

# **PROTECTING INDIVIDUAL RIGHTS IN THE NETHERLANDS**

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Eurowarrant - a Justice conference 5/6 July 2003 in London

## **1. Introduction**

The official Dutch proposal for an implementation law of the framework decision on the European arrest warrant has not been made public yet. This paper is based on a provisional draft prepared by the Ministry of Justice on October the 14<sup>th</sup> 2002. I have been told however that the most recent version which at this moment is under the scrutiny of the Dutch Council of State – an obligatory phase in the Dutch law-making process- is very comparable to the draft. After the Dutch Council of State has given its advice, the Dutch parliament has to give its consent to the draft. They can also however, make amendments to this draft before giving their consent. So nothing has been decided yet and the conclusions I draw today are very preliminary.

In this paper I will not describe the complete Dutch procedure under the new EAW-system. I will merely focus on certain typical features of the Dutch model. I will first of all pinpoint a few significant changes to the currently still existing procedure and I will further mention in what ways the Dutch implementation law differs from the EAW. Obviously overall the main focus will be on the protection of individual rights.

## **2. The implementation law**

As of January 1<sup>st</sup> 2004 –that is to say if the Dutch parliament manages to agree on a final version before the end of this year- a new extradition law, called '*Overleveringswet*' will function alongside the old extradition law, called '*Uitleveringswet*'. Extradition to EU member states will no longer be called extradition ('*uitlevering*') but surrender ('*overlevering*'). This makes the distinction between the two different systems of extradition/surrender even clearer. The new (surrender) law will only be applicable if an extradition request comes from an EU-member state. In all other cases the old extradition law will still be applied. The Dutch legislator has tried to make as few changes as possible to the system which exists today. The only changes made were those which were absolutely essential in order to implement the framework decision on the EAW.

## **3. The Procedure**

The probably most significant change in the Dutch model is the fact that only the judge is to decide on the extradition request. The role of the secretary of justice is extremely limited. Up till today one of the most significant features of the Dutch extradition procedure was that the extradition law clearly distinguished between the role of the extradition judge –who was given

a limited number of areas of competence- and the role of the secretary of justice – who was given other distinctive areas of competence. Besides: the order in which they had to decide was very clear. The extradition judge had to decide first. If his conclusion was that the extradition was inadmissible then the secretary was bound by this decision. If the judge, however, would declare the extradition admissible, the secretary of state was free to decide whether he will or will not comply with the extradition request. According to the extradition law, however he was obliged to take certain preconditions into account. The fact that in the near future the extradition judge will be the only competent authority in extradition cases in which the EAW is applicable, will be a major change compared to the existing system.

The role of the secretary of justice will become extremely limited. He does, however, have to decide in cases of concurrent extradition requests from an EU-member state and a third country or an EU-member state and a war tribunal or the international criminal court. [If two EU-member states request the extradition of a suspect at the same time then the judge has to decide which request should prevail.] The secretary of justice furthermore has to make the final decision in cases when the suspect is under investigation in the Netherlands. The secretary has to decide whether to continue the Dutch prosecution or whether to discontinue the prosecution and extradite the suspect.

A second major change is the fact that the possibilities for appeal will become extremely limited. This decision was made due to the very tight time schedule the EAW imposes. An appeal on facts is no longer possible and an appeal on grounds of law can only be initiated by the procurator-general. It is debated among scholars whether a special civil procedure (*'kortgeding-procedure'*) will still be available under the new system or not. Thanks to this summary procedure an extraditee may appeal the decision of the secretary of justice to extradite him. An important matter though as the civil summary judge has a better record on human rights protection in extradition cases than the extradition judge.

A third important change is that the only court which will be competent to decide on EU-extradition matters will be the District Court of Amsterdam. Up till now all district courts were competent. This court will thus become very experienced in extradition cases which will be beneficial to the smooth and efficient handling of european arrest warrants.

The law distinguishes between an ordinary procedure and a summary procedure. In the ordinary procedure the judge will look into the extradition request during a public hearing and will check whether all preconditions are fulfilled. The extraditee has the right to a defence lawyer and may give his view on the matter. The extraditee may, however, waive his right to

a full extradition hearing. In that case he must waive his rights in front of the examining magistrate who must warn him of the fact that in that case he automatically loses the protection of the speciality principle. It is then upon the public prosecutor to decide whether to accept the waiver or not. If it is doubtful whether the extradition request meets all the requirements, the waiver may not be accepted and the ordinary procedure will be applied.

There are two deviations in the Dutch implementation law compared to the EAW. In the Dutch law a distinction is made between a *provisional arrest* on the basis of an alert in the Schengen Information System and an *arrest*. According to Dutch law the time starts running only when the actual EAW has been received and looked into by the public prosecutor. The EAW doesn't make a distinction between provisional arrest and arrest. The second deviation is that Dutch law contrary to the EAW allows a suspect some very limited time to prove his innocence. The hearing will not be adjourned nor will any discussion on his whereabouts be allowed. The only proof allowed has to be clear and direct proof of his innocence.

