

Parliamentary records mention the possibility of a sentence reduction as a—some-what odd—alternative to the refusal in such cases.⁵⁹

In cases where no obstacles exist—the file is complete, the treaty and other conditions are met, no refusal grounds are present—the court will grant leave for execution (*verlof tot tenuitvoerlegging*), after which the second stage of the procedure will start in which the court commutes the foreign sentence into a Dutch one with a view to its execution (*exequatur*). At this stage, courts must have regard to all relevant elements, including considerations of foreign policy.⁶⁰ The latter means that courts must show that they have also taken due account of the sensitivities (*internationale gevoeligheden*) related to the differences between the various national legal systems when it comes to penal and sentencing policies.⁶¹

The decision of the court is open for *cassatie* to the Supreme Court.⁶² As opposed to continued enforcement, once the judicial stage of the proceedings has become final, the Minister is bound by it, regardless of whether it was a positive or negative decision.

6.1.2.1.5 MLA Proceedings: Interrogations, Searches and Interceptions

Dutch procedures for mutual legal assistance in the strict sense (*wederzijdse rechtshulp*) have recently been revised.⁶³ These procedures are characterized by a lesser degree of formality. The Minister/AIRS still plays a role in channelling incoming and outgoing requests and formally acts, where treaties do not provide for direct contacts, as the granting authority.⁶⁴ Yet with an increasing number of treaties enabling for direct contacts, the formal role of the Public Prosecution Service as the granting (and executing) authority is increasing, as is reiterated by the new Article 5.1.4 (4) of the Code of Criminal Procedure.⁶⁵ As mentioned before, MLA is organized via the Centres for International Legal Assistance in criminal matters (*Internationale Rechtshulpcentra* (IRCs)).

Unlike the other two forms of cooperation, MLA provisions are found in the general code of criminal procedure. An important change, compared to the aforementioned two forms of assistance and also to the previous MLA provisions, is that there is no treaty requirement anymore, not even for intrusive or covert measures. Also, for the latter type of measures, the requirement was abandoned to enable

⁵⁹*Kamerstukken II* 1984/85, 18129, 6, pp. 15–16.

⁶⁰Art. 31 WOTS.

⁶¹Supreme Court of the Netherlands, judgment of 18 May 2004, ECLI:NL:HR:2004:AO6410.

⁶²Art. 32 WOTS.

⁶³Wet herziening regeling internationale samenwerking in strafzaken, *Stb.* 2017, 246, and *Stb.* 2017, 492.

⁶⁴Art. 5.1.4 (1) CCP; *Kamerstukken II* 2015/16, 34493, 3, pp. 14–15.

⁶⁵Exceptions to the latter exist for discriminatory prosecutions, tax offences and political offences; see Art. 5.1.5 CCP.

cooperation with countries with which no treaty relations exist and to ensure reciprocity in future cases.⁶⁶

No need to say that the existence of treaties remains relevant nonetheless. Treaty-based requests must be answered to the largest extent possible (Art. 5.1.4 (2) CCP). By contrast, requests without a treaty base can be refused for statutory reasons or for reasons of general interest (*algemeen belang*),⁶⁷ including human rights considerations. In the latter case, the threshold of a flagrant denial of justice may not even have to be established. Moreover, the Minister may, in such cases, refuse a request when another state is considered to be better placed for the investigation, in the interest of the proper administration of justice.⁶⁸

Once it has been established that a request may be granted and no grounds for refusal are present,⁶⁹ its execution is in the hands of the competent public prosecutor.⁷⁰ Where investigative measures are requested, those measures can be applied only in cases where they would also have been available in a Dutch investigation on a similar set of facts.⁷¹ This, therefore, entails an assessment of double criminality—not as part of the granting decision but as part of the execution stage—and of the other formal requirements for application. However, the requirement does not, as far as treaty-based requests are concerned, imply an assessment of the proportionality of the requested measure or of the investigative interest at stake (*onderzoeksbelang*).⁷²

For acts for which Dutch law attributes powers to the investigating judge or prescribes his/her prior authorization, there is the additional requirement that the request comes from a ‘judicial authority’ (*rechterlijke autoriteit*).⁷³ In cases where the assistance of the investigating judge is necessary or wanted, the prosecutor must or may forward the request to the former.⁷⁴ The execution stage of the proceedings, therefore, clearly follows the structures of the provisions of the Code of Criminal Procedure. The Dutch MLA provisions serve as the link between the investigative powers of criminal procedure under Dutch law and the foreign interests. Specific provisions are in place, additionally, for video conferences⁷⁵ and for direct transmissions to or interceptions of telecommunications by foreign authorities.⁷⁶

⁶⁶*Kamerstukken II* 2015/16, 34493, 3, p. 6. The reciprocity argument then is that, as MLA is not possible, because there is no treaty, the requesting stat may in future cases also refuse assistance.

⁶⁷Art. 5.1.4. (3) CCP.

⁶⁸*Kamerstukken II* 2015/16, 34493, 3, p. 16.

⁶⁹The grounds—all of them mandatory—are listed in Art. 5.1.5. CCP. Compared to the former regime, they have been expanded and now also include an explicit human rights exception (Art. 5.1.5. (3) CCP).

⁷⁰Art. 5.1.6. CCP.

⁷¹Art. 5.1.8. (1) CCP.

⁷²Art. 5.1.8. (1) CCP.

⁷³Art. 5.1.8. (3) CCP.

⁷⁴Art. 5.1.8. (4) CCP.

⁷⁵Art. 5.1.9. CCP.

⁷⁶Art. 5.1.12 CCP, resp. Art. 5.1.13. CCP.

The Code of Criminal Procedure does not provide for specific remedies against the granting decision. However, the new provisions do foresee in the form of judicial review at the end of the procedure, but only when, roughly speaking, intrusive, coercive or covert investigative measures have been applied. These procedures clearly serve to protect the interest of the persons concerned, including the defendant; parliamentary records make notice of the fact that in later foreign procedures, possible irregularities in the Dutch MLA procedure will usually not be tested and that these procedures, therefore, fill the gap caused by the rule of non-inquiry.⁷⁷

A so-called complaint procedure (*beklagprocedure*) is—save for cases where the secrecy of investigations requires otherwise—consequently open for, *inter alia*, persons whose objects or data were seized or who were confronted with the recording of data during (digital) searches or with decryption, preservation or restriction orders with respect to data.⁷⁸ In those cases, the actual transfer of the objects and data will be postponed for two weeks so as to allow that person to file a complaint. The competent court will then assess the relevant treaty and statutory conditions with respect to the granting decision and the execution of the request, but that court is also allowed to—somewhat cryptical—assess ‘the potential consequences of a transfer to foreign authorities’.⁷⁹ Meanwhile, no data, documents or objects will be transferred before the expiration of the said 2-week term or, in the case of a complaint, the decision on that complaint has become final. There is the possibility of an appeal on legal grounds (*cassatie*).

In addition to the complaint procedure, there is a number of cases in which the court, seized by the public prosecutor, must explicitly grant leave to transfer objects, documents or data to the requesting party (*verlofprocedure*).⁸⁰ That happens, in short, where a complaint as just discussed was not possible in order to protect the secrecy of the investigation or where intrusive covert measures—including the interception of telecommunications—were applied to obtain those documents or data. The scope of review is comparable to that of the complaint procedure, yet without, of course, the input of the person concerned.

6.1.2.2 Outgoing Requests for Assistance

Outgoing procedures are markedly different than just described as they are characterized by a low level of statutory regulation. For extradition, procedures are mostly governed by treaties—if applicable—and the laws of the requested party. Dutch law itself is silent on the conditions upon which Dutch authorities may issue outgoing requests. There is consequently some controversy around the specific formalities and conditions that are applicable. The most heard position is that only the authorities

⁷⁷*Kamerstukken II 2015/16*, 34493, 3, p. 21.

⁷⁸Art. 5.1.11. CCP.

⁷⁹*Kamerstukken II 2015/16*, 34493, 3, p. 23.

⁸⁰Art. 5.1.10. (3) CCP.

that are competent for preliminary custodial measures in Dutch procedures are competent to initiate extradition procedures, under the same conditions as would have applied in comparable national cases.⁸¹ The point—which is particularly urgent under the European arrest warrant regime—is, however, that the Dutch internal rules not easily lend themselves to their analogous application in extradition cases. Internal Dutch procedures follow the logic that the more intrusive custodial measures are (particularly the longer they last), the ‘higher’ the competent authority (deputy prosecutor, prosecutor, investigative judge, court) must be. The length of extradition procedures is, however, a matter for the requested state. It is conceivable, therefore, that a simple order for arrest (*aanhouding buiten heterdaad*, Art. 54 CCP), ordered by a public prosecutor, is the underlying national title for the extradition request, *de facto* legitimizing a custodial measure of several months in the requested state (that state will, as a rule, not deal with the substantive merits of the request, its reasonableness, its proportionality, etc.).

Procedures for transfers of execution to other states are found in the WOTS.⁸² As was indicated in the above, there has been criticism on the fact that there is no treaty requirement for transfers of execution to those states.⁸³ That is because a treaty is still regarded as the ultimate expression of trust in a foreign legal order, which is reiterated by the fact that extradition (for execution purposes) to such legal orders does require a treaty base. That degree of trust also covers, particularly, the detention conditions in the other state.

The question to which a treaty requirement is necessary correlates to a well-known dilemma in transfer procedures. Whereas humanitarian conditions may call for a transfer *to* the Netherlands, considerations related to the rule of law and the Dutch *order public* may oppose such a transfer (particularly where there have been flagrant denials of justice in the sentencing state). The treaty requirement helps to protect those latter interests.⁸⁴ Yet the same balancing exercise turns out differently in the case of *outgoing* transfers. Concerns on detention conditions may exist, but do not automatically block a transfer, in the interest of re-socialization. Solutions are then found in procedural guarantees. I agree with those authors stating that what may be criticized in the Netherlands is not so much the non-existence of the treaty requirement for outgoing transfers but the apparent inconsistency in the approach between incoming and outgoing transfers.⁸⁵

What are these procedural guarantees? Dutch procedure prescribes that a public prosecutor may, in the interest of a proper administration of justice, issue duly motivated advice to the Minister to initiate a transfer procedure.⁸⁶ The Minister

⁸¹See *in extenso* Hirsch Ballin (2014), no. 3.2.1.

⁸²Arts. 51 *et seq.* WOTS.

⁸³Supra note 39.

⁸⁴Those interests have been reiterated in a communication of the Dutch Minister of Justice, supra note 41.

⁸⁵Cf. Van der Wilt and Ouwerkerk (2014), no. 8.2.

⁸⁶Art. 51 (1) WOTS. See arts. 56-57 WOTS for foreign requests.

(IOS) then decides as quickly as possible, taking account of the relevant treaty provisions (where applicable).⁸⁷ Sentenced persons who are in the Netherlands and who have not (yet) agreed with the transfer must be informed in writing and be given 2 weeks to initiate a written appeal with the court that ultimately convicted him to the custodial sanction.⁸⁸ The latter court then performs a marginal test of whether the decision of the Minister to initiate a transfer was reasonable in the light of the proper administration of justice.⁸⁹ The sentenced person must be heard and, if necessary, be given legal counsel. If the court grants the appeal, the (intended) transfer cannot take place.⁹⁰ In cases of a transfer, Article 59 WOTS contains a number of guarantees to be ascertained, such as the *lex mitior* principle, the deduction of any time already spent in detention in the Netherlands and, in cases of a non-voluntary transfer, the speciality principle.

These provisions demonstrate that a number of procedural guarantees are in place. Obviously, further debate is possible in light of the content and scope of the central criterion (*goede rechtsbedeling*) and the fact that appeal is open only for Netherlands-based sentenced persons.⁹¹ Moreover, it must be noted that the right to appeal is not the same as the right to initiate an outgoing transfer. There is no such right,⁹² though it is always possible to launch civil procedures and try to obtain a court order obliging the Minister to launch a transfer procedure.

Mutual legal assistance procedures are the area where the most significant changes took place. The revised procedures for MLA explicitly pay attention to the role of Dutch authorities as to the requesting party. In principle (unless the applicable treaties provide otherwise), the Ministry will be the competent authority.⁹³ The request itself, however, is based on an underlying request of the prosecutor, investigative judge or court.⁹⁴ The latter is to be read in conjunction with what is stipulated in Article 5.1.3 CCP; Dutch authorities can only request from their foreign colleagues what would have been within their range of competences in a similar national investigation or what could have been transmitted via the Police Data Act (*Wet politiegegevens*). A special provision is included for interviewing witnesses, experts or defendants by videoconference by the investigative judge or the court.⁹⁵

The rationale of Article 5.1.3 CCP is, obviously, the prevention of silver platter situations.⁹⁶ Yet the question is also whether the current provision will not be an

⁸⁷ Art. 52 (1) WOTS.

⁸⁸ Special provisions for in absentia convictions in the Netherlands are found in arts. 54-55 WOTS.

⁸⁹ Art. 52 (3) WOTS.

⁹⁰ Art. 52 (5) WOTS.

⁹¹ Cf. Van der Wilt and Ouwerkerk (2014), no. 8.2.

⁹² Van der Wilt and Ouwerkerk (2014), no. 9.

⁹³ Art. 5.1.2. (3) CCP.

⁹⁴ Art. 5.1.2. (1) CCP.

⁹⁵ Art. 5.1.3a. CCP.

⁹⁶ Luchtman (2008), p. 150; Van Wijk (2017), p. 121 *et seq.*; Hirsch Ballin (2014), no 3.2.1. This ratio is also at the core of older cases, which have now been codified in Art. 5.1.3. CCP.

unnecessary hurdle in certain cases,⁹⁷ whereas it may not be apt to reach its goals in others. Different countries will, after all, regulate investigative techniques in different manners. Regarding the first point of criticism, the problem lies in the cumulative application of two sets of criminal procedures—those of the requesting state (Art. 5.1.3 CCP, in conjunction with the internal Dutch procedures) and those of the requested state, applying its *lex loci*—which may hamper enforcement too much. Provisions like these are, therefore, (only) particularly useful where materials could also have been obtained using the powers of Dutch criminal procedure.⁹⁸ The question is, moreover, whether the current provision is still up to gear for present-day, often dynamic and multilateral transnational criminal investigations. That is the second point of criticism. The provision does not prevent cooperating authorities from coordinating their joint operations (also outside the setting of joint investigation teams) and from subsequently sharing the information, which was then officially obtained within the framework of the national procedures of the transmitting party (and not for MLA purposes). Such information is then already in possession of the requested party and can be transferred under a different set of rules (those for professional secrecy and the protection of personal data) than the ones that would have been applied had the information been gathered in the execution of an MLA request. Therefore, provisions like Art. 5.1.3 CPP only have their full protective effects in cases where one party helps another in proceedings, with which it has no further connections. The latter image is still the dominant frame,⁹⁹ though it is certainly not always a fully satisfactory one.

6.1.2.3 Cooperation Within the European Union

There is no doubt that the specific setting of cooperation in criminal matters within the European Union has had a significant influence on the internal Dutch procedures. It is noteworthy that, in general, European cooperation is still viewed as a form of international cooperation.¹⁰⁰ The European setting, however, did have the effect that the role of the Ministry has been significantly reduced or even abandoned. This goes, particularly, for surrender cases.

6.1.2.3.1 Surrender Proceedings: The European Arrest Warrant

The implementation of the European arrest warrant regime in the Surrender Act (SA, *Overleveringswet*), which is currently the subject of a ‘re-implementation’ of the

⁹⁷Reijntjes (2015), pp. 337–404.

⁹⁸Hirsch Ballin (2014), no 3.2.1.

⁹⁹See *Kamerstukken II* 2015/16, 34493, 3, pp. 8–9.

¹⁰⁰Cf. *Kamerstukken II* 2002/03, 29042, 3, p. 5, discussed *in extenso* by Luchtman (2017) (inaugural lecture).

Framework Decision (*herimplementatie*),¹⁰¹ has introduced a single-stage procedure for European arrest warrants. With a few exceptions, the procedure is entirely a judicial one, with a prominent role for the District Court of Amsterdam as the sole court in the Netherlands competent to deal with all incoming European arrest warrants and the Centre for International Legal Assistance in Criminal Matters of the Public Prosecutor’s Office of Amsterdam as its counterpart at the level of the Public Prosecution Service. There are no ordinary remedies, only the extraordinary *cassatie in het belang der wet*, which is launched by the Prosecutor General at the Supreme Court. It has in fact been used in some surrender cases.¹⁰²

As in extradition cases, it is the prosecutor who initiates the surrender procedure before the court. He or she will also conduct a preliminary check of the European arrest warrant.¹⁰³ The court must then decide within, in principle, 60 days after the arrest of the person claimed.¹⁰⁴ An extension of this term of another 30 days is possible. After 90 days, the court must suspend the detention while taking measures to ensure that the person claimed does not escape justice (*schorsing onder het stellen van voorwaarden*).¹⁰⁵ The latter legal provision has given rise to significant controversy in legal practice, particularly in cases where matters were referred to the Court of Justice or where that court has been asked to answer questions by other courts that are also relevant for the Dutch cases or where the issuing judicial authorities have been asked questions on the detention conditions in their state, in the wake of *Aranyosi*. The maximum detention term of 90 days proved to be far too strict in those cases. Consequently, the Amsterdam District Court and the Amsterdam Court of Appeal (who is competent for reviewing decisions on remand in custody) were more or less forced to stretch the interpretation of Article 22 (4) SA to the limits, and beyond. Partly because of their diverging approaches to the situation, this legal practice was found to be in violation of Article 6 of the EU Charter of Fundamental Rights (CFR), whereas the European Court of Justice also found the implementation of the relevant provisions of the Framework Decision in Article 22 (4) SA to be incorrect.¹⁰⁶

Article 11 of the Dutch Surrender Act entails a general human rights exception,¹⁰⁷ which has seldomly been used (except for some cases, in the early years of the system, of dealing with undue delays in the procedures of the issuing state) until the

¹⁰¹See Overheid.nl, ‘*Herimplementatie kaderbesluit Europees aanhoudingsbevel*’, 2019, <https://wetgeving.skalender.overheid.nl/Regeling/WGK009492>, (Accessed 29 January 2020).

¹⁰²For examples, see Supreme Court of the Netherlands, judgment of 28 November 2006, ECLI:NL:HR:2006:AY6631; Supreme Court of the Netherlands, judgment of 18 March 2014, ECLI:NL:HR:2014:650.

¹⁰³Art. 23 (2) SA.

¹⁰⁴See art. 22 SA.

¹⁰⁵Art. 22 (4) SA.

¹⁰⁶European Court of Justice (CJEU), judgment of 12 February 2019, Case C-492/18 PPU (TC).

¹⁰⁷It reads in (unofficial) translation: ‘Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as

Aranyosi saga and, subsequently, the European Court of Justice's ruling in *LM*.¹⁰⁸ Detention conditions and the rule of law are prominently on the agenda since then. All of these issues are within the exclusive competence of the district court or, in some cases, the prosecution service.¹⁰⁹ Hence, there is no role for the Minister anymore, regardless of the (future or past) fundamental rights violation at stake.

What does complicate matters, however, is another wrongful implementation of the Framework Decision in the Dutch Surrender Act.¹¹⁰ Article 6 of the act prohibits the surrender of Dutch nationals (and aliens with a residence permit for an indefinite time, including EU citizens)¹¹¹ for execution purposes while simultaneously obliging the prosecutor to inform the issuing judicial authority of the willingness to take over the execution of the judgment.¹¹² For most EU countries (save for those who did not yet implement Framework Decision 2008/909/JHA,¹¹³ such as Bulgaria), the latter procedure takes place, per 1 November 2012, on the basis of the Mutual Acknowledgement and Execution of Detention and Probation Sanctions Act (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties* (WETS)).¹¹⁴ That law also applies to surrender procedures of Dutch nationals. The problem in those cases is that the transfer decision is taken by different authorities under different conditions, including a full double criminality test, and at a later stage.¹¹⁵ As neither the District Court of Amsterdam nor the prosecutor's service can consequently guarantee a transfer to the Netherlands, there

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950.'