#### **4. Material conditions**

Motivated by the goal to change as little as possible the framers of the draft used all options available to them and turned all optional grounds for refusal into mandatory grounds for refusal. This means that:

- double criminality will still be required for all crimes not listed in art. 2 par. 2 EAW
- extradition is prohibited if the person has been tried in a EU-member state or third state alike
- extradition is prohibited if the crime is statute barred
- extradition is prohibited in most cases in which Dutch authorities have decided not to prosecute
- extradition of nationals will only be allowed if it is guaranteed that the suspect in case of a conviction will be returned to the Netherlands in order to serve his custodial sentence
- extradition after a trial in absentia is only allowed when the suspect has had or will get another chance to defend himself.

The draft furthermore makes clear that the principle of speciality will and has to be fully respected.

#### **5. Human Rights protection**

There is no specific article in the Dutch implementation law referring to art. 1 par. 3 EAW. Apart from a discrimination clause by which no one may be extradited who might be discriminated in the requesting state, no human rights clauses are included. There is no reference to the right to a fair trial (apart from the prohibition of a trial by default), the right to a human treatment or to the ECHR in general. The reason given for the lack of such an article is that it would be redundant as no law or treaty can supersede the ECHR. This would mean that an extradition request should be turned down if there would be substantial grounds to believe that the extraditee would face a real risk of an inhuman treatment, torture or in case he would face the risk of a flagrant violation of his right to a fair trial. (See ECHR 7 July 1989, Soering vs. UK) The Dutch extradition judge, however, feels himself bound by a self-imposed rule of non-inquiry. Only in exceptional cases a very limited inquiry is allowed and accepted.

Two main arguments are used by the extradition judge why he is bound by the rule of non-inquiry: the first is the argument that not the judge but merely the secretary of justice may inquire in the judicial system of the receiving state. As said before a typical feature of the Dutch extradition law was that both the judge and the secretary of justice are supposed to look into the extradition request. They have, however, distinctive areas of competence. As the need to look into the human rights situation of the receiving state is not mentioned in the extradition law it is not clear who should look into that. The extradition judge, however, often used the argument that the secretary of justice should decide on this matter as the consequences of a denial of the extradition request can have grave consequences for the international relations of the country. Extradition is still seen as a form of international relations and thus falls within the area of competence of the executive and not of the judiciary. Besides: the secretary of justice is supposed to be in a better position to inquire into the situation in the country and to demand guarantees of the authorities from this country.

The second argument is the following: according to the Dutch Constitution extradition is only possible on the basis of a treaty. It is upon the government to decide in which countries it has sufficient trust as to agree or not agree on an extradition treaty. The treaty therefore presupposes that the human rights situation in the other country is in line with the requirements of the ECHR and it presupposes that the suspect will be treated humanely and will receive a fair trial. Therefore it is not upon a judge to decide whether the presuppositions are correct or not.

It has to be said, however, that the rule of non-inquiry is not applied as an absolute principle of law. In exceptional circumstances the judge may -despite the above-mentioned arguments- inquire into the human rights situation in the requesting state. Inquiry might for e.g. be allowed if the requesting state is not a party to the ECHR or if the requesting state has not recognized the right to individual complaint. Or in situations where there are strong reasons to believe that there is a serious risk that the human rights of the extraditee will be violated. The threshold applied by the extradition judge, however, is very high. Too high in my opinion.

Another interesting feature of Dutch law is the possibility to have a civil summary judge (*'kortgedingrechter'*) look into the decision of the secretary of justice in extradition cases. It is a kind of appeal to the decision of the secretary of justice. This civil judge has a better human rights record than the extradition judge and there have been a few cases in which this judge prohibited the extradition whereas the extradition judge had judged the extradition admissible.

## **6. Conclusions**

The conclusions can only be provisional as the Dutch bill is only a draft. The first conclusion is that in general there are fewer changes than had been expected. The Dutch drafters have tried to change as little as possible. The most important change for the Dutch model is in case a EU-member state requests the surrender of a suspect merely the judge will decide and that the role of the secretary of justice is very limited.

Considering the human rights protection: art. 1 par 3 EAW is not implemented as such in the new extradition law. There is a discrimination clause but apart from this clause no other article or paragraph refers to possible human rights violations in the requesting state. The reason for the lack of an explicit paragraph on this matter is because it was thought to be redundant. That means that in case a surrender on the basis on the EAW would violate the ECHR (Soering-situation) the extraditee may not be surrendered despite a lack of a specific rule thereto in the law. As of the first of January 2004 much will depend on the District Court in Amsterdam. They have a good reputation but much will depend on how they will decide upon their obligation to inquire into the human rights situation in the requesting state every time doubts arise.