¹⁰⁸The latter ruling has not (yet) brought the Amsterdam Court to refrain from surrender. The most relevant rulings to this date are: District Court Amsterdam, judgment of 4 October 2018 ECLI:NL:RBAMS:2018:7032 (District Court takes the first step of the LM-test); District Court Amsterdam, judgment of 18 January 2019, ECLI:NL:RBAMS:2019:393 (Extension of the LM-test to execution-European arrest warrants for convictions later than Autumn 2017); District Court Amsterdam, judgment of 27 September 2019, ECLI:NL:RBAMS:2019:7161 (Having established structural deficiencies in the Polish judiciary at the first two levels of the LM-test, the Court announces to focus on the third step of the LM-test from now on, save for new circumstances); District Court Amsterdam, judgment of 16 January 2020, ECLI:NL:RBAMS:2020:184 (The fact that Polish authorities do not respond to the Court's questions, does not lift the requested person's responsibility to demonstrate that (s)he did not receive a fair trial. The wording of the ruling also seems to cover European arrest warrants for prosecution purposes).

¹⁰⁹For an example of the latter, see Art. 35 (3) EA (*postponement* in cases of 'hardship').

¹¹⁰See CJEU, judgment of 29 June 2017, Case C-579/15 (Popławski).

¹¹¹See Art. 6(5) SA.

¹¹²CJEU, judgment of 25 July 2018, Case C-216/18 PPU (*LM*).

¹¹³Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27.

¹¹⁴See also Dienst Justitiële Inrichtingen, '*Fact sheet for foreign prisoners in the Netherlands (from an EU country): WETS*', March 2013, [https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-\(from-an-eu-country\)_tcm41-120875.pdf](https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-(from-an-eu-country)_tcm41-120875.pdf), (Accessed: 21 June 2019).

¹¹⁵See Art. 2:11 (1)(f) WETS.

is a risk of impunity. The first *Popławski* judgment has learned that it is not allowed to refuse the surrender of persons like Popławski to Poland without simultaneously providing for a guarantee that the execution of the sentence is taken over.¹¹⁶ That was why the Amsterdam Court subsequently asked the EU Court of Justice, in short, whether it would be possible to disapply the relevant provision of the Surrender Act and thus to facilitate the transfer of the person claimed to Poland.¹¹⁷ The latter court has meanwhile answered this question in the negative.¹¹⁸ In response to this, the Amsterdam District Court has now refined its case law, ruling that—under both new¹¹⁹ and old transfer regimes¹²⁰—it is possible for the District Court, after having performed a prospective analysis of the relevant WOTS/WETS provisions, to refuse the surrender of persons like Popławski because that court must assume as follows:

- The competent Dutch authorities in the subsequent transfer procedures (including the Minister) will comply with their obligation to interpret national law in conformity with EU law.
- And the public prosecutor—who, as the competent Dutch authority, is also subject to that obligation—will notify the issuing judicial authority and the Minister that the Netherlands can and must take over the execution of the sentence and will do whatever is necessary to meet that obligation.

Finally, one important remark must be made with respect to outgoing European arrest warrants. In the Netherlands, the issuing authority has always been the public prosecutor (Art. 44 SA). However, as the Ministry of Justice and Security is competent to give instructions to prosecutors,¹²¹ Dutch prosecutors may not meet the requirements of independence put forward in the European Court of Justice’s recent case law,¹²² certainly in cases where they are also responsible for the national title for arrest. The legislator decided not to wait for further case law¹²³ and to intervene. The Surrender Act now designates the investigative judge to be the competent issuing authority in the Netherlands.¹²⁴ In light of the intrusiveness of the coercive measures that are usually applied in surrender procedures, it is

¹¹⁶See CJEU, judgment of 29 June 2017, Case C-579/15 (*Popławski*).

¹¹⁷The case deals with the situation prior to implementation of Framework Decision 2008/909, under the regime of the WOTS. An additional hurdle then exists because of the aforementioned Treaty requirement.

¹¹⁸CJEU, judgment of 24 June 2019, Case C-573/17 (*Popławski II*).

¹¹⁹For the WETS, see District Court Amsterdam, judgment of 17 October 2019, ECLI:NL:RBAMS:2019:7754.

¹²⁰For the WOTS, see District Court Amsterdam, judgment of 26 September 2019, ECLI:NL:RBAMS:2019:7104 (*Popławski*).

¹²¹Art. 127 of the Act on the Judicial Organization (*Wet op de rechterlijke organisatie*).

¹²²Cf. CJEU, judgment of 27 May 2019, Case C-509/18 (PF); CJEU, judgment of 27 May 2019, Joined Cases C-508/18 and C-82/19 PPU (OG and PI).

¹²³CJEU, judgments of 12 December 2019, Case C-627/19 PPU, (*Procureur du Roi de Bruxelles*) and C-625/19 PPU (*Parquet Suède*).

¹²⁴See *Stb.* 2019, 259.; *Kamerstukken II* 2018/19 35224, nos. 1–3.

noteworthy that there are no further conditions inserted in the law. It is a striking difference with the implementation of the European investigation order (discussed below), where statutory conditions for issuing a European investigation order are much stricter.

6.1.2.3.2 Transfer of Execution of Custodial Sentences

In addition to offering a framework for the transfer of Dutch nationals in surrender proceedings, the aforementioned WETS serve as the implementation act of Framework Decision 2008/909. It applies to (almost) all EU Member States; for all other countries, the WOTS (and the applicable international treaties) continue to apply.

WETS procedures are different from surrender procedures and follow more or less the traditional route.¹²⁵ From an internal Dutch perspective, this also makes sense as the Minister of Justice and Security (and no longer the public prosecution service) has recently been made responsible for the execution of (custodial) sanctions.¹²⁶ Yet in light of the principle of mutual recognition of judicial decisions, further questions to the Court of Justice are likely to follow in light of its recent judgments.¹²⁷ Be that as it may, Dutch law marks the Minister as the competent authority for the recognition of foreign judicial decisions with a view to their enforcement in the Netherlands and *vice versa*.¹²⁸

As is the case under the international law regime, a transfer in principle requires the consent of both the Minister and the sentenced person.¹²⁹ The latter requirement does not go for those who are Dutch citizens and live in the Netherlands (and certain other categories).¹³⁰ Where there is a demonstrable and sufficient connection to the Netherlands, the Minister may, also at the request of the sentenced person, request or consent to the transfer of the foreign judicial decision to the Netherlands with a view to its recognition and execution.¹³¹ Again, this is not a right for the sentenced person.

The procedure to be followed is similar to the continued enforcement procedure under the WOTS. It means that, upon a preliminary check of all documents (including the underlying court conviction),¹³² the Minister will forward the file to the

¹²⁵ See Custodial Institutions Agency, *The Mutual Acknowledgement and Execution of the Transfer of Sentences Act (WETS)*, November 2016, https://www.dji.nl/binaries/Factsheet_WETS_ENG_nov%202016%20def_tcm41-120876.pdf, (Accessed: 24 June 2019).

¹²⁶ See the recent Wet herziening tenuitvoerlegging strafrechtelijke beslissingen, *Stb.* 2017, 82.

¹²⁷ The question, of course, is what consequences the rulings of the court, mentioned in note 122, will have, particularly where the sentenced person does not consent. To what extent can executive bodies—in light of the principle of mutual recognition of judicial decisions—be trusted with such a fundamental element of the administration of justice?

¹²⁸ Art. 2:1 WETS; art. 2:7 WETS.

¹²⁹ Art. 2:3 WETS.

¹³⁰ Arts. 2:4 and 2:5 WETS.

¹³¹ Art. 2:6 WETS.

¹³² See art. 2:8 WETS.

Advocate General at the Arnhem-Leeuwarden Court of Appeal with a view to obtaining the advice of that court.¹³³ The Minister then decides on the recognition of the foreign judgment, taking account of the court’s opinion. The Minister is bound by the court’s opinion on the imperative refusal grounds of Article 2:13 WETS (including double criminality) but has full discretion on the optional, discretionary refusal grounds of Article 2:14 WETS, which are not assessed by the court (e.g. the territoriality exception).¹³⁴ Sentenced persons, present in the Netherlands, will be informed.¹³⁵

It is noteworthy that the Netherlands has included in Article 2:11 (5) WETS a special procedure for transfers of Dutch nationals after surrender procedures. In clear contradiction to Framework Decision 2008/909, Dutch courts retain the possibility to adjust the sentence to Dutch standards yet, to the largest extent possible, also taking account of the standards of the issuing state.

As regards the outgoing transfers, the conditions and procedures mirror the recognition of judgments by the Netherlands.¹³⁶ The Minister is the competent authority. There is no statutory right for sentenced persons to initiate transfer proceedings,¹³⁷ but the sentenced person is in principle offered the possibility to give his or her views on an intended transfer in advance.¹³⁸ An appeal against the intended transfer is possible within 14 days after notification at the Court of Appeal of Arnhem-Leeuwarden.¹³⁹ The court will then assess whether the intended decision of the Minister has been reasonable. No ordinary appeal is open.

6.1.2.3.3 The European Investigation Order

Procedures with respect to incoming and outgoing European investigation orders have been implemented in the Code of Criminal Procedure.¹⁴⁰ The European investigation order is an order for the execution of certain investigative measures, including materials already available to the executing authorities. Unlike the traditional MLA procedure discussed in the above, it is an entirely judicial procedure in the wide sense of the word: the competent authority is the public prosecutor.¹⁴¹ He or

¹³³ Art. 2:11 WETS. The assessment performed by that court is the same as under the WOTS.

¹³⁴ *Kamerstukken I* 2011/12, 32885, C, p. 10.

¹³⁵ Art. 2:9 WETS.

¹³⁶ See also Dienst Justitiële Inrichtingen, ‘*Fact sheet for foreign prisoners in the Netherlands (from an EU country): WETS*’, March 2013, [https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-\(from-an-eu-country\)_tcm41-120875.pdf](https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-(from-an-eu-country)_tcm41-120875.pdf) (Accessed: 24 June 2019).

¹³⁷ Civil procedures are conceivable, of course.

¹³⁸ Art. 2:27 WETS. This is different where that person does not reside in the Netherlands or him-/herself has requested the transfer; art. 2:27 (2) WETS.

¹³⁹ Art. 2:27 (3-8) WETS.

¹⁴⁰ *Stb.* 2017, 231.

¹⁴¹ Art. 5.4.2. CCP.

she has exclusive competence over the granting decision and over its execution. The granting stage lasts 60 days at most, the stage of execution in principle 90 days or, if this is not possible, within another appropriate scheme as agreed upon with the issuing authority (*passend tijdschema*).¹⁴²

There are some actions for which the intervention of the examining magistrate is necessary.¹⁴³ That is the case, particularly, where investigative measures need his prior authorization or where the law attributes powers only to him. In those cases, the prosecutor will hand over the European investigation order.

There is also the possibility of a complaint, before the actual transfer of the results to the executing authority, under the same conditions as the complaint procedure in MLA cases.¹⁴⁴ In order to enable the person concerned to issue such a complaint, a notification will usually be sent out, and the transfer will be postponed for two weeks.¹⁴⁵ If a complaint is filed, the transfer will take place only after there has been a final decision on it.¹⁴⁶ Under certain circumstances, if this is necessary for the proper cause of the investigation or for the protection of the rights of individuals, a provisional transfer may be allowed unless that would cause irreparable damage to the interests of the persons concerned.¹⁴⁷

The European investigation order complaint procedure deviates from its MLA counterpart in one important aspect. There is no judicial procedure to grant leave to transfer objects, documents or data to the requesting party (*verlofprocedure*) where the interests of the investigations require their secrecy. In those circumstances, therefore, a complaint procedure is not possible, but neither is this lack of legal protection compensated by a judicial leave to transfer. This was considered to be justified in view of the principle of mutual recognition and the high degree of trust among EU states.¹⁴⁸ Yet, obviously, that is an unconvincing argument, precisely because the leave procedure deals with the actions of the executing Dutch authorities; it is unlikely—even at odds with the principle of mutual recognition—that the lawfulness of the execution of investigative measures in the Netherlands will be assessed in another state.

Provisions for the Netherlands as the issuing state are found in Art. 5.4.21 *et seq.* CCP. Competent authorities are the prosecutor and the investigating judge or the courts. As is the case with the corresponding MLA procedures, the legal provisions ensure a proportionality check and mechanisms to prevent a bypass of the procedural safeguards that would have applied in purely national cases.¹⁴⁹

¹⁴² Art. 5.4.5. CCP.

¹⁴³ Specific provisions for, for instance, videoconferences are found in Art. 5.4.13. CCP, and the interception of telecommunications.

¹⁴⁴ Art. 5.4.10. CCP.

¹⁴⁵ *Kamerstukken II* 2016/17, 34611, 3, p. 12.

¹⁴⁶ Art. 5.4.9. (1) CCP.

¹⁴⁷ Art. 5.4.9. (3) CCP.

¹⁴⁸ *Kamerstukken II* 2016/17, 34611, 3, p. 12.

¹⁴⁹ Art. 5.4.21. (2) CCP.

6.1.2.4 Remedies Against the Granting Decision

The issue of who can challenge the final decision granting or not granting a request for cooperation has been discussed in the above. It depends on the specific type of cooperation, as well as the international or EU setting. Within the setting of international assistance, the dichotomy between the granting and execution stages is clearly discernable in extradition and transfer proceedings (at least in the *exequatur* procedures). In both types of procedures, the district courts act as authorizing bodies. An appeal on legal grounds (*cassatie*) is open to their decisions on the admissibility of extradition,¹⁵⁰ respectively granting leave for execution.¹⁵¹ The remedy is open to the person claimed/sentenced person, as well as the prosecution. Moreover, as also indicated in the above, the subsequent decisions of the Minister—particularly relevant in extradition procedures—can lead to civil injunction procedures.

With respect to MLA procedures, the granting and execution stages are clearly more integrated. Though it will formally be the Minister who is the competent authority, legal practice shows a strong role for the prosecutor. Legal remedies are available at the end of the procedure and have been retained under the recently revised internal MLA rules, precisely because of the fact that foreign courts may not be willing to investigate the legality of Dutch MLA procedures. As was mentioned in the above, a complaint procedure (*beklag*) is open—save for cases where the secrecy of investigations requires otherwise—for, *inter alia*, persons whose objects or data were seized or who were confronted with the recording of data during (digital) searches or with decryption, preservation or restriction orders with respect to data.¹⁵² In those cases, the actual transfer of the objects and data will be postponed for 2 weeks, to allow that person to file a complaint. The competent court will then assess the relevant treaty and statutory conditions with respect to the granting decision and the execution of the request. That court is also allowed to—somewhat cryptical—assess ‘the potential consequences of a transfer to foreign authorities’.¹⁵³ Meanwhile, no data, documents or objects are to be transferred before the expiration of the said 2-week term or, in the case of a complaint, the decision on that complaint has become final. There is the possibility of an appeal on legal grounds (*cassatie*).

For EU cooperation, the situation has changed most dramatically for surrender procedures. Dutch surrender procedures are a single-stage procedure, with an exclusive role for the Amsterdam district court. An appeal on legal grounds (*cassatie*) is no longer possible, and there is no formal role for the Minister anymore. Only the extraordinary *cassatie in het belang der wet* is a possibility (but not open to persons claimed or the prosecutor as such). With respect to European investigation order procedures, the most significant change has been the abolition of the so-called *verlof*

¹⁵⁰Art. 31 EA.

¹⁵¹Art. 32 WOTS.

¹⁵²Art. 5.1.11. CCP.

¹⁵³*Kamerstukken II* 2015/16, 34493, 3, p. 23.

procedure in cases where the secrecy of investigations hinders the notification of those concerned. Finally, with respect to transfer procedures, continued enforcement has become the default procedure, with a specific role for the penitentiary chamber of the Arnhem-Leeuwarden Court of Appeal, against which no legal remedies are open.

6.2 Subject Matter of Judicial Control

6.2.1 *The General Framework of International Cooperation in Criminal Matters*

6.2.1.1 International and Internal Dimension of the Granting Decision

Roughly speaking, in extradition procedures, courts (or other bodies in the administration of criminal justice) deal with the application of the powers of criminal procedure, whereas it will be the Minister who is dealing with issues of policy or with the assessment of the factual situation in another state.¹⁵⁴ Courts only deal with what can be established on the basis of the extradition request and without further extensive examinations. What belongs to the realm of the extradition judge and what to that of the Minister has been the subject of extensive case law, particularly when it comes to the protection of fundamental rights (see above). Because of Articles 93 and 94 of the Constitution and of the direct effects of human rights treaties in the Dutch legal order, a full judicial review will always be available, either by the extradition court or by the civil courts.¹⁵⁵

In transfer procedures, the courts assess the legal conditions for a transfer (and commute the sentence), whereas the executive assesses the policy issues and appropriateness of such a transfer (sufficiently strong ties to the Netherlands etc.). Human rights issues mainly fall to the courts in exequatur procedures.¹⁵⁶ Once they have granted leave for execution, the Minister is bound by it.¹⁵⁷ The remedy available against the decisions of the Minister is a civil injunction procedure. Given the marginal review exercised by civil courts in those cases and the aforementioned¹⁵⁸ policy documents in which the Netherlands government has laid down the applicable policies and criteria for a transfer to the Netherlands, the chances of success are not very high where one does not fall within these policy parameters.

For MLA procedures, the institutional landscape has changed considerably lately. In principle—where a treaty does not provide otherwise—it is the Minister who

¹⁵⁴Supra note 25.

¹⁵⁵Supra note 5.

¹⁵⁶As indicated in the above, this issue falls to the Minister in continued enforcement procedures.

¹⁵⁷Sanders (2015), p. 436.

¹⁵⁸Supra note 41.

decides on the granting elements,¹⁵⁹ after which the request is then put in the hands of, in principle, the prosecution service. Noteworthy is the change in position of the leave to transfer procedure, which was previously a time-consuming, mandatory check at the end of any MLA procedure but which has now become an alternative to the complaint procedure, in cases where intrusive techniques have been used and the secrecy of investigations prohibits their disclosure to persons concerned.

6.2.1.2 Assessment of Foreign Criminal Proceedings and Decisions: Scope and Limits

Dutch authorities will, in principle, not enter into an assessment of the actions of foreign authorities. This is, in cases of extradition and transfer of sentences, because of the treaty requirement. In MLA cases, the Supreme Court has also consistently held that where requests are based on a treaty, the assessment of the degree of suspicion¹⁶⁰ or the subsidiarity or proportionality of foreign requests is not for the Dutch authorities.¹⁶¹ Only substantive impediments (*belemmeringen van wezenlijke aard*), as defined by the treaty or statutory law, or the fundamental principles of criminal procedure can block the assistance.¹⁶² This is different in cases where MLA is requested by a state with which no treaty relationship exists, as indicated in the above. This mitigation was inserted to ensure workable relationships with those countries. However, in those cases, the strict standard of a flagrant denial of justice is also not applicable *per se*.¹⁶³

In extradition procedures, another (very limited) exception to this strict rule of non-inquiry is a plea of innocence.¹⁶⁴ Such a plea only succeeds when it can be demonstrated without further delay, on the basis of the dossier and without further investigations.¹⁶⁵ The same standard applies in surrender procedures.

The reason behind this approach is the ambition to facilitate smooth and speedy international cooperation as much as possible. A strict rule of non-inquiry (*vertrouwensregel*) facilitates this, while it simultaneously has removed fundamental rights considerations from the judicial equation, save for exceptional circumstances. That reasoning goes particularly for treaty-based requests. The presence of such a treaty, after all, presupposes that (a) the Netherlands, as a party state to the ECHR and ICCPR, has duly assessed, before entering into the treaty, that (b) the legal

¹⁵⁹Supra note 64.

¹⁶⁰Cf. Supreme Court of the Netherlands, judgment of 21 December 2007, ECLI:NL:HR:2007:BB5359.

¹⁶¹Cf. Supreme Court of the Netherlands, judgment of 22 May 2012, ECLI:NL:HR:2012:BV9212.

¹⁶²A likely example is the violation of legal professional privilege.

¹⁶³Supra note 66 and 68.

¹⁶⁴Cf. Supreme Court of the Netherlands, judgment of 19 March 2002, ECLI:NL:HR:2002:ZD2927.

¹⁶⁵Art. 28 (2) EA. See further Glerum and Rozemond (2015), pp. 211–212.

system of the prospected partner state meets all of the relevant fundamental rights standards. Moreover, a continuation of that relationship shows that the underlying reasons for it are still present.¹⁶⁶ Under those circumstances, there is no additional task for the judiciary. By consequence, Dutch courts are not allowed to take up these issues, except when there is a risk for a flagrant denial of justice (Art. 6 ECHR) and after it has been established, on the basis of a sufficiently substantiated argument, that remedies are not present in the requesting state.¹⁶⁷ It is not possible to lodge a legal remedy against the foreign request with a Dutch court, which triggers judicial review in the requesting state.

The same goes with respect to a review of the lawfulness of the actions on which a foreign request is based. Where those actions were carried out by foreign authorities, they are not subjected to a review or test by Dutch authorities.¹⁶⁸ The Supreme Court has even held that alleged irregularities, committed by Dutch authorities in the framework of preceding MLA procedures in the same case, cannot be assessed within the framework of subsequent extradition procedures.¹⁶⁹ In a similar vein, in a case where US authorities acted on Dutch(-Antilles) territory without the knowledge of the local authorities and in violation of the *lex loci*, the Supreme Court held that the extradition court is not allowed to assess the legality of evidence gathering (let alone to refuse extradition on that basis) with a view to the criminal case in the requesting state.¹⁷⁰

6.2.1.3 Direct and Indirect Review of the Decision (Not) to Request for Legal Assistance

6.2.1.3.1 Remedies with Respect to Irregularities in the (Issuing of the) Request

There are a number of ways of redressing irregularities concerning the issuing of a request or its execution in the requested state. Parties concerned may, on the one hand, try to prevent Dutch authorities from issuing such a request via a complaint procedure (Art. 552a CCP), where applicable,¹⁷¹ or via civil procedures. The other option is during the later trial procedures (for instance via a plea to exclude evidence)

¹⁶⁶Supreme Court of the Netherlands, judgment of 7 September 2004, ECLI:NL:HR:2004:AP1534, para 3.4.2.

¹⁶⁷Supreme Court of the Netherlands, judgment of 7 September 2004, ECLI:NL:HR:2004:AP1534.

¹⁶⁸Cf. Supreme Court of the Netherlands, judgment of 7 September 2004, ECLI:NL:HR:2004:AP1534, para 3.4.3.

¹⁶⁹Cf. Supreme Court of the Netherlands, judgment of 10 July 2001, ECLI:NL:HR:2001:AB3324. This is different in cases where a person claimed risks a flagrant denial of justice in the requesting state as a result of his extradition, Supreme Court of the Netherlands, judgment of 7 September 2004, ECLI:NL:HR:2004:AP1534, para 3.4.3.

¹⁷⁰Supreme Court of the Netherlands, judgment of 9 December 2014, ECLI:NL:HR:2014:3540.

¹⁷¹Cf. *Kamerstukken II* 2016/17, 34 611, nr. 3, p. 13 (European investigation order).

or, possibly, in procedures for the compensation of damages as a result of unlawful acts/tort (*onrechtmatige daad*).¹⁷²

With respect to the issuing of requests, irregularities may relate, for instance, to the circumvention of Dutch rules of procedure—an issue that was discussed in the above with respect to MLA procedures¹⁷³— or to the responsibility of the Dutch state not to trigger criminal proceedings in another state because of human rights concerns. Irregularities may also relate to flaws in the request itself.¹⁷⁴ The latter situation occurred in a criminal case where the Dutch fiscal police allegedly misled Swiss authorities by (a) combining two different cases—one a stock exchange fraud, the other involving money laundering for drug offences—in two MLA requests to the Swiss authorities (one for interrogations, the other for searches) while (b) adding information on the presumed laundering of drug-related proceeds in the German version of the request (relevant only to a case against another person mentioned in the request). This information, however, was not included in the Dutch version of the request. As a result of the information received, the later defendant caught the attention of the Dutch authorities. In the later criminal case against him for stock exchange fraud, lower courts consequently ruled the case of the Public Prosecution Service inadmissible because of the misleading information in the request. The Supreme Court, however, quashed those judgements because of contradictory findings in the reasoning of the Court of Appeal.¹⁷⁵

What appears to be particularly important for the Supreme Court in its assessment of whether there must be consequences (exclusion of evidence, for instance) in cases like these is whether the interests of the defendant were harmed by this (*Schutznorm*), whether there was the intention to mislead on behalf of the authorities¹⁷⁶ and, so it appears, whether it is clear (in the subsequent Dutch proceedings) that the requested party indeed provided unlawful assistance *because of* the incorrect information.¹⁷⁷ Obviously, in situations like these, one may also try to persuade the requested authorities or courts in that state to take a stance on the impact of the incorrect information on the granting and execution of the request.¹⁷⁸ The question, however, is to what extent they will be willing to hear such a case. Presumably, the latter will only be so when it has been previously established by a Dutch authority that there have indeed been irregularities in or prior to the Dutch request. The latter

¹⁷²Hirsch Ballin (2014), no. 5.1., referring to District Court The Hague, judgment of 18 December 2013, ECLI:NL:RBDHA:2013:19090.

¹⁷³Supra note 96.

¹⁷⁴Hirsch Ballin (2014), no. 3.2.

¹⁷⁵Supreme Court of the Netherlands, judgment of 7 December 2004, ECLI:NL:HR:2004:AP8439.

¹⁷⁶Hirsch Ballin (2014), no. 3.2.2.

¹⁷⁷Cf. Supreme Court of the Netherlands, judgment of 26 March 2019, ECLI:NL:HR:2019:425.

¹⁷⁸As suggested by the Advocate General in his opinion to the case, mentioned in the previous footnote, ECLI:NLPHR:2019:79.

must be done, depending on the requested measure, via a complaint procedure in the Netherlands (*beklag*)¹⁷⁹ or via civil procedures.

There have also been cases where individuals have tried to stop the initiation of MLA proceedings because of concerns that those requests would trigger proceedings in the requested state. It has indeed been recognized in parliamentary records that there is a duty upon Dutch authorities not to trigger criminal proceedings in countries with questionable human rights standards through, for instance, an MLA or extradition request.¹⁸⁰ Assuming that the interests of the investigation do not impede notification of the person concerned, the latter person has the option of starting civil procedures. As was noted before, civil law's scope of review is, however limited. Interesting in this respect is the case of *Van Laarhoven*, in which the Public Prosecution Service (OM), the Ministry of Justice and Security and the Dutch police received fierce criticism—*inter alia* from the Dutch Parliament and the Dutch *Nationale ombudsman*¹⁸¹—for their actions in the criminal investigations against a Dutch coffee shop owner residing in Thailand and under investigation for, *inter alia*, large-scale trade in soft drugs and money laundering. After it appeared that the Thai authorities would not (timely) comply with the execution of the Dutch MLA request, the Dutch prosecutor sent an additional letter to the Thai authorities, in July 2014, suggesting them to start their own criminal investigation. In addition, the wife of the applicant, who was mentioned as a witness in the request for mutual assistance and who was not the subject of a criminal investigation in the Netherlands, was now also mentioned as a suspect. Both were subsequently arrested and sentenced to years of imprisonment in Thailand. It is striking to note that the actions of the Dutch authorities were not qualified as unlawful by the civil courts during injunction procedures to order the Dutch state to, *inter alia*, start extradition procedures from Thailand to the Netherlands.¹⁸² Only after the Thai criminal case became final were the Dutch authorities able to start (WOTS) transfer proceedings. Van Laarhoven has recently been brought to the Netherlands; his wife—a Thai citizen—still remains in detention in Thailand. As said in the above, the affair led the Minister to refine and reiterate the division of labour of all Dutch actors involved in MLA procedures.¹⁸³

¹⁷⁹Cf. Supreme Court of the Netherlands, judgment of 3 June 2008, ECLI:NL:HR:2008:BC9015. The question is to which extent the complaint judge (*beklagrechter*) will assess any potential irregularities. That is not certain yet. A catch-22-situation may occur.

¹⁸⁰*Kamerstukken II* 2016/17, 34493, nr 6, p. 13.

¹⁸¹See Nationale ombudsman, '2019/014 OM, *Justitie en Veiligheid en politie onzorgvuldig na indienen rechtshulpverzoek aan Thailand*', 11 maart 2019, <https://www.nationaleombudsman.nl/nieuws/rapporten/2019014>, (accessed 29 January 2020), as well as the reaction by the Minister in *Kamerstukken II*, 2018/19, 30010, nr. 42.

¹⁸²See District Court The Hague, judgment of 16 December 2014, ECLI:NL:RBDHA:2014:15729, confirmed in The Hague Court of Appeal, judgment of 23 June 2015, ECLI:NL:GHDHA:2015:1593.

¹⁸³Supra note 14.

6.2.1.3.2 Remedies After the Execution of a Request

Defences with respect to alleged irregularities during the execution of a request (or the subsequent transfer of materials) regularly show up in Dutch cases. Where these defences relate to the actions of foreign authorities, the Supreme Court has introduced a strict rule of non-inquiry.¹⁸⁴ In the court’s case law, it is relevant, first of all, to determine whether the other state is a party to the ECHR. Human rights and the rule of non-inquiry are therefore strongly related, as noted in the above.¹⁸⁵ Second, the issue is whether the actions took place under the responsibility of the Dutch or foreign authorities. In the latter type of situation, any defence with respect to violations of foreign law or Article 8 ECHR will not be heard by Dutch courts. Remedies must be sought after in the other state.¹⁸⁶ It may even be so—that where the requested or executing state has formally established a violation of its laws in the execution of a request, such formal declaration of unlawfulness will not lead to some sort of compensation (e.g. exclusion of evidence) in the Dutch criminal procedure. The (open) question is, of course, to which extent such an approach would be, in the EU setting, compatible with Article 14 (7) of the European investigation order Directive. The legislator held, unconvincingly and without further motivation, that there was no need to implement such section as its contents would already follow from the general principles of criminal procedure (*algemene beginselen strafprocesrecht*).¹⁸⁷ It will be interesting to see what the approach of the Court of Justice will be when asked to interpret Article 14 (7) of the European investigation order Directive.

With respect to violations of Article 6 ECHR, the Supreme Court has ruled that the Netherlands is fully responsible for the use of the materials as evidence in criminal procedures. This wording seems to suggest that there is no such responsibility with respect to the *gathering* of materials in violation of Article 6 ECHR, assuming that such a violation does not render the proceedings unfair as a whole. The question is to which extent this rule—established before *Stojkovic v. France and Belgium*¹⁸⁸—is still entirely good law. From the latter judgment, it can, after all, be deduced that MLA requests are certainly capable of invoking the *requesting* state’s responsibility under Article 6 ECHR during the execution of MLA requests.

Mitigation of this strict rule may occur, incidentally, where criminal investigations involve a transfer from foreign to Dutch criminal investigations. This is a situation that is likely to happen ever more frequently, particularly within the EU. It occurred in a case involving German undercover agents, which started in Germany

¹⁸⁴The most important judgment is Supreme Court of the Netherlands, judgment of 5 October 2010, ECLI:NL:HR:2010:BL5629.

¹⁸⁵Idem, Hirsch Ballin (2014), no. 4.2.

¹⁸⁶This may be different for violations of, for instance, Art. 3 ECHR.

¹⁸⁷*Kamerstukken II* 2016/17, 34611, 3, p. 25.

¹⁸⁸ECtHR, judgment of 27 October 2011, Application no. 25303/08 (*Stojkovic v. France and Belgium*).

but was later taken over by the Dutch authorities.¹⁸⁹ The undercover operation was subsequently led by Dutch authorities. The trial also took place in the Netherlands, according to Dutch law. The Court of Appeal had serious doubts as to the proportionality and subsidiarity of the measures in the early stages of the German procedures and their compliance with (the principles of the) Dutch prosecutorial guidelines on undercover operations. As such, the court did not refrain from testing the actions of the German authorities before the transfer. The rule of non-inquiry was therefore not applied here. However, as it considered that the Dutch prosecution service would not be able to produce the relevant information, it declared the case of prosecution inadmissible. The Supreme Court quashed this decision because the prosecution service had indicated that the German officers were willing to testify in court.¹⁹⁰ Similar to the Court of Appeal, the Supreme Court, therefore, saw no reason to apply the rule of non-inquiry because of the specifics of the case at hand.

Obviously, in those cases where Dutch authorities act abroad and apply powers of criminal procedure—via Article 539a *et seq.* CCP—there is no reason *not* to apply Dutch law. Potential violations of another state's sovereignty will, however, not be heard in the criminal case against the defendant (*Schutznorm*).¹⁹¹

Moreover, though the Supreme Court refers explicitly to ECHR signatory states, it is likely that Dutch courts will apply similar logic in other cases, certainly when those states are—as is the Netherlands—a party to the ICCPR and the assistance provided was treaty based.¹⁹² For other states, of course, the presence of an effective remedy is not always guaranteed, and additional scrutiny of the Dutch courts may be warranted. This will require, however, a substantiated argument by the defence.¹⁹³

6.2.1.3.3 Remedies in Case Dutch Authorities Do Not Issue a Request

As is widely recognized in international law, individuals do not have standing in interstate relations.¹⁹⁴ That means that their only option is to request—if necessary force—judicial authorities to issue requests on their behalf. Within the framework of MLA (and European investigation order) procedures, there is the possibility for the defendant and his or her counsel to ask the investigating judge to perform investigative measures, including the issuing of a request to foreign authorities.¹⁹⁵ Should

¹⁸⁹Supreme Court of the Netherlands, judgment of 8 February 2000, ECLI:NL:HR:2000:ZD1780. Another example is offered by Supreme Court of the Netherlands, judgment of 16 November 1999, ECLI:NL:HR:1999:ZD1451 (criminal investigations started on the basis of a tip from UK authorities).

¹⁹⁰Supreme Court of the Netherlands, judgment of 8 February 2000, ECLI:NL:HR:2000:ZD1780.

¹⁹¹Supreme Court of the Netherlands, judgment of 5 October 2010, ECLI:NL:HR:2010:BL5629.

¹⁹²*Idem*, Hirsch Ballin (2014), no. 4.3.

¹⁹³Hirsch Ballin (2014), no. 4.3.

¹⁹⁴See, in extenso, Van Wijk (2017), p. 123 *et seq.*

¹⁹⁵See art. 182 CCP; *Kamerstukken II* 2016/17, 34611, 3, p. 5.

such a request be denied, the defendant and his/her counsel may appeal to the court (*bezwaarschrift*) via a so-called *raadkamer procedure*.¹⁹⁶ The investigating judge will turn down that request (only) when it cannot (reasonably) contribute to any decision in the criminal proceedings.¹⁹⁷

Where specific remedies are absent, the decision not to initiate a (mutual legal assistance or extradition) request is subject to judicial review in the form of civil procedures. The scope of review of the Dutch civil courts is, however, limited to a marginal test of reasonableness. That goes particularly where requests interfere with the wide degree of discretion that the prosecution service has when it comes to prosecutorial decisions (including, for instance, the decision to commence proceedings in the Netherlands instead of somewhere else).¹⁹⁸

6.2.1.4 Extraterritorial Operations

There are some cases in which the lawfulness of the actions of foreign agents have been put to the test in Dutch criminal procedures. They mostly concern undercover agents operating as undercover on Dutch soil. Though there have been repeatedly made allegations that in some cases these actions took place without the knowledge of Dutch authorities, there is hardly any case law on this.

Dutch criminal procedure does foresee the possibility of foreign agents operating in the Netherlands, but under a number of binding conditions, which are to be agreed upon in advance. These include the application of Dutch law, the formal responsibility of Dutch authorities and also the duty to appear as a witness in court when summoned.¹⁹⁹ For Dutch courts, the dominant issue is whether or not those agents acted under the formal responsibility of the Dutch authorities.²⁰⁰ If so, their actions are (also) assessed in light of Dutch law. If irregularities are established, the determination of the consequences, if any, goes along the lines of Dutch criminal procedure.²⁰¹ When foreign agents disregard the instructions of the Dutch authorities, this is likely to have consequences for the criminal case in the Netherlands and may lead, in extreme cases, to the Public Prosecution Service losing its right to prosecute.²⁰²

¹⁹⁶ Art. 182 (6) CCP.

¹⁹⁷ *Kamerstukken II 2009/10, 32177, 3, p. 16.*

¹⁹⁸ See District Court’s-Gravenhage, judgment of 18 December 2009, ECLI:NL:RBSGR:2009:BK7001, in which complainant requested the issuing of a Dutch European arrest warrant with a view to prosecution in the Netherlands (instead of Argentina). The claim was denied.

¹⁹⁹ See, for instance, Art. 126i (4) CCP (*pseudo-koop*). Further requirements are set out in arts. 9 and 10 of the Samenwerkingsbesluit bijzondere opsporingsbevoegdheden 2019, *Stb.* 2018, 448.

²⁰⁰ Cf. Supreme Court of the Netherlands, judgment of 8 February 2000, ECLI:NL:HR:2000:ZD1780.

²⁰¹ See, in particular, Art. 359a CPP, which has generated a lot of case law.

²⁰² See for instance District Court Amsterdam, judgment of 27 April 2007, ECLI:NL:RBAMS:2007:BA4017.

6.2.2 *The Framework of Cooperation Within the EU*

National law does not make a real difference with respect to the issues that have been addressed here.²⁰³ It makes sense to assume that within the EU, the aforementioned considerations with respect to the rule of non-inquiry apply even stronger on the basis of the principle of mutual trust and the principle of mutual recognition.²⁰⁴ The organizational set-up has, of course, changed significantly in the EU setting, but this was addressed already in the previous section.

6.3 Scope of Judicial Protection and Applicable Legal Standards

6.3.1 *Judicial Protection and Applicable Standards in the Requested State*

As a monist legal system, the standards for review are in principle Dutch law and self-executing (*een ieder verbindende bepalingen*) treaty provisions.²⁰⁵ ECHR provisions are considered to be self-executing, and the same goes for most of the treaty provisions for cooperation in criminal matters. Such provisions may even serve as the basis for the application of coercive measures.²⁰⁶ Where national laws conflict with treaty provisions, they are not to be applied (Art. 94 Constitution).

As noted, EU law produces its effects in the Dutch legal order in and of itself, not via the Dutch Constitution.²⁰⁷ There have been a number of cases in which EU nationals tried to prevent/prevented extradition to third countries via civil procedures on the basis of Articles 18 and 25 Treaty on the Functioning of the European Union (TFEU) (*Petruhhin*).²⁰⁸

Compliance with provisions of foreign law will usually not be checked, for practical reasons and also because of the rule of non-inquiry. To that extent, Dutch incoming MLA procedures are strictly separated from the main proceedings abroad.

²⁰³ See the materials, referred to in footnote 187, wherein the legislator saw no need to implement Art. 14 (7) European investigation order Directive.

²⁰⁴ Cf. Hirsch Ballin (2014), no. 4.2.

²⁰⁵ Supra note 1.

²⁰⁶ Cf. Supreme Court of the Netherlands, judgment of 26 April 1988, ECLI:NL:HR:1988:AD0295; Van der Wilt (2014), no. 5.

²⁰⁷ Supra note 3.

²⁰⁸ Cf. District Court The Hague, judgment of 2 November 2017, ECLI:NL:RBDHA:2017:12708. For a successful argument that the Dutch state—when granting the extradition of a Bulgarian citizen to Turkey instead of Bulgaria—had taken insufficient account of Arts. 21 TFEU and 7 CFR/8 ECHR (right to a family life), see Court of Appeal of The Hague, judgment of 26 June 2018, ECLI:NL:GHDHA:2018:1767.

Only under exceptional circumstances will Dutch authorities embark on an analysis of foreign law, for instance where it cannot follow from the extradition request itself that the acts for which extradition has been requested are indeed criminal offences in the requesting state.²⁰⁹

For the same reasons, Dutch courts will not undertake an assessment of defence or excuse under foreign law, save for cases where such defence or excuse follows directly from the request itself or can be ascertained without a thorough further investigation (*zonder diepgaand onderzoek*).²¹⁰ Only in the latter case can it lead to a refusal of extradition (or any other type of assistance for which double criminality is a condition or refusal ground).

It is conceivable, theoretically, that issues with respect to compliance with foreign laws in the investigative stage come up in subsequent Dutch granting/execution procedures. We already noted in the above that this even goes for the actions of Dutch authorities prior to the foreign request for cooperation.²¹¹

Obviously, where such infringements also lead to interferences with Convention rights (Art. 3 ECHR, for instance), they may be examined under that heading. In other cases, such complaints will in principle not be heard by Dutch authorities. That is because, particularly for ECHR states, violations of national laws are to be addressed in the requesting state. However, where it turns out that the authorities of that state do establish violations of their laws and subsequently notify their Dutch colleagues, there may be a reason for the latter to investigate to what extent the findings in the requesting state have an impact on their granting or execution decision. That may be so particularly when it turns out that—based on that new information—they would not have been allowed to provide assistance under Dutch law or under relevant international (including the ECHR) or EU law.

6.3.2 Judicial Protection and Applicable Standards in the Requesting State

Under the opposite scenario, the question arises to which extent and on what grounds persons concerned can challenge outgoing Dutch MLA requests. The answer to that question mirrors the observations in the above. The legality, proportionality and subsidiarity of such requests will be assessed in light of Dutch law and international law. The human rights situation in a specific country may be a reason not to issue a request.²¹²

²⁰⁹Cf. Supreme Court of the Netherlands, judgment of 12 March 2002, ECLI:NL:PHR:2002:AD8728.

²¹⁰Cf. Supreme Court of the Netherlands, judgment of 5 September 2006, ECLI:NL:HR:2006:AY3440.

²¹¹Supra note 161.

²¹²Supra note 180.

6.4 Pleading Requirements

The division of labour between the courts and the executive has its bearing on the standards that are used by the different actors. A second factor that determines the scope of review and the applicable standards is the distinction between primary and secondary forms of assistance.

Under the former type of cases (*exequatur procedures*), there is no real difference between the tasks of the exequatur judge and the criminal courts in the Netherlands, although the former needs to take account of the ‘international sensitivities’ when commuting a sentence to Dutch standards.²¹³ Exequatur courts are to investigate *ex officio*, for instance the personality of the sentenced person with a view to the determination of the appropriate sanction.²¹⁴

Under secondary types of assistance (and the granting stages of transfer procedures), the scope of review is limited by nature. Article 26 EA defines the task of the extradition court,²¹⁵ as does Article 28 WOTS, when it comes to transfer procedures. The courts need to establish the identity of the person concerned, the admissibility of the request and the possibility of granting it. The internal provisions of Dutch Criminal Procedure as regards the content of the judgment and the (mandatory) motivation of why substantiated arguments, pleas or defences were rejected are not applicable.²¹⁶ That makes sense, of course, now that extradition courts do not operate as criminal courts and do not establish guilt. However, also the provisions on how to respond to raised arguments (advanced by the prosecution service or the person concerned) are not applicable.²¹⁷

Dutch authorities will, in principle, always check for the fulfilment of the conditions and refusal grounds in cooperation requests.²¹⁸ This is done, therefore, *ex officio*.²¹⁹ The point is, however, on the basis of what information they perform this test. There is no access to the criminal files, and the procedures do not lend themselves for extensive investigations, certainly not under a principle of mutual recognition. Dutch authorities will rely mainly on the information in or accompanying the request and, sometimes, the additional information provided by the foreign authorities. The rule of non-inquiry again serves as an important structuring principle in this respect.

²¹³Supra note 61.

²¹⁴Cf. Supreme Court of the Netherlands, judgment of 18 May 2004, ECLI:NL:HR:2004:AO6410.

²¹⁵Supra note 19.

²¹⁶Courts however must explain why they rejected an ‘onschuldverweer’, see Art. 28 (4) EA.

²¹⁷See art. 29 EA *a contrario*. Those requirements are laid down in art. 359 CCP, particularly in section 2 (*uitdrukkelijk onderbouwd standpunt*).

²¹⁸Cf. *Kamerstukken II* 2015/16, 34493, 3, p. 15; *Kamerstukken II* 2016/17, 34611, 3, p. 7.

²¹⁹This goes, for instance, for the assessment of the condition of double criminality *in abstracto*. The person concerned must pinpoint (*voldoende precies en gemotiveerd aangeven*) its absence *in concreto*, cf. Supreme court of the Netherlands, judgment of 5 September 2006, ECLI:NL:HR:2006:AY3440.

This may be different when arguments are raised by the person concerned. But even then, as a rule of thumb, Dutch courts will not undertake a thorough assessment comparable to that of an ordinary national criminal case, although recent practice shows that, in surrender cases at the least, when it comes to the assessment of the human rights situation in another jurisdiction, the scrutiny of the review has meanwhile become quite ‘intense’. In principle, however, the task of Dutch judicial authorities is limited to whether the defence can be ascertained without a thorough further investigation (*zonder diepgaand onderzoek*).²²⁰

The precise rules on the burden of proof and—connected to that—the scope of the courts’ review and their duties to respond to arguments raised by parties have not received much systematic attention in doctrine. Articles 28 EA and 30/31 WOTS contain provisions on the issues that need to be addressed in court decisions. These decisions must be duly motivated. As such, these provisions do not indicate how to deal with defences that have been rejected. There is case law that suggests that the rejection of substantiated defences (*geadstrueerde verweren*) also need additional motivation under this heading.²²¹ Rejections of a position on the admissibility of the request, taken by the prosecution service, on the other hand, do not require an explicit motivation.²²²

The burden of proof, the standards of review and the requirements for a court’s ruling are, of course, connected. The applicable standard for the person concerned is not one of ‘beyond reasonable doubt’. As a rule of thumb, for the courts to enter into an examination into the potential existence of a refusal ground, that person will have to demonstrate that his/her position is arguable (*aannemelijk*) on the basis of facts, documents *et cetera*. Moreover, in principle, the objections raised must be a concern to him/her specifically. Most case law deals with the assessment of past or future human rights violations. Dutch courts then follow the rules set out by the Strasbourg (or Luxembourg) courts. This case law has been described above.

In addition to the default position that an *ex officio* test is done (only) on the basis of the request or warrant, courts may also use *ex officio* knowledge of relevant circumstances in other countries. There is a certain connection here with the specialization within the judiciary (and prosecution services), also in the area of transnational cooperation. For instance, the District Court of Amsterdam is the sole court dealing with European arrest warrant cases. On that basis, it is well inverted into the different sets of detention conditions (or the rule of law conditions) all over the EU. It has used that knowledge to supplement the information contained

²²⁰Cf. Supreme Court of the Netherlands, judgment of 5 September 2006, ECLI:NL:HR:2006:AY3440.

²²¹By implication, see Supreme Court of the Netherlands, judgment of 5 June 2007, ECLI:NL:HR:2007:BA4936 (extradition law).

²²²Supreme Court of the Netherlands, judgment of 2 September 1986, ECLI:NL:PHR:1986:AB8072.

in, for instance, European arrest warrants, also in the absence of a specific argument raised by the person concerned.²²³

Finally, the scope for review in civil procedures is much more limited, as was noted in the above. The civil courts will mostly limit themselves to a marginal test of the reasonableness of the decision of the Minister, safe for the directly applicable human rights standards.²²⁴

6.5 Guarantees Given by the Requesting State

Guarantees certainly play a role in Dutch legal practice, specifically under the international law framework. As such, asking for guarantees may be considered to be in contradiction to the assumption of mutual trust, which is in turn based on the treaty requirement.²²⁵ This implies that guarantees can be asked for only in cases where otherwise a refusal ground (or other deviations from the duty to cooperate) would have been applicable. In those cases, guarantees are an alternative to such refusals.

There is much debate on the legal status of guarantees, and particularly on whether they have binding status or not.²²⁶ In the Dutch legal order, guarantees do play an important role and will, for instance, hinder the application of refusal grounds when formulated with sufficient precision,²²⁷ depending on the circumstances of the case. The effect of such a guarantee is after all to remove the existence of a *real risk* of a human rights violation in the requesting state.²²⁸ A sufficiently precise guarantee must be presumed to be respected on the basis of the principle of mutual trust (*vertrouwensbeginsel*), which in turn is, again, based on the existence of a treaty. This may be different only in exceptional circumstances. When there are serious reasons (*ernstige redenen*)—based on a substantiated defence—for believing that the guarantee will not be respected, it may not be accepted.²²⁹

There is little material on what would be the consequences for the Netherlands in cases where foreign authorities eventually did not respect—despite their prior assurances—the (contents of the) guarantee. Presumably, responsibility for the Dutch state would be rejected by Dutch courts, certainly in the relationship with

²²³Cf. District Court Amsterdam, judgment of 14 May 2019, ECLI:NL:RBAMS:2019:3673.

²²⁴Supra note 5.

²²⁵Glerum (2013), p. 171 *et seq.*; Kraniotis (2016), p. 205 *et seq.*

²²⁶Both positive on this issue are Glerum (2013), p. 171 *et seq.*; Rozemond (2009).

²²⁷Cf. Supreme Court of the Netherlands, judgment of 15 September 2006, ECLI:NL:HR:2006:AV7387, par. 3.4.2.; Supreme Court of the Netherlands, judgment of 17 June 2014, ECLI:NL:HR:2014:1441. See also Court of Appeal The Hague, judgment of 20 January 2005, ECLI:NL:GHSGR:2005:AS3366.

²²⁸*Idem*, Glerum (2013), p. 171.

²²⁹Cf. Supreme Court of the Netherlands, judgment of 17 June 2014, ECLI:NL:HR:2014:1441.

those states that are also parties to the multilateral human rights treaties that guarantee not only the right to a fair trial but also the right to an effective remedy. That may be different, however, in cases where there were already indications at the time of examination of the extradition request of, for instance, non-compliance with ECHR supervision mechanisms or of negative experiences with the authorities of the requesting state in the past in similar situations.²³⁰ But then, the point seems to be that the guarantee should not have been accepted in the first place. There appears to be no obligation for Dutch authorities to monitor the case after a sufficient guarantee has been provided for.

In the opposite scenario, precise and specific guarantees that have been provided for by the Netherlands are binding on the Dutch state. The main question in that situation—in case the Netherlands have provided guarantees, which are (allegedly) not respected—is whether compliance with those guarantees can be enforced by individuals in criminal proceedings (or civil procedures).²³¹ A comparable issue arises with respect to the principle of speciality. Dutch courts have accepted—in consistent case law—that prosecutions for other offences than for which extradition was granted in principle lead to the Public Prosecution Service losing its right to prosecute.²³²

Under EU law, most of the relevant provisions do not offer room to ask for guarantees as a lighter alternative to a refusal. In those situations where EU law does provide for the possibility of asking guarantees, the binding legal basis for that lies in the nature of EU law itself.²³³ The District Court of Amsterdam has consistently held, for instance, that it—in cases of surrender of Dutch nationals for prosecution purposes—does not ask for specific guarantees on the length of the period after which a Dutch national/resident is to be sent to the Netherlands. Guarantees are, after all, binding because of EU law. In light of Article 47 CFR (effective remedy), non-compliance with those guarantees is considered a matter to be addressed before the courts of the issuing state.²³⁴

With the principle of mutual recognition as the dominant principle, the focus clearly is on the effectiveness of the scheme. Save for those cases where the Framework Decision provides for it itself, there is no room for obtaining guarantees from the issuing state. However, the legal practice that has emerged in European arrest warrant cases—with respect to detention conditions and the rule of law issues (Poland)—is that detailed questions are asked to the respective issuing judicial authorities. These judicial dialogues in effect often boil down to the same result as

²³⁰As discussed by Rozemond (2009), p. 22, 28–29, 38–39, with references to ECtHR case law.

²³¹Glerum argues that this is not necessarily the case, Glerum (2013), p. 172. See also Kraniotis (2016), pp. 149–154.

²³²Cf. District Court Amsterdam, judgment of 25 March 2014, ECLI:NL:RBAMS:2014:2147. The same goes in surrender cases, incidentally, see Court of Appeal Arnhem, judgment of 13 March 2012, ECLI:NL:GHARN:2012:BV8900.

²³³With the exception of the situations mentioned in Arts. 5 and 4bis (1)(d) FD European arrest warrant.

²³⁴See Glerum (2013), p. 340, with references.

a guarantee. Where the information provided does not sufficiently answer the questions asked (and sometimes they cannot be answered, for instance, because the conditions for humane detention simply do not (yet) exist), surrender must be postponed.

Eventually, surrender procedures will then be terminated,²³⁵ or the executing judicial authority must refrain from giving effect to a European arrest warrant.²³⁶

6.6 Effectiveness of Judicial Review

6.6.1 General Requirements (Access to Information and Suspensory Effects of the Remedy)

Under Dutch law, there is no general duty to inform individuals on *outgoing requests*, certainly not when the interests of the investigation require otherwise. Access—i.e. information on registration and correction or deletion of data—to the Schengen Information Systems is possible by addressing the data protection officer of the Dutch National police (*Landelijke eenheid politie, Dienst Landelijke Informatieorganisatie*),²³⁷ but such requests will mostly be turned down, either because there is no registration or in the interest of the investigation.²³⁸

In some instances, however, individuals are or will become aware of the existence of requests. In principle, and assuming they are a suspect (*verdachte*) in Dutch proceedings, they will have the rights and duties as provided for by the Code of Criminal Procedure, including the rights of access to a lawyer and access to the file. However, those rights may be limited in the initial stages of the procedure.

Remedies against the issuing of a request are available where they also exist with respect to the investigative measures in a comparable Dutch criminal procedure.²³⁹ Those remedies are useful as such topics as the subsidiarity and proportionality of the measures will most likely not be tested by foreign authorities under the rule of non-inquiry or mutual trust.²⁴⁰ An example is found in the aforementioned complaint procedure (*beklag*), which offers protection for, *inter alia*, persons whose objects or data were seized or who were confronted with the recording of data during

²³⁵CJEU, judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU (Aranyosi/Căldăraru), para 104.

²³⁶CJEU, judgment of 25 July 2018, Case C-216/18 PPU (LM), para 73.

²³⁷See Art. 41 of the SIS II Regulation in conjunction with Art. 25 of the Police Data Act (*Wet politiegegevens*).

²³⁸Art. 27 Police Data Act. See also the (outdated, yet nonetheless informative) document: https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/sis_ii_guide_of_access_updated_2015.pdf, (Accessed: 18 July 2019).

²³⁹Cf. Art. 14 European investigation order Directive 2014/41/EU.

²⁴⁰*Kamerstukken II* 2016/17, 34611, 3, pp. 12–13.

(digital) searches or with decryption, preservation or restriction orders with respect to data.²⁴¹ Complaint procedures may also be used to address the continuation of a seizure by foreign authorities executed as a result of a Dutch European arrest warrant (and, presumably, also MLA request).²⁴² If granted, this will require an additional request by Dutch authorities to end the seizure/preliminary measure.

In addition to the remedies offered by criminal procedure against requests for specific investigative measures, there is the possibility of civil injunctions. These proceedings may lead to the compensation of damages or to a cessation of certain investigative measures.²⁴³ Again, the test that will be applied by the courts is a marginal one. Only where no reasonable prosecutor (*redelijk handelend lid van het Openbaar Ministerie*) would come to such a decision (as, in this case, the issuing of a request) will the defendant succeed in his/her efforts.

As regards the position of the Netherlands as a *requested state*, the relevant provisions of the Roadmap Directives have been incorporated in the Surrender Act (SA).²⁴⁴ With respect to the dual defence mechanism, which has been implemented by Article 21a EA, it is up to the person concerned to request the Dutch authorities to contact the issuing authority. The latter must then provide that person with the necessary information, for instance a list of potential defence lawyers. The final appointment needs to be done by the claimed person himself/herself.²⁴⁵ A similar provision is lacking for other types of assistance, for instance under MLA regimes or within the European investigation order setting. The District Court of Amsterdam has meanwhile ruled that a failure by the issuing state to appoint a lawyer with a view to assisting in Dutch surrender procedures does not affect the strict time limits of the Dutch surrender procedure; it cannot lead to a postponement.²⁴⁶

Under Dutch law, remedies in MLA procedures do have a suspensive effect, and the persons concerned will be notified, in principle. The relevant procedures have already been described in the above.²⁴⁷ It is possible, however, that, in the interest of the investigation, those persons are not notified. What may also be considered a serious setback in European investigation order cases is that under that specific EU regime, the traditional leave to transfer procedure (*verlofprocedure*) is no longer available. It is also possible to send the results of the execution of a European investigation order to the issuing authorities on a provisional basis.²⁴⁸ The latter provision implements Article 13 (1) and (2) of the European investigation order

²⁴¹Supra note 78.

²⁴²Supreme Court of the Netherlands, judgment of 3 June 2008, ECLI:NL:HR:2008:BC9015.

²⁴³On that, see also Lindeman (2013), pp. 285–286.

²⁴⁴See art. 17 SA (information on rights), art. 43a SA (access to a lawyer), arts. 30, resp. 23 (3–5) SA (rights to an interpreter and translation), art. 21a SA (appointment of a foreign lawyer with a view to assistance in the Dutch European arrest warrant-procedure).

²⁴⁵*Kamerstukken II* 2014/15, 34157, 3 (*tweede herdruk*), p. 55.

²⁴⁶District Court of Amsterdam, judgment of 8 August 2017, ECLI:NL:RBAMS:2017:5781.

²⁴⁷Supra note 148.

²⁴⁸Supra note 147.

Directive.²⁴⁹ A similar provision for international MLA procedures was ultimately removed from the legislative proposal²⁵⁰ because of concerns that a later prohibition against using provisionally transferred data would be difficult to enforce outside the EU. Specific provisions for the EU context are found in Article 5.4.9 (3) CCP. A provisional transfer is not possible if it would cause serious and irreversible damage to the persons concerned. Moreover, the use of the materials as evidence is only possible after the final transfer. Until then, Dutch law continues to apply to the provisionally surrendered materials.

6.6.2 *Ineffectiveness of Ex Post Facto Judicial Review*

It may happen that irregularities occur in the process of the gathering or transferring of information/evidence to the Netherlands, upon an initial Dutch request. In those instances, the aforementioned case law of the Supreme Court applies.²⁵¹ Dutch court will not enter into an examination of acts that have been conducted by foreign authorities when the country concerned is an ECHR state. Remedies must be sought in that state. The consequence of that is that the exclusion of the unlawfully obtained evidence, for instance, will not occur. That, of course, begs the question to what extent those remedies are still *effective*. This is different for violations of Article 6 ECHR as a result of the *use* of the materials.

In turn, should damages occur as a result of irregularities in the execution of a foreign request warrant or order, then there is the possibility of (pecuniary) compensation for damages. There is a specific procedure for this in extradition and surrender law, but in general, the Dutch state is liable under civil law for torts (*onrechtmatige daad*). As regards the specific procedure for unlawful detention under extradition or surrender procedures, the Amsterdam District Court has chosen to assimilate the surrender procedures with those of extradition law.

A person concerned can thus claim pecuniary compensation on the basis of Articles 67 SA, resp. 59 EA. Compensation occurs when, all circumstances taken together, grounds of reasonableness exist (*gronden van billijkheid*).²⁵² In principle, such grounds are present when extradition/surrender has been declared inadmissible (*ontoelaatbaar*).²⁵³ The fact that the Dutch authorities or Dutch state cannot be blamed for the course of the procedures or the (continued) duration of the detention

²⁴⁹Kamerstukken II 2016/17, 34611, nr. 3, pp. 11–12.

²⁵⁰Kamerstukken II 2015/16, 34493, nr. 3, p. 24.

²⁵¹Supra notes 184 and following.

²⁵²See arts. 67 SA and 59 EA in conjunction with Art. 90 CCP.

²⁵³By implication, compensation on this basis is not possible when the case of the Public Prosecutor has been declared inadmissible (for instance because the European arrest warrant was repealed); see District Court Amsterdam, judgment of 26 July 2018, ECLI:NL:RBAMS:2018:5343.

does not prevent courts from offering compensation.²⁵⁴ The same goes for the possibility to find redress in the executing state; by no means will it be certain, after all, that such state will share the reasons for the inadmissibility and, consequently, the qualification as an *unjustified* deprivation of liberty. It may be, however, that there are reasons to believe that the detention has (also) been the result of the claimed person’s own actions. In that case, there may be a reason to deny or mitigate a claim.

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²⁵⁴Cf. District Court of Amsterdam, judgment of 26 July 2018, ECLI:NL:RBAMS:2018:5339.

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Michiel Luchtman Professor of Transnational law enforcement and fundamental rights, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands.