LWWL PROJECT:

THE SCOPE OF THE TERRITORIALITY PRINCIPLE IN EUROPEAN ARREST WARRANT PROCEDURES IN THE NETHERLANDS, GERMANY, FRANCE AND BELGIUM.

Initiated and supervised by the:

UNIVERSITY OF AMSTERDAM in conjunction with the
T.M.C. ASSER INSTITUTE, The Hague, and the
INTERNATIONALE RECHTSHULPKAMER, DISTRICT COURT AMSTERDAM.

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Foreword

With this LWWL project, I bravely set out to determine the scope of the territoriality principle in the European Arrest Warrant Procedures in four EU Member States: The Netherlands, Germany, France and Belgium. I started my research towards the end of May 2006, convinced that I could finish by November of that same year. How optimistic I was. Luckily, I could rely on a great group of people involved with the LWWL project. Regardless of their busy schedule, they kept me on track and inspired me at times when I felt that I did not make enough progress.

My research was done in two parts. The first part concerns my study of the Dutch and German territoriality principle. Due to the fact that I was allowed to attend the IRK’s procedure without any restrictions, I witnessed the most fascinating legal bouts between the Amsterdam District Court and the Public Prosecutors Office regarding the scope of the territoriality principle.

As far as the German section of my research, I was lucky enough to get in touch with Ms. Peggy Pfützner from the Max Planck Society in München and correspondent at the T.M.C. Asser Institute. Ms. Pfützner took the time to fill me in on some of the deeper implications of the new German EAW Implementation Act.

So far, so good.

As it turned out, finishing the French and Belgian section was a ‘tour de force’. While studying the legal implications of the territoriality principle in EAW procedures in these two countries it became evident that a modest knowledge of the French language simply is not good enough for in depth research. Fortunately, Ms. Marie Delbot from the Asser Institute and prof. dr. Dirk van Daele from the Katholieke Universiteit Leuven (Belgium) helped me fill in the blanks.

I hope that the findings of my research will be indicative of the implications of the territoriality principle in EAW procedures in relation to the Area of Freedom, Security and Justice and fundamental rights in the Netherlands, Germany, France and Belgium.

Taking part in the LWWL project has been quite an experience. I would like to thank the following people for making it possible and for sharing their knowledge with me while guiding me through the project:

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On a personal note, to my daughter MoMo and my friend for life Geeta: Where would I be without your support?

Amsterdam, February 2nd 2007, Ricardo Wijngaarde
1 Introduction.

The rules regarding the surrender of suspects between Member states of the European Union have been framed in the European Arrest Warrant Framework Decision and the procedure of surrender between Member States (EAW FD). The EAW FD in itself is not a Treaty and therefore doesn't have direct effect. It is a decision from a supranational organisation from which all EU Member States are party to. At the same time it obliges these Member States on the basis of article 32 (2) (b) of the EU Treaty to implement this agreement into national legislation.

Extradition of suspects and the safeguarding of the fundamental rights of the suspected person have always been connected. This balancing of conflicting obligations for member states is the same in the surrender procedure of the European Arrest Warrant (EAW) as follows from the provisions of the EAW FD and its Preamble. Article 1 (3) of the EAW Framework Decision reads as follows: "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" (EU Treaty). This means that through the Preamble of the Framework Decision and its explicit connection with Article 6 (1) of the EU Treaty, Member States are obliged to guarantee the safeguards of the fundamental rights as set forth in the European Convention on Human Rights (ECHR).

Furthermore recital 13 of the EAW FD Preamble reads that: "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

As far as the scope of the territoriality principle as a ground for refusal, the decision on the effectiveness of the prosecution must be the result of checks and balances between the proportionality and subsidiarity of the surrender and the fact that there is a connection between the offence and the requested State. The main question than is: Given this territorial connection, is surrender justified if tested against its aim and with the means by which it is to be effected?

In the Soering Judgement, the ECtHR held that a State was considered to violate the fundamental rights enshrined in the ECHR if it extradited without granting the protection ensured by these rights. This means that States have to ensure that the requested person will not be subjected to violations of his/her fundamental rights as laid down in Articles 1, 3, and 6 of the ECHR. This is even the case when the requesting State is also a party to the ECHR.

Even though the ECHR expressly mentions extradition, following the Tyrer s. UK judgement in which the ECtHR stressed that the ECHR must be regarded as a living instrument, it can be assumed that the ECHR surrender procedures as well. In this regard the comment from JUSTICE is highly relevant: (..) In a true European judicial space based upon mutual trust, there can be little scope for the margin of appreciation that the ECtHR has regularly applied to the enjoyment of human rights. The ECtHR has already begun to recognize the EU as setting a benchmark for standards in member States, with reference to the European Charter of Fundamental Rights and Freedoms, despite the Charter’s lack of legal force.

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4 Territoriality principle: Art. 4 (7) European Arrest Warrant Framework Decision
5 ECHR July 7th 1989, Soering v. UK, NJ 1990, 158, annotated by EAA.
6 Article 1 ECHR: State responsibility regarding the fundamental rights; Article 3: Prohibition of inhuman treatment; Article 6: Right to a fair trial.
7 ECHR, March 7th 2000, T.I. v. UK; Also EHRM November 15th 1996 Chahal vs.UK
What exactly is a flagrant denial of justice? Most certainly there is a flagrant denial in case of inflicting the right to life and the personal integrity. However, there is also a flagrant denial of justice due to a lapse of time between the offence and the issuing of the Arrest Warrant that cannot be compensated by a custodial sentence.\(^{10}\)

This 'lapse of time', needs to be substantiated with evidence during trial as much as a defence based on the allegation of torture of inhumane treatment in the requesting state. Simply bringing it up during the procedure will not suffice.\(^{11}\)

However this may be, it is also upon the issuing State to convince the judges with a satisfactory explanation regarding the delay in the procedure\(^{12}\). Nonetheless, at all times one should bear in mind that a flagrant denial of justice -as such- does not contain sufficient ground for the refusal of an surrender request.

In the light of the principle of mutual trust it seems safe to conclude that an EAW surrender request can only be refused if there is:

1. (risk) of flagrant denial of the rights protected by the ECHR, and
2. it has been established that the requested person will have no access to an effective remedy as provided for in Article 13 of the ECHR\(^{13}\) in either the requesting or the requested State\(^{14}\).

The paradox that has been pointed out by Verrest and Kraniotis is that the IRK feels less restricted in case of a less serious offence whereas when confronted with flagrant denials of justice regarding fundamental rights like the one contained in article 3 of the ECHR, the threshold is much higher.\(^{16}\) It is equally true that precisely the nature of the violations under article 3 ECHR is such, that more often than not, these violations remain unknown to the judicial authorities. Therefor one can question the added value of the requirement of an effective remedy.

Recital 12 of the EAW FD preamble reads: The Framework decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty of the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. (…) Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person, for whom a European arrest warrant has been issued, when there are reasons to believe that on the basis of objective elements, the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons (….)

When taking into account the strict time limits upon which the surrender procedure is bound, also the manoeuvre space as far as time plays a major role in the EAW practice of all EU Member States\(^{17}\). As a result the judicial authorities will seldom be able to thoroughly investigate the human rights situation in a Member State within these time limits.

Those who are acquainted with the results of the most recent Amnesty International reports on the human rights situations in the new EU Member States, will agree that regardless of the reputation of the issuing State, one should be alert at all times.

\(^{10}\) V. Glerum (m.m.v. V. Koppe) De Overleveringswet, Praktijkchamiers Strafrecht, Den Haag 2005, p. 75.


\(^{12}\) IRK Amsterdam, 1 juli 2005, LJN AT8580

\(^{13}\) Even though this additional criterium has not been contained by article 11 of the Dutch EAW Implementation Act (Overleveringswet): IRK Amsterdam, 2 juli 2004, LJN AQ 6070 (6 EVRM), 10 september 2004, LJN AR2378 (6 EVRM), 5 november 2004, LJN AR5600 (6 EVRM) en 17 mei 2005, LJN AT5635 (3 EVRM)

\(^{14}\) Article 13: Right to an effective remedy against violated rights and freedoms.


\(^{16}\) Verrest en Kraniotis, DD 2005, afl. 10/86, p 1208.

\(^{17}\) Selma de Groot, Mutual Trust In Extradition Law, p. 97.
Finally, Recital 10 of the Preamble reads that the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States. Taken too literally, the rule of non-inquiry, should prevail. As a result, this could amount to a situation or area in which the transferral of sovereignty between states will become standard procedure.

However more often than not, there are circumstances, facts or allegations regarding the (possible) violation of the fundamental rights and freedoms, on the basis of which the requested state should investigate whether this transferral of sovereignty is justified. Failure to act accordingly, could make the requested state liable for violations of the requested persons’ fundamental rights.  

If the judicial authorities find that this transferral is not justified in a particular case, apart from the aut dedere aut judicare principle, the EAW FD gives the requested state the opportunity to exercise jurisdiction through the principle of territoriality as provided for in article 4 (7) EAW FD.

So, as a result, the principle of territoriality can play a significant role in resolving the tension between ‘Mutual Recognition’ as contained in article 1 (2) of the EAW FD, ‘Mutual Trust’ as contained in recital 10 of the EAW FD preamble.

These provisions should be read in relation to the principle of ‘State responsibility’ as contained in article 1 (3) EAW FD in conjunction with article 6 (1) and article 7 (1) (2) Treaty on the European Union (TEU). Other essential provisions on which the judicial co-operation is based, are article 29 of the TEU, which defines this target “with the objective of providing citizens with a high level of safety within an Area of Freedom, Security and Justice”.

Similarly, articles 31 (1) (a) - (e) TEU concerning mutual assistance and the facilitation of extradition in criminal matters, are also some of the key provisions upon which the EAW procedure is based.

The structure of my research is as follows:

- In the chapters in the chapters 3 till 6, the scope of the territoriality principle as contained in the EAW implementation acts of the Netherlands, Germany, France and Belgium will be explored based on case law and directly related legal provisions.
- In chapter 7, I will draw a conclusion, based on three legal principles that as a consequence of the implementation of the EAW FD, have become part of the EAW procedure in all EU Member States.

These legal principles are:
- The implications of Tampere and the principle of mutual trust.
- The fundamental rights of the accused.
- The proper administration of justice.

In the next chapter I will first determine the scope of these principles in relation to my research subject.

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18 For the question whether this is a constitutional duty of the requested state, see also: H.G. van der Wilt, ‘Apres Soering: The relationship between Extradition and Human Rights in the legal practice of Germany, the Netherlands and the United States’ in: Netherlands International Law Review, 1995, p. 70.
19 Article 4 (7) EAW FD reads:
Where the European arrest warrant relates to offences which:
- a° are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
- b° have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Note its relation to recital 10 and 13 of the EAW FD Preamble.

20 Article 1 (2) reads as follows: "(...) Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision". Note its relation to recital 10 and 13 of the EAW FD Preamble.
2 The territoriality principle in the light of the Tampere Declaration\textsuperscript{22}, Fundamental rights and the proper administration of justice.

The Territoriality principle not only protects the sovereignty of a State but also the fundamental rights of the requested person\textsuperscript{23}. With this in mind the requested State is not obliged to exercise jurisdiction \textit{per se}. It is \textit{allowed} to do so. This also applies to EAW procedures\textsuperscript{24}.

First let us have a closer look at the three guidelines that will be used in determining the scope of the territoriality principle in EAW procedures in Germany, France, Belgium and The Netherlands.

1 Implications of Tampere and the principle of Mutual Trust

In order to completely understand the implications of the 1999 Tampere declaration, we have to go back to the origins of the idea of a commonly shared European ideal of an Area of Freedom, Security and Justice as set out earlier that year in Amsterdam. On October 2\textsuperscript{nd} 1997, The Treaty of Amsterdam was signed and it came into force on May 1st 1999.\textsuperscript{25} Its objective was to create an Area of Freedom, Security and Justice. One of the main instruments by which this should be achieved was enhancing judicial co-operation in criminal matters within the European Union by way of mutual recognition. Since a few years earlier, as a result of the 1992 Treaty of Maastricht, EU Heads of State had already agreed upon making judicial cooperation in

Justice and Home Affairs part of the EU policy under the so-called ‘\textit{the third pillar},’ this seemed like a natural development\textsuperscript{26}. In virtue of the Treaty of Amsterdam, an Action Plan was drafted by the Council and the EU Commission, regarding an ‘\textit{Area of Freedom, Security and Justice},’ based on judicial co-operation.\textsuperscript{27} The Tampere agreements based on the principle of mutual recognition and mutual trust, set out to establish:\textsuperscript{28}

- Prevention of disagreements concerning Jurisdiction between Member States;
- Facilitating the surrender procedure between Member States;
- Faster and easier co-operation between judicial authorities;
- Safeguarding the compatibility of judicial procedures between Member States and enhancing judicial co-operation;
- Securing a step-by-step approach of fighting organised crime, drugs and terrorism by formulating minimum procedural rules and regulations.

These agreements can be considered an implicit and integral part of EAW procedures in all Member States. This could give rise to conflicting jurisdiction especially when violation of the public order is felt in more than one Member State. This shows the importance of determining the scope of the territoriality principle in each Member State separately\textsuperscript{29}.

\textsuperscript{22} Declaration of the European Council on Freedom, Security and Justice, 15-16 October 1999, Tampere, Finland.
\textsuperscript{23} V. Koppe en V. Glerum, \textit{De Overleveringswet, Overlevering door Nederland}. Praktijkchancers strafrecht, SDU Uitgevers, Den Haag 2005, p. 46.
\textsuperscript{24} Article 4 of the EAW FD reads: \textit{The executing judicial authority may refuse to execute the European arrest warrant (…)} (7) where the European arrest warrant relates to offences which: (a) are regarded by the law of the executing member state as having been committed in whole or in part in the territory of the executing Member state or in a place treated as such: or
\textsuperscript{26} For instance, article K.1 (7) Title VI of the Maastricht Treaty, expressly mentioned judicial cooperation in criminal matters as one of the areas in which close cooperation had to be established. For a detailed account on this topic: Michael Plachta and Wouter van Ballegooij, \textit{The Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union}, in: R. Blekxtoon en W. Van Ballegooij, Handbook on the European Arrest Warrant, 2005, T.M.C. Asser Press, The Hague, p. 19, 26-28.
\textsuperscript{28} Especially sections C and D and Chapters VIII-X.; Apart from the general agreements on mutual recognition in judicial matters, Part II, Category C, of the Action Plan proved to be crucial for the further development of several other third pillar instruments like Joint Investigation Teams and a remodelled Europol.
The basis of the requested person’s rights in the EAW procedure is guaranteed by the ECHR. Through the Preamble of the Framework Decision in conjunction with Article 6 (1) of the EU Treaty, Member States are bound to abide to the fundamental rights contained in the ECHR. In addition, there are the safeguards mentioned in recitals 12 and 13 of the Framework Decision’s Preamble. Recital 12 of the Preamble is intended to serve as a guard against surrender to States that are known to prosecute for unlawful reasons, as it provides a general prohibition of discrimination on fundamental grounds such as sex, race, religion and political beliefs.

The added value of recital 13 is that it explicitly reminds Member States to respect the principle of non-surrender in certain cases. These Preambles can be regarded as a guideline for Member States to refuse surrender in cases where one can reasonably expect that surrender will violate the requested person’s fundamental rights. They also reflect a realistic view regarding the principle of mutual trust in an expanding European Union.

As far as the requested person’s rights are concerned, the European Council expressed the need for minimum norms regarding multi-lingual forms in judicial procedures, and legal assistance in cross-border cases.

However, in spite of this ambition, the results regarding the requested persons’ fundamental rights, other than as those provided for in the EAW FD, so far have not been too impressive.

Any prosecution in one way or another has to be brought to conclusion. Not only will the requested person’s fundamental rights have to be balanced, but also at times, conflicting targets of Tampere such as:

- Right of Access to a court vs. the principle of Mutual Recognition, and
- The rights of victims versus the rights of others in the EAW procedure, including the rights of requested persons.

As a starting point, even if only for reasons of procedural economics, the amount, the availability and the location of evidence, witnesses, victims and alleged partners in crime will have to be taken into consideration. Furthermore, the judicial authorities will have to take into account where the prosecution was started and whether other suspects have already been convicted or are still detained pending the court hearing.

An important element in the balancing process is that recital 10 of the EAW FD that sets out of the presupposed mutual trust between Member states. Recital 10 reads:

The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member states of the principles set out in article 6(1) of the treaty of the European Union, determined by the Council pursuant to Article 7 (1) of the said Treaty with the consequences set out in article 7 (2) thereof.

So as a result, of this ‘high level of confidence’ to which we shall refer as the principle of mutual trust, an isolated breach of fundamental rights cannot in itself carry enough weight to tip the balance in favour of the requesteds persons wish not to be surrendered. This can happen only if there is a pattern of serious and persistent breaches of fundamental rights.

Recital 13 of the Preamble: “No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”


Under 30 and 31 of Chapter V, Section B of the Tampere Declaration.

The territoriality exception in the Dutch law implementing the EAW FD\textsuperscript{35}.

In this chapter I will try to explain the scope and meaning of the territoriality exception in Dutch EAW procedures. The territoriality exception has been incorporated in Dutch law in article 13 of the Overleveringswet\textsuperscript{36}.

Test framework

The scope and meaning of the territoriality exception will be tested on the basis of several factors such as the role of the proportionality principle, the proportionality test, the hardship clause and the principle of mutual trust.

Even two years after the EAW FD has been implemented in Dutch Law, the application of article 13 OLW causes many law specialists to worry about the application and scope of the territoriality principle in the OLW, the main reason for this worry can be attributed to the diversity of the application methods. The Public Prosecutors Office and the Internationale Rechtshulp Kamer of the Amsterdam District Court (IRK) are involved in a fascinating exchange of views regarding the scope article 13 of the OLW\textsuperscript{37}.

In itself this is something that could have been foreseen, since article 13 OLW aims to balance three complementary interests, that amount to the principle of a proper administration of justice. These interests are:

- That of the violated public order of the requested State,
- Violation of the public order of the requesting State,
- Interest of the requested person.\textsuperscript{38}

To begin with, these interests are not of equal stature. The States and the requested person have legal personality whereas the concept of proper administration of justice is an abstract principle that contains several specific interests and tries to harmonise all these elements.\textsuperscript{39}

Article 13 (1) OLW reads:

Execution \textit{will} be refused in the following cases (...) when the European Arrest Warrant concerns offences which:

a. Were committed in all or in part on Dutch soil or territory\textsuperscript{40};

b. Were committed outside the territory of the issuing member State and the act if committed outside Dutch territory does not make for a criminal offence according to Dutch\textsuperscript{41}.

First of all, it is important to note that the territoriality exception contained in article 4 (7) EAW FD has been implemented as an \textit{obligatory} ground for refusal in the OLW. It is also important to note that the ground for refusal in paragraph 1, applies to all offences regardless of the fact whether they are punishable under Dutch law.\textsuperscript{42}

Article 13 (2) contains the exception to the rule contained in the first paragraph. According to this provision, the IRK has the opportunity to -if so requested by the Public Prosecutor- refuse to reject the surrender request even if the offence has in whole or in part been committed on Dutch Soil according to the situations as described in article 13 (1) under a and b. The only exception to this rule is when the IRK is convinced that the Public Prosecutor had no reasonable ground for his objection against refusal of the surrender request\textsuperscript{43}.

\textsuperscript{35} Overleveringswet: OLW

\textsuperscript{36} Framework Decision nr. 2002/584/JBZ.

\textsuperscript{37} IRK stands for: International Legal Aid Chamber.

\textsuperscript{38} As far as the interest of the ‘ordre public’ of the requested State, one should discriminate between acts that constitute a criminal offence and those that fall under the protection of the requested State protection. In the Netherlands acts like legal abortion and euthanasia fall under the second category of acts.

\textsuperscript{39} Prof. A.H.J. Swart, \textit{Goede Rechtsbedeling en Internationale Rechtshulp in Strafzaken}; especially: p. 5 (relation between proper administration and human rights aspects), p. 9 (need for equivalent protection), p. 15 (procedural and substantive issues), and p. 18 (role of the judiciary)

\textsuperscript{40} Or in a place assimilated to its territory.

\textsuperscript{41} And therefore Dutch law does not authorise prosecution of these offences that are committed outside Dutch territory

\textsuperscript{42} Parliamentary Documents II, 2003/04, 29 042, nr. 12, p.26, and nr. 21, p.3

\textsuperscript{43} See: Comment of the Dutch delegation on the Member States report from the Commission based on Article 34 of the Council Framework Decision of 13 June
Article 13 (1) OLW is very similar to article 7 of the EU Extradition Treaty (EUV) and article 6 of the Benelux Extradition Treaty (BUV)\(^44\).

However, an important difference can be found in the fact that as we have seen the ground for refusal in article 13 OLW has been formulated as a obligatory one. This means that the IRK must apply this ground for refusal in case the Public Prosecutor does not utilise the possibility contained in article 13 (2) OLW\(^45\).

By turning this ground for refusal into an obligatory one, the Dutch legislator apparently wished to compensate the restriction of the Dutch Sovereignty in Criminal matters as a result of the abolishment of the double criminality requirement for list offences as embodied by article 2 of the EAW FD.

The reason for this is that the Dutch would have been forced to surrender individuals for acts committed on Dutch territory, that are not punishable under Dutch law. It is exactly acts like legal abortion, the use of soft drugs and controlled euthanasia that are an expression of the Dutch Sovereignty in criminal matters that continue to cause much controversy in the international legal order as criminal offences\(^46\).

Another important factor is the fact that because of a fairly extensive interpretation of the (extra) territoriality principle in many Member States, an obligatory ground for refusal has become a necessity.

It is no secret, that Germany claims universal jurisdiction over drugs offences because they consider their public order to be violated sooner and more serious by drug related acts that are either condoned or legal in the Netherlands.

Consequently this has repercussions for the establishment of the *lex loci delicti*. One only has to picture a scenario where drug related acts are being committed on Dutch territory while the effects on foreign territory are such, that that foreign public order is violated by these acts.\(^47\)

With its decision from September 30\(^{th}\) 2005, the IRK has explicitly mentioned that article 13 OLW also sees upon surrender requests on behalf of the execution of a foreign sentence of acts that have been committed on Dutch territory and that are not punishable under Dutch law\(^48\).

Finally it is important to note that in these circumstances the nationality of the requested person is of no importance. What matters is the establishment of the fact that the Dutch public order has not been violated by acts that according to foreign law are considered criminal offences, but that do not constitute a criminal offence according to Dutch law.

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\(^{44}\) See also: Conclusion Advocate-General D. Ruiz-Jarabo Colomer, in Case C-303/05, September 12th 2006, Advocaten voor de Wereld, supra note 105: (...)

\(^{45}\) Parliamentary Documents II, 29 042, nr. 21, p. 2

\(^{46}\) Parliamentary Documents II, 29 451, nr. 1, p. 9-10

\(^{47}\) Consequently also legal abortion and euthanasia performed on Dutch territory on a French National can have serious consequences for the medical examiner - annex ‘perpatrator’ according to French law.

\(^{48}\) District Court Amsterdam, 30 september 2005, RK 05/2734.
3.1. The balancing system contained in article 13 OLW.

The Explanatory Memorandum regarding article 13 OLW departs from the principle of primary jurisdiction of the State where the criminal offences have been committed in part or in whole. Nowhere in the explanatory notes is there any mentioning of the involvement of the personal interests of the requested person while balancing the relevant factors in virtue of the proper administration of justice. There is no such discretionary power, let alone an obligation to weigh these personal interests.

The IRK has developed a unique policy regarding the request of the Public Prosecutor based on article 13 (2) OLW. It is significant that apparently contrary to the intention of the legislator regarding the just administration of law, the personal interests of the requested person that seem to fall outside the scope of the ordre public, play a major role.

At first sight it seems like the interests of someone who had reasonable grounds to think that he acted within the legal framework of the Dutch law like for instance the consumption of a small amount of soft drugs, is significantly different than that of someone who has committed an offence that is punishable to foreign and Dutch law as well, but on the basis of family- or health issues objects to being surrendered.

With Prof. Van der Wilt I agree that the differentiation between these two types of rights is an artificial one. Based on article 1 of the ECHR every State is bound to protect the fundamental rights and freedoms of every individual on its territory. Even apart from the fact whether or not these interests are an integral part of the ordre public, the scope of article 1 ECHR in conjunction with other ECHR provisions, is sufficient proof of the fact that the interests of the requested person and that of the State are bound through the scope of the ECHR. However, the question remains than, how to reconcile this obligation under the ECHR with the obligations deriving from the EAW FD.

So as a whole, what we’re looking at is a system of fundamental rights and freedoms that are a direct result of the Dutch criminal Law policy, the principle of legal certainty as well as interests regarding the protection of the national Sovereignty as opposed -and at times parallel- to the interests of the requested individual. How these different interests are weighed and balanced in the EAW procedure will be explained in the following subparagraphs.

1.4.a Proportionality, hardship clause and the principle of mutual trust

Proportionality

The defence in EAW surrender procedures is often based on the principle of proportionality. The question that is posed is that if the surrender is allowed for minor offences or that there should be referred to other alternatives like voluntary report of the requested person with the requesting judicial authorities. Similarly the Public Prosecutors Office must weigh the interests of the requesting State against the possible irreversibility of the consequences for the requested person. The IRK has a clear point of view on this matter: The PPO must either develop a unambiguous and written policy on article 13 OLW or formulate a more substantial claim in each separate case as to why they want the IRK to comply with the EAW. Consequently, the proportionality principle that the PPO has to abide and the appeal on the principle of subsidiarity are complementary.

The PPO has opposed the IRK’s view arguing that regarding the uniqueness of each EAW, the need for a written policy is simply not there, even it had been established that such was desirable. In each separate case the PPO claims to take all the relevant interest in regard on the basis of which it than decides how the PPO will ensue with the surrender request based on the EAW. The balancing of interests is incorporated in the PPO’s system from the moment they receive the EAW. Therefore the PPO already has subjected those cases that finally make it to the courtroom, to the proportionality and subsidiarity test.

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50 It should be noted that this refers to acts that have been committed in whole on Dutch territory.

51 Rechtbank Amsterdam, 1 april 2005, LJN AT 3380; NJ 2005, 278 en Rechtbank Amsterdam 20 mei 2005, LJN AT 6265; NJ 2005, 293.
The principle of proportionality has also been accepted by the European Court of Justice in the Baumbast verdict as an independent fundamental right in Community law. This gives it an even stronger base in the judicial matters between member states in general and in the EAW procedure in particular. As already shown in Chapter 1 there is a direct link between article 6 of the EU Treaty and article 1 (3) of the EAW FD. Consequently, an appeal on the principle of proportionality is possible not only in relation to the hardship clause as contained in article 11 OLW, but also in case of the applicability of the territoriality principle.

Finally the principle of proportionality can be called upon not only autonomously, but also in relation to the right to a family life as contained in article 8 of the ECHR. Both IRK and PPO always take the family situation of the requested person in consideration.

At the same time the PPO argue that a considerable amount of EAW is rejected and remains out of the IRK’s view, precisely because of their balancing of the requested person’s interests. Nevertheless, there seem to be some inconsistencies in the PPO’s view, precisely because of their balancing of the requested person’s interests.

The principle of mutual trust

The principle of Mutual Trust derives from the implications of the Tampere Declaration and the principle of Mutual recognition in particular. This presupposed trust in principle should have the effect of a restrictive attitude towards the weighing of the personal interests of the requested person in the EAW procedure. Consequently, humanitarian objections against the surrender procedure therefore should be reserved for the procedure before the judicial authorities of the issuing State. As we’ve seen the same applies for an appeal upon the alleged disproportional character of the arrest warrant.

As indicated earlier, opposed to this presupposed principle of mutual trust, articles 12, 13 of the Preamble as well as article 1 (3) of the EAW FD contain safeguards against the violation of the requested person’s fundamental rights. In this way even within the EAW FD itself, respect for fundamental rights in conformity with article 6 of the EU Treaty has been explicitly confirmed.

Hardship clause

The legislator has refrained from incorporating a hardship clause in the OLW like the one contained in article 10 (2) of the Extratition Law. Instead, apart from the provisions in article 10 (age) and 11 OLW, the legislator opted for a hardship clause in article 35 OLW that is restricted to the postponement of a surrender after the EAW has been found executable by the IRK. But even apart from the provisions ex article 10, 11 or 35 OLW, the IRK has found a unique way to stretch the applicability of a hardship clause by reinterpreting it to the territoriality principle ex article 13 OLW. On the basis of the personal interest of the requested person, and the fact that the public order of the requesting State has not been seriously violated by the alleged offence, the IRK has introduced a unique type of circumstantial hardship clause. However the Supreme Court has quashed the IRK’s decisions in these cases.

52 European Court of Justice September 7th 2002, C-413/99, NJ 2003, 93, Baumbast.
53 When the act has been committed in part or entirely on Dutch territory.
54 Glerum en K. Rozemond, DD 2006, 9, p. 189; Also: Lijn AY6631, 00730/06 CW
55 For instance regarding their decisions in custodial matters and the compliance with- or rejection of arrest warrants.
56 In one such a case there was a need for a specific kind of medical treatment for the requested person. Even though such a treatment would have been possible in the requesting State, the PPO nevertheless rejected the EAW forthwith. The PPO did so because of their findings of the particular features of the case, being the personality of the requested person, the nature of the treatment and the importance of not disrupting the mutual trust between the requested and Dutch medical personnel directly involved with the treatment.
58 Postponement ex article 35 OLW can be granted exclusively by the PPO, because of the requested persons’ age –either too young or too old to be surrendered- or his/her mental and physical condition. V. Glerum (m.m.v. V. Koppe) De Overleveringswet, Praktijkchakers Strafrecht, Den Haag 2005, p. 39; Parliamentary Documents II 2003/04, 29 042, nr. 27, p. 30
59 V. Glerum (m.m.v. V. Koppe) p. 72 en 73
60 Lijn: AY6631, Hoge Raad, 00730/06 CW:
61 See also Recital 10 of EAW preamble.
62 See Chapter 1 for the complete text of these EAW provisions.
3.2. Balancing of interests; are these tailor made decisions or examples of work on the assembly line?

Since the EAW FD itself contains several instruments to balance the different interests involved in a respectable way, this by no means leads to the conclusion that this balancing exercise is being made with equal precision. Glerum and Rozemond rightly find that apart from these instruments the IRK can also apply the guideline when judging upon the reasonableness of the claim by the PPO.

From this directive one can deduce that in case the Netherlands can claim jurisdiction, extradition is only permitted in case of serious offences. In the light of this directive, the IRK when confronted with arrest warrants based on minor offences, cannot suffice with a marginal test of the proportionality of the PPO’s claim.

However, day-to-day EAW practice appears to be based on a different scenario in which the IRC’s more than marginal test of the PPOs claim plays a major role. Unsurprisingly it is in particular this more than marginal test by the IRK that has given rise to a remarkable legal bout with the PPO in EAW procedures.

For one, also from the explanatory memorandum regarding article 13 OLW (Nota naar aanleiding van het verslag bij artikel 13 OLW), it appears that only the ‘proper administration of justice’ is of major significance when judging upon the question whether or not the Public prosecutor has come to its claim in all reasonableness.

However this may be, even though the balancing of the personal interests of the requested person is not mentioned in this context, nonetheless, as mentioned earlier, it is of equal importance to realize that in virtue of article 1 ECHR, these personal interests as a rule at all times should be weighed in the balancing exercise regarding the proper administration of justice.

5.a. Elementary decisions from the IRK

Two years of EAW jurisprudence has proven to be enough to make for a fascinating case law regarding article 13 OLW. Some of the most interesting matters that have been answered in these cases are:

1. Which criteria are instrumental for the IRK while establishing a proper administration of justice ex article 13 (2) OLW?

2. What is the scope of the IRK’s balancing framework reach in order to weigh the personal interests of the requested person separately within the context of the proper administration of justice?

3. What is the IRK’s policy as opposed to the PPO’s regarding an appeal on the principle of proportionality?

4. Do the principle of reciprocity and the principle of mutual trust play a major role as opposed to the humanitarian exception in case of a rejection of the surrender request ex article 13 (1) OLW? If so, to what extent?

5. How much weight is given to an appeal by the PPO on the judicial co-operation between Member States and or a mutual investigation led by a Joint Investigation Team?

These questions will be answered in the following paragraphs.


64 V. Glerum en K. Rozemond, DD 2006, 9, p. 182; Parliamentary Documents II 2003/04, 29 042, nr. 12, p.12
Ad 1/ Which criteria are instrumental for the IRK while establishing a proper administration of justice ex article 13 (2) OLW?

As a starting point both IRK and PPO acknowledge the importance of the personal interest of the requested person when establishing the just administration of law between Member States. The main difference is that the PPO’s before they submit an EAW to Court. Nevertheless from case law it appears that these two instances attribute a different weight to the relevance of these personal interests. As a result these different views at times collide. In the Ruznic judgement, in absence of a written policy regarding the way the PPO utilises its competence under article 13 (2) OLW, this is considered by the PPO on a case-by-case decision. Therefore the IRK has decided to introduce an additional demand of ‘aggravated motivation’ for the PPO to observe in order to indicate on the basis of which arguments they have decided to make use of their competence under article 13 (2) OLW. The interest on which the proper administration of justice is based are considered to be too general in comparison with the very specific objections of the requested person especially regarding the irreversibility of the surrender and the existence and willingness of the requested person to co-operate with alternative options for surrender. The IRK concludes that therefore they cannot determine the reasonableness of the PPO’s claim resulting in the claim being rejected.

In another case regarding the proper administration of justice the IRK finds that no mention is made of any consideration regarding the principle of subsidiarity in the Public Prosecutor’s plea. With regard to the seriousness of the offence for which Sweden has issued the EAW, the status quo of the investigation as well as jurisprudence from the ECtHR regarding the establishment of restrictive policy in custodial manners will have to be taken into account. Therefore it seems appropriate to investigate whether there are alternatives available when deciding upon the proper administration of justice. At the same time the IRK acknowledges the fact that Sweden has an undeniable interest in the execution of the EAW.

Ad 2/ The IRK’s framework regarding the personal interests of the requested person with regard to the proper administration of justice?

One of the most interesting cases in Dutch EAW jurisprudence regarding article 13 (2) OLW, is the one from July 2nd 2004. In this case a claim by the Public Prosecutor was found not to be amounting to the required amount of reasonableness since the Prosecutor held that the personal interests of the requested person have no relevance when determining the proper administration of justice should lead to the compliance with an EAW. Contrary to this point of view, the IRK does not feel restricted to weigh the personal interests of the requested person in its final judgement. The refusal of the Public Prosecutor to weigh the interests of the requested person therefore leads to dismissal of the Public Prosecutors claim ex article 13 (2) OLW because of the absence of the required element of reasonableness. Undoubtedly, the PPO’s restrictive policy as far as the requested persons interest not to be surrendered, seems to contradict the fact that according to their standard procedure, at any time they take into consideration the requesteds person right to a family life as provided for by article 8 ECHR.

However, based on jurisprudence from summary jurisdiction and procedures in matters of special urgency (Kort Geding), the fact that the requested person is involved in a steady and continuing relationship and or is taking care of underage children, in itself, is no reason not to extradite that person. The IRK considers this an argument in favour of the requested persons claim to be prosecuted and tried in the Netherlands. Contrary, during EAW procedures it often appears that the PPO considers this possible disturbance of the requesteds person family life a risk that comes with the job of committing crimes.

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65 IRK Amsterdam, 1 april 2005, NJ 2005, 278 (LJN AT3380/ Ruznik)
66 IRK Amsterdam, 20 mei 2005, NJ 2005, 293 (LJN AT6265/ Beuke)
67 IRK Amsterdam, 2 juli 2004, LJN AQ6668/ Hamzas and LJN AT3380 / Ruznic.
68 The reason for this being that the alleged violation is foreseeable (legislation) and necessary in a democratic society. Therefore surrender can be regarded as a legitimate violation of article 8 ECHR.
Ad 3/ IRK’s policy in case of appeal on the principle of proportionality

In another case the IRK reaffirms its policy that the requested persons interest as a rule always should be weighed in case of a claim based on article 13 (2) OLW. As a result the primary claim of the PPO is being rejected. In its subsidiary claim the PPO argues that even if the requested persons’ interests have to be taken into account, in this specific case, these interests should give way to the interests of the requesting State, since both the Dutch and the German public order have been seriously violated by the drugs offences for which the EAW was issued. The IRK agrees with the PPO and decides that the PPO’s claim under article 13 (2) OLW has met with the requirement of reasonableness. Obviously also an appeal on article 8 ECHR can play an important role in this balancing exercise.

Another important factor while determining the proportionality of the surrender request, obviously is the expected sentence in the requesting State. The Dutch Supreme Court has determined on extradition that it is not upon the requested State to decide whether or not there are less radical ways of complying with the requesting States’ procedural characteristics This includes not only the maximum sentence but also the possibility of a lengthy custodial sentence in the requested State.

Ad 4/ Does the principle of mutual trust play a major role as opposed to the humanitarian exception in case of a rejection of the surrender request ex article 13 (1) OLW? If so, to what extend?

Compared to cases based upon the humanitarian exception ex article 11 OLW, the principle of mutual trust seems to play a different role in article 13 procedures. In article 11 OLW procedures the main question is whether or not the judicial authorities have faith in the judicial system of the requesting State. In article 13 OLW procedures the question is whether the judicial authorities believe that the judicial authority from the requesting State will properly handle the specific interests of the requested person properly. Accordingly a marginally motivated rejection of the requested persons request for voluntary report with the requesting States’ authorities as an alternative to being surrendered, was considered as a display of disinterest from the issuing State for the personal interests and humanitarian appeals of the requested person. Consequently, the IRK found that therefore the requested persons interest not to be surrendered had become more substantial. Even so the principle of mutual trust plays a significant role in EAW procedures, be it a different one. From the IRK’s procedures and considerations it appears that a very high standard is maintained. Apparently the IRK would like to see this high standard reflected in the requesting States requests. In absence of such a confirmation of judicial and legal preciseness, the IRK seems very well able to balance all the interests involved in such a way that in certain cases, rejection of the surrender request is the only reasonable option.

Ad 5/ How decisive is judicial co-operation between Member States and mutual investigation by a Joint Investigation Team?

The principle of Sovereignty implies that a State has total and sometimes exclusive jurisdiction over criminal proceedings on its own territory. As a result no other State is allowed to start or execute criminal or investigative proceedings on the territory of a foreign State unless such has been explicitly agreed upon. Within the context of the European Member states, the activities of Joint Investigation teams can be considered as exceptions to the rule. According to the Minister of Justice, a decision based on judicial co-operation with regard to concentration of the prosecution in one Member State is of major significance for the establishment of the proper administration of justice, regardless of the fact whether the offences have been committed in that State. In EAW procedures however, Joint Investigation Teams still do not play a significant role. Considering the fact that international crime has become a specialization in itself and in conformity with the economic laws of supply and demand, it seems reasonable to expect that this will change in the near future.

69 IRK Amsterdam, LJN AT3380; NJ 2005, 278 / Ruznic.  
70 HR October 14th 1997, NJ 1998/288 as opposed to IRK decision LJN AX8863.  
71 IRK Amsterdam, 20 mei 2005, NJ 2005, 293 (LJN AT6265)  
73 Parliamentary Documents II, 2003/04, 29 042, nr. 21, p.3.
3.3. Summary territoriality principle in Dutch EAW procedure

In the previous chapters I tried to show that the text and the structure of the Overleveringswet leave room to considerations of a humanitarian nature. This is possible not only through article 11 OLW, but also as is evident from the jurisprudence, through the territoriality exception as contained in article 13 OLW.

Even though neither the text of the OLW nor the explanatory notes of the Dutch EAW FD implementation act mention this as such, I find that the IRK policy regarding the balancing of the personal interests of the requested person can serve as a humanitarian safeguard based on the territoriality exception.

On the basis of IRK policy until very recently, the PPO was obliged to weigh the personal interests of the requested person while formulating its claim under article 13 (2) OLW in virtue of the proper administration of justice. If not the PPO risked the dismissal of its claim without further consideration. The personal interests of the requested person include anything that can be considered significant for the requested persons’ personal well being as well as the well being of his or her partner and family members that depend on them socially, economically or in any other way.

Difference between IRK and PPO concerning the weight that must be given to these personal interests manifests mostly regarding offences of not too serious nature. In those cases the application of a hardship clause by the IRK is strongly objected by the PPO and sanctioned by the Dutch Supreme Court\textsuperscript{74}. The same goes for the demand for a more substantial obligation to motivate as discussed in the previous chapter.\textsuperscript{75}

In case of serious offences coupled with strong evidence, IRK and PPO significantly more often agree upon the balancing of interest that fulfil the need for the proper administration of justice. Nevertheless, in the cases Ruznic, Ceyham and Van Dam, the PPO has successfully applied for a special appeal procedure at the Supreme Court resulting in the IRK’s decisions being quashed.

Even though now it seems that the Dutch Supreme Court has condemned the IRK’s policy in these cases, it is by no means certain that the IRK will significantly change its direction. A closer look at the Supreme Courts considerations shows that it almost invites the IRK to formulate its decisions with even greater precision in order to convince the Supreme Court that, as far as abstaining for a marginal test of the humanitarian interests of the requested person, their demand for a substantial motivation by the PPO and the IRK’s application of a circumstantial hardship clause, they (IRK) do the right thing.\textsuperscript{76}

All in all it seems safe to conclude that the IRK apparently holds the view that notwithstanding the implications of Tampere regarding mutual trust between Member States, this trust first has to be earned\textsuperscript{77}.\textsuperscript{78}

\textsuperscript{74} LJN: AY6631, Hoge Raad, 00730/06 CW (Van Dam): (...) In het voetspoor van het Kaderbesluit bevat de OLW niet een regeling die vergelijkbaar is met de in het uitleveringsrecht erkende en in art. 10.2 UW neergelegde zgn. “hardheidsclausule” op grond waarvan de uitlevering niet kan worden toegestaan. Art. 35.3 OLW voorziet in overeenstemming met art. 24.4 Kaderbesluit. Immers slechts in uitstel van de feitelijke overlevering o.g.v. ernstige humanitaire redenen en i.h.b. de omstandigheid dat “het gelet op de gezondheidstoestand van de opgeeiste persoon niet verantwoord is om te reizen”, maar voorziet niet in weigering van de overlevering. Op grond hiervan moet worden geoordeeld dat...

\textsuperscript{75} LJN: AY6633, Hoge Raad, 01397/06 CW (Ruznic): (...) De IRK heeft, door bij haar toetsing van de vordering van de OvJ de namens de opgeeiste persoon aangevoerde redenen van humanitaire aard die zich tegen de overlevering zouden verzetten te betrekken, blijk gegeven van een onjuiste opvatting omtrent de bij die toetsing aan te leggen maatstaf. Ook is de klacht terecht over het oordeel van de IRK (...) dat op de OvJ een “verzwaarde plicht” rust te motiveren waarom wordt gevorderd af te zien van de weigeringsgronden van art. 13.1 OLW...

\textsuperscript{76} LJN AY6634, Hoge Raad 01398/06 CW(Ceyhan): (...) De IRK mag de vordering van de OvJ slechts marginaal mag toetsen. Gelet hierop geeft het oordeel van de IRK dat de feiten ter sake waarvan de overlevering is verzocht “een grove schending van de Nederlandse rechtsorde” vormen en dat de “beperkte schending van de Duitse rechtsorde niet opweegt tegen de inbreuk op de NL rechtsorde” blijk van miskening van de te dezen aan te leggen maatstaf (...)

\textsuperscript{77} (…) Even if a state where the European arrest warrant has been issued has a good record of protecting human rights, this does not exclude the possibility (and
Germany, the drafting of a new Article 80 of the EAW Implementation Act (IRG)

On Monday 18 July 2005, the German Bundesverfassungsgericht – the German Constitutional Court – in Karlsruhe declared void a European Arrest Warrant as far as the German national legislation was concerned. The judgement was delivered in a case where Spanish authorities had issued a European Arrest Warrant for the suspected terrorist Darkanzali, a German national of Syrian origin.

According to the German Constitutional Court the German legislator had not fully taken into account the constitutional safeguards granted to own nationals in extradition matters as required by Article 16 (2) of the German Grundgesetz (Hereafter Basic Law, BL). Therefore the German law implementing the EAW was considered to go beyond what was constitutionally permitted.

One of the BVerfG’s main concerns was the fact that the German legislation concerning the EAW did not leave sufficient room to refuse the extradition of German nationals. It has been argued that as the EAW’s main aim is to fight international terrorism and organised crime within a united Europe, the principle of mutual trust amongst Member States as formulated in the Pupino case should have prevailed.

The criteria set out by the German Constitutional Court are now part of the new article 80 (1) en (2). One of the main characteristics of Article 80 IRG is that the distinction between approving and allowing surrender is maintained.

Approval must always be reasoned, regardless of the underlying decision. In the event the Approving Authority finds that there are grounds to refuse extradition on the basis of the conditions set out in Article 83 IRG, the surrender procedure is thereby terminated.

When no ground for refusal is found, the decision containing the approval is submitted to a higher regional court, the Oberlandesgericht, which pronounces on whether surrender is actually allowed.

The German Constitutional Court decided otherwise and expressly required at least access to an impartial judicial authority to guarantee the individual’s constitutional safeguards. The fact that the legislation provides for a right to return to the homeland for the execution of a sentence does not alter the need for such a judicial test. With this judgement to implement, it was up to the German legislator to resolve two problems:

First, what to do about the violation of the prohibition of extradition of nationals and secondly, how to deal with the violation of the guarantee of access to the courts as set out in article 19 (4)?

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80 Other provisions that the BVerfG found to be violated, were article 19 (4), 2 (1) and 20 (3) BL. Art. 19 (4) guarantees a resource to court for anyone who’s personal rights have been violated by a public authority; Art. 2 (1) guarantees the right to freely develop ones personality insofar the rights of others are not violated or the constitutional order or morality are not offended; Art. 20 (3) determines that legislation is subject to constitutional order and that the executive and the judiciary are bound by law and justice. Source: Christian Tomuschat, Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant, European Constitutional Law Review, 2, 2006, T.M.C. Asser Press and Contributors. p. 212 under note 10.

81 ECHR; C-105/03, Pupino, Grand Chamber, June 16th 2005. 36; See also Conclusion Advocat-General D. Ruiz-Jarabo Colomer, in Case C-303/05, September 12th 2006, supra note 36 (...) irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives (...)
A new Article 80 of the German EAW Implementation Act

Article 80 IRG; Rules concerning the surrender of German citizens and privileged foreigners

(1) The extradition of a German for criminal prosecution is only allowed where,

i. it is ensured that, after the final imposition of a custodial sentence or any other penalty, the issuing Member State offers that the sought person upon his or her request is re-transferred for the purpose of the execution of the sentence to the territory covered by this Act (Germany), and

ii. the offence has a meaningful connection with the issuing Member State.

A significant link between the offence and the issuing Member State will, as a rule, be present:

- where the act or omission in its entirety or in part has been committed on the territory of the issuing State and the result of the act or omission -at least in significant part- has occurred on the territory of the issuing State, or

- where the offence is a serious offence of a typically cross-border nature, which has at least in part been committed on the territory of the issuing State.

(2) If the conditions of paragraph 1 sentence 1 under ii are not fulfilled, the extradition of a German citizen for purposes of criminal prosecution would only be allowed where:

- the conditions of paragraph 1 sentence 1. under i are fulfilled, and

- according to German law, the offence is also an unlawful act or would, in corresponding circumstances, also be a criminal offence under German law and where, upon balancing the conflicting interests in the individual case the legitimate expectations of the requested person that he or she will not be extradited do not prevail.

A significant link of the offence with Germany will, as a rule, be present where the act or omission, in its entirety or in part, has been committed on German territory and the result of the act/omission has, at least in significant part, occurred on German territory.

In the process of balancing the various interests, it is in particular the alleged offence, the practical exigencies or possibilities for effective prosecution, and the constitutionally protected interests of the requested person, that need to be weighed and of which it must be determined what their mutual relationship should be, with due regard to the goals inherent in the creation of a European Judicial Area. 84

In the case of a decision of a public prosecutor or a court not to prosecute or to discontinue the prosecution of an offence that is the subject of an extradition request, this decision and the reasons for which it was taken also have to be included in the balancing exercise. The same applies if a court has decided that a case has to be tried in full or that it has handed down a written penal notice (Strafbefehl). 85

(3) The extradition of a German citizen for the purpose of the execution of a sentence is only allowed where the requested person, having been notified of his or her rights in a judicial protocol, has agreed to the extradition. §41 (3) and (4) apply accordingly.

(4) Subparagraphs 1 to 3 apply mutatis mutandis to a foreign citizen who lives in Germany with a German family member or who is married to a German national or living in registered partnership with a German national.

84 We will further elaborate on this in Chapter 2.2. under Section III.
85 A Strafbefehl is an order of summary punishment, i.e. an order imposing a penalty (fine or imprisonment of up to 3 months) issued by the Ambtsrichter at the request of the public prosecutor without a preceding trial being held.
4.2. Implications of the new surrender procedure

At first sight, Article 80 IRG differs significantly from its Dutch counterpart. The provision connects territoriality with the nationality of the suspect. Furthermore, the territoriality principle in Article 80 also applies to foreign citizens who have a family relationship or a registered partnership with a German national. A basic principle that applies to any German national or privileged foreigner after being extradited is the right to return to German territory for the execution of the sentence imposed by the foreign judicial authorities. This is only possible when there is no significant link between the offence and German territory.

The second paragraph of Article 80 now includes the requirements that were imposed by the German Constitutional Court. To understand these requirements, several different cases must be distinguished.

I Cases with a territorial connection or Inlandsbezug

These are cases where a significant part of the act and its effects are situated in Germany. With reference to Article 9 of the German Criminal Code, this stands in the way of extradition and constitutes a general ground for refusal.

II Cases with a foreign connection or Auslandsbezug

These are cases where:

a. both the act and its effects are situated outside German territory, or
b. the act is considered very serious and of a typical cross-border nature, such as trafficking in drugs and humans, and has at least partially been committed on the territory of a foreign State.

III Mixed cases where no national or foreign connection can be found

This will be the case when parts of the act have taken place in Germany, but its effects are mainly situated in a foreign country. Moreover, the double criminality requirement will apply. In order to determine whether the person in question can be surrendered in these cases, established rights and obligations would have to be taken into consideration. As we have mentioned in the introduction, these are:

- The implications of Tampere and the principle of mutual trust
- The fundamental rights of the accused
- The principle of proper administration of justice

4.3. The scope of article 80 in the post Darkanzali period

As we have just seen, article 80 (2) contains two different types of cases can be distinguished: one type where there is a territorial connection barring surrender, and one type that is termed mixed cases.

Tampere has been important in instigating a new approach to the surrender procedure on the basis of two assumptions:

- the realisation of an Area of Freedom, Security and Justice;
- the aim of full mutual recognition of judicial decisions from competent judicial authorities within the EU within 2 years.

This gave rise to the principle of mutual trust, which is based on a common appreciation of freedom, democratic principles as well as respect for human rights and fundamental freedoms and the Democratic Society.

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86 Based on an article by Peggy Pfützner, Max Planck Institute, unpublished.
87 Article 80 (1) IRG.
88 Article 9 Strafgesetzbuch / StGB.
89 Article 80 (2) (2) IRG.
90 Article 80 (2) (3) IRG.
91 According to Article 9 of the German Criminal Code, these are cases where a significant part of the act and its effects are situated in Germany which stands in the way of extradition as a general ground for refusal.
92 Mutual recognition can be described as the willingness to accept and execute foreign judicial decisions within the national territory, Swart (2001), pp. 16-17.
In doing so, the Member States must at all times take into consideration the targets that were set out in the Tampere Declaration regarding the creation of a European Judicial Area of Freedom, Security and Justice. As a result, the interest of the requested person to be tried in Germany has to be balanced against all the other elements that play a role in the course of a prosecution.\textsuperscript{93}

At first sight, the implications of Tampere mainly concern the development of more technical, procedural economics features of judicial co-operation in general and the surrender procedure in particular. But, as we have seen in Chapter 1.2, as far as the requested person’s rights are concerned, the European Council expressed the need for minimum standards regarding multi-lingual forms in judicial procedures and legal assistance in cross-border cases. However, on the basis of Article 80 alone, not too much consideration is given to the requested person as far as safeguarding his/her fundamental rights is concerned, unless there is reasonable doubt that surrender will constitute a serious violation of these fundamental rights.

According to Article 80 IRG in conjunction with Article 9 of the German Criminal Code, the surrender of German nationals and privileged foreigners can only be granted when:

- the return for execution of the sentence imposed by the foreign State is guaranteed;
- the act has no connection with the national territory, but only with the foreign territory and the double criminality requirement is fulfilled;
- the principle of Mutual Trust does not bar surrender.\textsuperscript{94}

This last circumstance is crucial for understanding the wider implications of Article 80, as the principles of mutual trust, mutual recognition and State responsibility are closely related.

Accordingly, in the balancing process, the alleged offence, the practical implications regarding effective prosecution and the constitutionally protected interests of the requested person will need to be considered proportionally.

In the following Chapters, we will take a closer look at the requirements regarding the surrender of German nationals and privileged foreigners in the post-

\textbf{4.4. Mutual recognition, mutual trust and State responsibility in relation to the territoriality principle contained in Article 80 EAW Implementation Act.}

In Chapter 2.1 we saw that article 80 (2), requires the balancing of various interests like the alleged offence, the practical exigencies or possibilities for effective prosecution, and the constitutionally protected interests of the requested person.

Out of this balancing process it must be determined what their relationship is with due regard to the Area of Freedom, Security and Justice. In order to find out how these principles relate to each other, first we have see once more, which are the key players in this balancing process:

\textit{Mutual trust, Mutual Recognition and State Responsibility in relation to art. 80 IRG}

- Mutual trust and Mutual Recognition in relation to art. 80 IRG.

As we saw in the first chapter, the principle of \textit{mutual trust} lies at the heart of the principle of \textit{mutual recognition}. The European Arrest Warrant is the first tangible item to come from within the EU that is based on these principles.\textsuperscript{95}

\textsuperscript{93} This is true not only in a national context, but most definitely also in the context of an expanding, growing and sometimes volatile new European Area of Freedom, Safety and Justice.

\textsuperscript{94} ‘Schutzwürdiges Vertrauen’, Bundestag Document no. 16/544, February 7th 2006, p. 33. Source: Peggy Pfützner, Max Planck Institute, unpublished.

The principle of mutual recognition is expressly laid down in Article 1 (2) of the Framework Decision on the European Arrest Warrant. It should be read in conjunction with recitals 6 and 10 of its Preamble. We also saw that the principle of Mutual Trust is first mentioned in recital 10 of the Preamble, reaffirming that the mechanism of the EAW is based on a high level of confidence between Member States. Recital 10 of the Preamble states that applicability of the principle of mutual trust can be suspended in case of serious and repeated violations of the fundamental rights embedded in Article 6 (1) of the EU Charter by the requesting Member State. So according to recital 10, the principle of mutual trust is not absolute.

The importance of mutual trust and mutual recognition in relation to article 80 is, that they in an explicit manner count against the Public prosecutor discretionary powers not to surrender German nationals, especially when the offence has been committed on German territory.

State responsibility can be described as the liability of a State for an act/omission that leads to the breach of an international obligation. This breach is called an internationally wrongful act of a State.

Unsurprisingly, ever since *Soering*, the principle of state responsibility has been gaining potential towards becoming a reliable safeguard of the fundamental rights of the requested person. Two elements can be distinguished:

- The *subjective* element deals with the normative aspect of the act as being attributable to a State and not to an individual or group;
- The *objective* element refers to the failure of the State to fulfill a particular international obligation.

The characterisation of an act as internationally wrongful is governed by international law and not affected by the characterisation of the act under internal law. Furthermore, there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. In the light of a surrender procedure, article 16 of the Articles on State Responsibility might prove crucial. This article reads that:

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter, is internationally responsible for doing, so if the State does so with knowledge of the internationally wrongful act, and the act would (also) be internationally wrongful if committed by that State."

From article 80 it follows that in the case of a decision of a public prosecutor or a court not to prosecute or to discontinue the prosecution of an offence that is the subject of an extradition request, this decision and the reasons for which it was taken also have to be included in the balancing exercise. The same applies if a court has decided that a case has to be tried in full or that it has handed down a written penal notice.

As a result, article 80 actually demands from judicial authorities that decisions to refuse a surrender request—thus eliminating a possible State liability for wrongful acts—must be reasoned. Thus, the authorities have to reason why the principle of mutual trust has not prevailed.
4.5. Appeal and review in the German EAW procedure; Reparation of the violation of guarantee of access to courts

The German Constitutional Court’s criticism of the European Arrest Warrant was directed against the gap left in the legislation preventing appeal against the decision to surrender based on Article 74 of the original EAW Implementation Act. Furthermore, the requested person did not have recourse to a court to test the application of the grounds for refusal as set out in Article 83 of the original EAW Implementation Act either.

The German Constitutional Court’s judgement in *Darkanzali* meant that the Act had to be amended because the German legislator had formerly opted not to grant the right to appeal against decisions on surrender.102

However, the new EAW Implementation Act in Article 79 (2) provides for judicial review of the application of the optional grounds for refusal as provided for under Article 83 IRG.

The review is limited to the legal admissibility of the application of the grounds for refusal laid down in Article 83 IRG.

The new German judicial system, a request for surrender is first subject to approval by the General Prosecutor (hereinafter: the Approving Authority).

The Approving Authority notifies the Oberlandesgericht (the German higher regional court) whether it intends to apply one of the grounds for refusal in Article 83 IRG. It should be noted that only the decision to make use of the grounds of refusal and thus paves the way for surrender, it is not obliged to give further reasoning.103

The second stage of the review system under the new EAW Implementation Act deals with the situation where the higher regional court has declared the surrender admissible. The Approving Authority now has to decide whether it approves the surrender of the requested person. It should be noted that the Approving Authority is not bound by its previous decision not to make use of the grounds for refusal in Article 83.104

As was mentioned before, if the surrender request is refused, the Approving Authority has to reason its decision based on Article 29 IRG.

Finally, if after the higher regional court has delivered its judgement, new facts are being presented regarding the grounds for refusal of surrender, two outcomes are possible:

1. Surrender is considered admissible, regardless of these new facts.
2. The new facts lead to a refusal of approval.

In the first case the requested person can apply for further judicial review by a higher regional court.

In the second case, because of the previous examination by the higher regional court, no access to further judicial review is open to the General Prosecutor.

If however the Approving Authority decides not to make use of the grounds of refusal and thus paves the way for surrender, it is not obliged to give further reasoning.103

102 Article 79 in conjunction with article 74 IRG as a starting point still set out a general obligation to approve surrender; The relevant Section is entitled ‘Constitutional duty to surrender’ (*Grundsätzliche pflicht zu erledigung*). Based on comment by Peggy Pfützner, Max Planck Institute, unpublished.

103 As a result the requested person finds himself in a position where he/she is one step away from being surrendered.

104 With the provisions of Article 79 IRG in mind, which make surrender a general obligation, surrender will only be refused in exceptional cases.

105 Based on comment by Peggy Pfützner, Max Planck Institute, unpublished.
4.6. Summary territoriality principle in German EAW procedures

In the *Darkanzali* judgement the BverfG found a lack of proportionality in- and procedural defects of the German EAW Implementation Act. This EAW Act (*Europäischen Haftbefehlsgesetz, EuHbG*), contains provisions amending the International Assistance in Criminal matters Act.\(^{106}\)

Therefore a new Act had to be written. The new article 80 (2) introduces the requirements that were imposed by the German Constitutional Court in its judgement and distinguishes between cases where:

- there is a national territorial connection or *Inlandsbezug*\(^{107}\).
- there is a foreign territorial connection or *Auslandsbezug*\(^{108}\).
- there is neither a national, nor a territorial connection to be found.

A strong national territorial connection -meaning that the act must have been committed in Germany *and* its effects must have been felt on German soil- can stand in the way of surrender.\(^{109}\)

As a result, first of all, in cases with a strong *national* connection, the protection of Article 16 (2) of the German Constitution prevails and nationals and privileged foreigners cannot be extradited.\(^{110}\)

Secondly, in cases, with a strong *foreign* connection, the German Constitution could be read in such a way that the confidence of the requested person in his or her own judicial system is protected in a particular manner.

Finally, this is precisely so, where the act on which the request for surrender is based appears to have a significant connecting factor to both the issuing State as well as Germany.\(^{111}\)

In its judgement the German Constitutional Court held that: *"the co-operation that is put into practice in the Third Pillar of the EU in the shape of mutual recognition, is a way of preserving national identity and statehood in a single European judicial area, which is appropriate in terms of subsidiarity"*.\(^{112}\)

Judging from the new legislation, therefore, the German Constitutional Court’s decision does not seem to have led to an EAW procedure that in any way differs significantly from the situation prior to *Darkanzali*.

With the extensive German interpretation of territoriality in mind – especially in drug-related cases – it might be expected that requests to surrender nationals and privileged foreigners will only be considered admissible in exceptional cases.

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\(^{107}\) Article 9 StGB; These are cases where a significant part of the act and its effects are situated in Germany, which stands in the way of extradition as a general ground for refusal.

\(^{108}\) Article 80 (2) (2) IRG

\(^{109}\) Article 80 (2) (3) IRG. This will be the case when parts of the act have taken place in Germany while its effects are mainly situated in a foreign country. Moreover, the double criminality requirement will apply.

\(^{110}\) In conjunction with Article 9 StGB.

\(^{111}\) Article 80 (2) (2) IRG.

5. The French territoriality principle: an introduction.

The French territoriality principle provides that the French Penal Code is applicable on every ‘crime’ (felony), ‘delit’ (misdemeanour) or ‘contravention’, committed on French territory.

The basic provisions regarding territoriality are laid out in article 113 paragraphs 1 and 2 of the Penal Code (CP), establishing the applicability of French Criminal law to all offences committed within the territory of the French Republic. This includes French territorial waters and French air space.

Paragraph 2 contains the ‘constituent element’ principle as a method to establish jurisdiction according to which an offence is deemed to have been committed within the territory of the French Republic if one of its constituent elements was committed within that territory.

French criminal law is also applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad, if the felony or misdemeanour is punishable both by French law and the foreign law, and the judgement has been established by a final decision of the foreign court.

This has been provided for by article 113 paragraph 5 of the CP.

As a result of this basic principle the principle of territoriality also applies in cases where the requested person self is not on French territory. Such has been brought before the French Courts in the case of October 1st 1986, where the illegal possession of goods of French origin was accomplished through an accomplice on French territory while the requested person himself, remained outside France.

In order to determine the scope of the French territoriality principle in EAW procedures, first we will take a look how the French territoriality principle has been implemented. We will do so in Chapter 5.1.

Then we will try and answer the question how and to what extent the French authorities apply article 113 of the Code Penal on EAW procedures. These matters will be dealt with in Chapter 5.2.

Finally we will determine on basis of what arguments the French Courts decide to comply to a surrender request or not. This will be dealt with in Chapter 5.3.

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113 Code Penal, Partie Législative, Article 113-2:
La loi pénale française est applicable aux infractions commises sur le territoire de la République.
L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire.

114 113 (5) CP: La loi pénale française est applicable à quiconque s'est rendu coupable sur le territoire de la République, comme complice, d'un crime ou d'un délit commis à l'étranger si le crime ou le délit est puni à la fois par la loi française et par la loi étrangère et s'il a été constaté par une décision définitive de la juridiction étrangère.

5.1. The territoriality principle in French EAW Legislation.

Article 695 (24) of the Code of Criminal Procedures (CCP) reads:

The execution of a European Arrest warrant can be refused:

1° if the requested person has been the subject of proceedings by the French authorities or these authorities have decided not to initiate a prosecution or to put an end to one in relation to the offences for which the arrest warrant has been issued;

2° if the person wanted in relation to the execution of a custodial sentence or safety measure is a French national and the competent French authorities undertake to put it into execution;

3° if the matters in respect of which it was issued were committed wholly or partly on French national territory;

4° if the offence was committed outside the territory of the issuing Member State and French law does not permit the prosecution of the offence where it is committed outside French national territory.

Article 695 (24) of the CCP provides that the execution of a European Arrest warrant may be refused under certain circumstances. Herewith the French legislator has chosen for an optional ground of refusal when acts are committed in part or in whole on French territory.

As far as applicability of the French territoriality principle is concerned, it is significant that the distinction between felonies and misdemeanours cannot be derived from the wordings of article 695 (24) CCP.

Also, as we have seen previously, according to article 113 (2) of the Code Penal an offence is thought to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.

Furthermore, French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed.


L’exécution d’un mandat d’arrêt européen peut être refusée :

1° Si, pour les faits faisant l’objet du mandat d’arrêt, la personne recherchée fait l’objet de poursuites devant les juridictions françaises ou si celles-ci ont décidé de ne pas engager les poursuites ou d’y mettre fin; 

2° Si la personne recherchée pour l’exécution d’une peine ou d’une mesure de sûreté privatives de liberté est de nationalité française et que les autorités françaises compétentes s’engagent à faire procéder à cette exécution ;

3° Si les faits pour lesquels il a été émis ont été commis, en tout ou en partie, sur le territoire français ;

4° Si l’infraction a été commise hors du territoire de l’Etat membre d’émission et que la loi française n’autorise pas la poursuite de l’infraction lorsqu’elle est commise hors du territoire national.

117 The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused.
5.2. Brief overview of the French appeal procedure

The French criminal judicial procedure is divided in three instances; the lower Courts, the appeals Chamber -and the Cour de Cassation. Decisions by the Appeals Chamber can be brought to the Cour de Cassation unless such is prohibited by law for instance as is the case with minor claims.

Is entitled to review all aspects of the case. The jurisdiction of the Cour de Cassation is restricted to questions of law and procedural matters.

The Cour de Cassation can either reject the appel de cassation or permit cassation. When the Cour de Cassation decides that the appeal against the decision of the Cour d’appel is justified, there are in general three possibilities for the Cour de Cassation to proceed.

1. It refers the case to another Cour d’appel.
2. Optionnally it can also partially refer the case (cassation partielle)
3. Or –if the case at hand permits such a procedure- it can overturn the decison of the lower court while deciding on the case itself (cassation sans renvoi).

It is important to note that the Court of Appeal, to which a case has been lodged to by the Cour de Cassation, may decide on that case any which way it deems right. The decision of the Cour de Cassation has no binding effect on the appeals chambers' own findings.

When the same case is brought to the Cour de Cassation for the second time and the decision of the Cour d’appel is again found to be void, upon referral, the judgement of the Cour de Cassation is now binding for lower Courts as far as the settlement of legal issues.

On factual maters however, lower courts again may decide upon the case regardless of the decision in appeal.

5.3. Case law regarding the French territoriality principle.

As mentioned earlier in Chapter 1, the principle of territoriality also applies in cases where the requested person self is not on French territory.

Similarly, as was decided by the Tribunal Correctionnel on October 16th 1991 in Paris, when it has been established that the requested person has recruited his accomplices on French territory, this will be considered as a constituent element of the offence as mentioned above, resulting in the whole offence being committed on French territory 118.

In its decision from April 19th 1988 the Court of Appeals ruled that following art. 113 (5), French law applies to anyone on French soil who is an accomplice of a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable under both French law and the foreign law and if it has been established by a final decision of the foreign court119.

To decide whether or not the constituent elements of a crime have taken place on French territory, one should keep in mind the provision of article 203 of the French Code of Criminal procedure120.

Les infractions sont connexes soit lorsqu’elles ont été commises en même temps par plusieurs personnes réunies, soit lorsqu’elles ont été commises par différentes personnes, même en différents temps et en divers lieux, mais par suite d’un concert formé à l’avance entre elles, soit lorsque les coupables ont commis les unes pour se procurer les moyens de commettre les autres, pour en faciliter, pour en consommer l’exécution ou pour en assurer l’impunité, soit lorsque des choses enlevées, détournées ou obtenues à l’aide d’un crime ou d’un délit ont été, en tout ou partie, recelées.
Article 203 of the French Code of Criminal procedure reads:

Offences are related either when they were committed at the same time by several persons acting together, or when they were committed by different persons, even at different times and in different places, but as the result of a agreement made between them in advance, or where the guilty parties committed certain offences to obtain the means of committing the others, to facilitate or achieve their execution, or to ensure impunity, or where property abstracted, misappropriated or obtained through a felony or misdemeanour has been wholly or partly received.

It is important to note that French case law seems to indicate that article 203 by no means contains an exclusive list of situations from which the constituent element principle can be derived.

In its decision from August 18th 1987, the Cour de Cassation has decided that connective elements constituting one offence also extends to cases in which there are close links between the facts, similar to those provided for by law121.

This decision is essential in the sense that what is actually said is that the Courts will have to decide in each case separately whether or not on the basis of the facts of the case pending:
- the requirements as provided for in article 203 of the Code of Criminal procedure has been fulfilled and secondly if not,
- whether the case pending shows similarities to the situations as provided for in article 203 to such an extent that the Court can conclude that there are constituent elements at hand leading to the establishment of Jurisdiction by the French Courts.

As a result, in all the cases mentioned above, the French authorities shall have jurisdiction and French criminal law will be applicable to offences committed in whole or in part on French territory122.

Arrêt n° 05-81229, Cour de Cassation, 16 Mars 2005
Chambre criminelle - Rejet – Portugese EAW123

The CdC concludes that from the content of the Arrest Warrant concerned that during 2000 and 2001, the requested persons were part of an organised group that led a heroine and cocaine traffic operation in Portugal, the role of each of them being precisely determined124. Since the requested persons could not prove that article 695 – 24 CCP was applicable, approval of the surrender request was justified.

Arrêt n°05-81513, Cour de Cassation, 5 Avril 2005
Chambre criminelle - Rejet

The CdC finds that regarding the second ground of appeal, touching upon the violation of article 695-24 para. 3, and 591 of the CPP. The CdC also takes into consideration that the contested judgement authorised the surrender of requested person to the Belgian authorities and that the acts for which the EAW has been issued, are not represented in the list of 32 offences in article 695-23 CPP.

The CdC finds that nonetheless these offences are prosecuted in France under a similar qualification and are punished in the issuing State by a prison sentence of one year or more125.

122 This includes offences that are committed abroad in whole or in part, as long as it has been established that parts of the offence that have been committed on French territory are inseparably connected with other parts of the offence that are committed abroad.
123 Sur le moyen unique de cassation, pris de la violation des articles 5, 6 1 et 6 3 de la Convention européenne des droits de l’homme, 695-16, 695-22, 695-24, 591 et 593 du Code de procédure pénale ;
124 réserve de situations particulières non établies en l’espèce, a vocation à remplacer, entre les Etats membres de l’Union, la procédure d’extradition ; qu’il ressort des énonciations du mandat décerné que, courant 2000 et 2001, Joaquim A... B... Z..., Cacilda X... Y..., épouse Z..., et la mère de celle-ci, Maria Do C... X..., constitués en＂bande ou groupe organisé"; se seraient livrés au Portugal à un trafic continu d’héroïne et de cocaïne, le rôle de chacun étant précisément défini.
125 (...) Sur le second moyen de cassation, pris de la violation des articles 695-24, 3 , et 591 du Code de procédure pénale ;
"en ce que l’arrêt attaqué a autorisé la remise d’Audrey X.. aux autorités belges ;
The CdC further finds that according to art 695 (24) para. 3 CCP, the execution of a EAW can be refused if the matters in respect of which it was issued were committed wholly or partly on French national territory. However, in the underlying case, the protective measure could not be implemented by the judicial protection since the requested person had left French territory.

Since the offences were punishable by law in France as well as in Belgium, the investigating Chamber based its approval of the surrender request upon this double criminality element.

Nontheless, the Court finds that since the Investigating Chamber has not made use of the possibility offered by art 695 (24) para. 3 CCP, not to comply with the surrender request regarding the offences committed in France, the Investigating Chamber by doing so, has failed to apply the appropriate legal basis for its decision.

"aux motifs que, "si les faits reprochés à Audrey X... sous la qualification de non respect d’une décision protectionnelle (hébergement hors du milieu familial) et d’une décision civile (non représentation d’enfant) n’entrent pas dans la liste des trente deux catégories d’infractions visées à l’article 695-23 du Code de procédure pénale, il n’en demeure pas moins qu’ils sont poursuivis en France sous une qualification identique et sont punis, dans le pays d’émission, d’une peine privative de liberté égale ou supérieure à un an d’emprisonnement"(…)

126 (...)"alors qu’en vertu de l’article 695-24, 3 , du Code de procédure pénale, l’exécution d’un mandat d’arrêt européen peut être refusée si les faits pour lesquels il a été émis ont été commis en tout ou en partie, sur le territoire français ; qu’en l’espèce, le mandat d’arrêt précise que la mesure protectionnelle n’a pu être mise en œuvre par le service de protection judiciaire "étant donné qu’Audrey X... a disparu en France depuis le 2 mai 2001 et a emmené ses enfants" (…) 127 que la chambre de l'instruction, qui se contente de constater que les faits en cause étaient incriminés tant en France qu'en Belgique pour estimer qu'elle devait faire droit à la demande de remise de la personne et qui n’a pas apprécié l’opportunité qui lui était offerte par l’article 695-24, 3 , du Code de procédure pénale de ne pas faire droit à cette demande dès lors que le mandat d'arrêt visait des faits commis en France, a nécessairement privé sa décision de base légale au regard des textes susvisés" ;
5.4. Summary territoriality principle in French EAW procedure

As we have seen in the previous chapters, the French authorities shall have jurisdiction and French criminal law will be applicable to offences committed in whole or in part on French territory.

This includes offences that are committed abroad in whole or in part, as long as it has been established that parts of the offence that have been committed on French territory are inseparably connected with other parts of the offence that are committed abroad.

From the wordings of article 695 (24) of the French EAW Implementation Act it follows that the French authorities have discretionary powers to surrender a requested person when it has been established that an offence has been committed in whole or in part on French territory.

Following article 113 (5) of the CP, French Criminal law shall also be applicable to whoever is an accomplice in the territory of the Republic of a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable under both French law and the foreign law and if it has been established by a final decision of the foreign court.

This provision seems to expand and restrict the scope of the French territoriality principle in one single provision. The first part of article 113 (5) extends French jurisdiction over accomplices of both offences and misdemeanours when these acts have been committed on French territory and the double criminality requirement is met with.

The last sentence of paragraph 5 however bars the exercise of French jurisdiction as long as there is no final decision by a foreign court. This implies that without a prosecution by a foreign authority, the requirements of paragraph 5 will never be met, even if the accomplice has confessed his role in the offence.

Similarly, an out of court settlement by the foreign authorities will bar prosecution by the French authorities, despite a confession or other undeniable proof of guilt.

However this may be, even without this restriction, the scope of French jurisdiction based on the territoriality principle is wide enough because of the fact that when it has been established that the accomplice or the main perpetrator is on French territory, the French Courts are competent to exercise jurisdiction, irrespective of nationality or where the acts of complicity took place.

Another specific form of extension of the territoriality principle can be found in cases where a foreigner employed by a French company commits an offence abroad and it can be established that he acted on behalf of this French employer.

As a result, once it is established that the acts originated from France, be it from a French national or a French legal person, or that one of the constituting elements of the act has been committed on French territory, the French authorities will be allowed to exercise jurisdiction.

It should be noted that this prosecution will not only cover the national and legal persons in France, but also perpetrators abroad.

128 La loi pénale française est applicable à quiconque s'est rendu coupable sur le territoire de la République, comme complice, d'un crime ou d'un délit commis à l'étranger si le crime ou le délit est puni à la fois par la loi française et par la loi étrangère et s'il a été constaté par une décision définitive de la juridiction étrangère.

129 As would be the case for example of bribery committed abroad by a foreigner with the aid of or on behalf of a criminal association that was formed in France. Crim. 2/04/1981, B. No 116. Source: Review of the Implementation of the OECD Convention and 1997 recommendation, p. 17.
6 The Belgian territoriality principle

As a starting point, the appliance of the Belgian Penal Code remains restricted to Belgian territory. This is called the principle territoriality\(^{130}\). As we have also seen in the previous paragraphs, the Belgian legislation is clear as far as offences that have been committed either as a whole on Belgian territory (intra-territorial) or as a whole outside Belgian territory.

Offences committed outside Belgian territory as a rule remain outside the jurisdiction of the Belgian Courts, unless there is a specific rule of national law within the Belgian Penal Code that explicitly provides for extraterritorial jurisdiction. This is called the exceptional extra-territorial principle and is provided for in article 4 of the Belgian Penal Code.

As far as offences that have been committed on both Belgian and foreign territory (pluri- or multi-territorial) there are two methods of reference to decide whether Belgium has jurisdiction and if so, if this is either on territorial or on extra-territorial grounds\(^{131}\).

The Belgian Supreme Court has formulated a guiding principle as what is now known as the ubiquity theory\(^ {132}\). According to this theory an offence falls under the jurisdiction of the Belgian Courts in conformity with article 3 of the Belgian Penal Code when one of the constitutive elements of the offences in whole or in part have been committed on Belgium territory.

It should be noted that as far as international assistance in criminal matters is concerned, the constitutional territoriality principle has to be distinguished from territoriality as a rule of jurisdiction\(^{133}\). The Belgian territoriality principle evolves around the lex loci delicti principle. The Belgian Penal Code is applicable to all criminal offences that have been committed on Belgian territory, regardless of the nationality or domicile of either perpetrator or victim\(^{134}\).

It should be noted that it is of no significance that there has been a previous conviction for the offence in a foreign country. According to article 13 of the Belgian Penal Code, the Belgian Courts simply have to take into account judicial decisions from other Courts when the offence has been committed outside Belgium, on foreign territory\(^{135}\).

The only exception to this rule is when it concerns a decision from another Schengen State. Article 54 of the Schengen executive agreement (article 54 SUO) makes no distinction between territorial and extra-territorial offences. It’s important to note the Belgian delegations’ view on the scope of the decision that was rendered in the Gözütok and Brügge judgement regarding the relation between ‘final judgement’ and the Ne Bis In Idem principle\(^{136}\).


\(^{131}\) Article 4 of the Belgian Penal Code.


\(^{134}\) Article 3 of the Belgian Penal Code.

\(^{135}\) Source: Prof. Dr. B. Spriet in Strafprocesrecht en extraterritorialiteit, Les dossiers de la revue de droit penal et de criminology, La Charta, Brussel, Die Keure, Brugge, 2002, p. 6 and under note number 6.

\(^{136}\) In their Comment on the report from the European Commission on the Implementation of the EAW FD the Belgian delegation stated that: "Article 4(3) page 10 of the Annex: the case-law of the Court of Justice of the European Communities (H. Gözütok and K. Brügge Judgements of 11 February 2003) does not concern part 2 of Article 4(3) but part 3 relating to a "final judgement [...] passed [...] in respect of the same acts, which prevents further proceedings". The judgements in the two above cases relate to mediation and an out-of-court settlement, not just a discontinuation of proceedings as referred to in part 2 of Article 4(3). Consequently, Belgian legislation has duly taken account of the Court’s case-law; Member States comments to Report from the Commission based on Article34 of the Council framework Decision of June 13th 2002 on the European arrest warrant and the surrender procedures between member States."
6.1. The territoriality principle as an optional ground for refusal in Belgian EAW legislation.

As far as the EAW, The Belgian territoriality principle has been provided for in article 6 paragraph 5 of the Belgian EAW implementation law as an optional ground for refusal.

Article 6 paragraph 5 of the Belgian EAW legislation reads as follows\textsuperscript{137}: Execution can be refused in the following cases:

(...) When the European Arrest Warrant concerns offences which:

a Were committed in all or in part on Belgian territory or in a place assimilated to its territory\textsuperscript{138};

b Were committed outside the territory of the issuing member State and Belgian law does not authorise prosecution of the same offences outside Belgian territory.

Because of its discretionary character, the Investigation Chamber will have to weigh the separate interests of the issuing state against those of Belgium as the executing State to decide whether or not to grant the surrender request. He will have to do so even when the alleged offence is not punishable under Belgian Law.

It is important to note that the territoriality exception as an optional ground for refusal applies to anyone residing on Belgian territory (domiciled or resident) and not only in respect of its own nationals\textsuperscript{139}.

The territoriality principle, in relation to the abolishment of the double criminality requirement.

The abolishment of the double criminality check has practical reasons: it safes time and money. It also has consequences for the way that the territorial- and extra-territorial principle, are filled interpreted in the Belgian EAW surrender procedure.

Ad a The territoriality principle

This ground for refusal has to be seen in the light of the abolishment of the double criminality for offences that are listed in article 5 paragraph 2 of the Wet van 19 December 2003\textsuperscript{140}.

In case of a surrender request based on an offence for which the double criminality check is not allowed, and such an offence would not be punishable under Belgian Law, the surrender now can be refused when the act has in whole or in part been committed on Belgian territory\textsuperscript{141}.

Ad b The extra-territoriality principle

This discretionary ground of refusal also should be read in the light of the abolishment of the double criminality requirement. To understand this we have to look at a situation where an offence is committed outside the territory of the issuing State and this act is not punishable under Belgian Law.

In such a case surrender can be refused, because the absence of a suspicion of a criminal act under Belgian Law implies the absence of extra-territorial jurisdiction powers by the Belgian authorities\textsuperscript{142}.


\textsuperscript{138} This provision appears to be very similar those from the EAW FD.

\textsuperscript{139} Comment of the Belgian delegation on the Member States report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States. Council of the European Union, 7751/05, p. 2.

\textsuperscript{140} Wetsontwerp betreffende het Europees Aanhoudingsbevel, Memorie van Toelichting, Parl. St. Kamer 2003-2004, nr. 279/001, 16.

\textsuperscript{141} Prof. Dr. D. Van Daele, Belgie en het Europees aanhoudingsbevel: Een commentaar bij de wet van 19 December 2003, p. 22.

\textsuperscript{142} Prof. Dr. D. Van Daele, Belgie en het Europees aanhoudingsbevel, p. 22.
6.2. Appeal and review in the Belgian EAW legislation and decisions from the Belgian courts regarding the territoriality principle

a Appeal and review: an overview:

- Appeal is granted by the requested person as well as the Prosecutors Office against the order adopted by the investigating judge within 24 hours from the arrest concerning the detention or release of the concerned person.\textsuperscript{143}
- An appeal against the order of non-execution taken by the investigating judge is granted before the Chamber of Accusation. Higher appeal is granted before the Belgian Hof van Cassatie (Supreme Court).\textsuperscript{144}
- An appeal against the execution or non-execution decision taken by the Pre-trial chamber is granted before the Chamber of Accusation within the 15 days after the arrest. This decision can be appealed before the Supreme Court.\textsuperscript{145}

b Decisions from the Courts regarding the territoriality principle

On June 24\textsuperscript{th} 2001 the Belgian Supreme Court decided that the competence of the Belgian Courts is being expanded when the offences that have been committed both in Belgium as well as in a foreign country, together make for one undividable unity.\textsuperscript{146}

As a result an offence that has been committed on foreign soil, will be - through the preparation of this offence by the suspect on Belgian soil - absoIRKed by Belgian jurisdiction. This approach has been critisized for its contradictory implications.

First of all, this new approach by the Supreme Court seems to contradict the commonly accepted view amongst Belgian scholars regarding the objective nature of the ubiquity theory.\textsuperscript{147}

Secondly there is jurisprudence from the Supreme Court regarding the relation between the Act of 19 December 2003 and other Extradition Treaties, the 1957 European Convention on Extradition in particular, based on the hierarchical relation between Treaty provisions in the articles 31-33 of the Vienna Convention on The Law Of Treaties (VCLT).

Finally, in another case the Belgian Supreme Court held that an unilateral agreement by a Member State includes a consult in the sense of article 54 paragraph 4 of the VCLT.\textsuperscript{149}

Thus, as far as Belgium, the Netherlands and Luxembourg, it contains a procedural option to neutralise the provisions of Benelux Convention on Extradition and Mutual Assistance in Criminal Matters (hereafter BUV).\textsuperscript{150}

By implementing the EAW FD into their national legislation, Belgium and Luxembourg would have excluded themselves from the BUV as far as surrender procedures concerned. So, the prohibition of the surrender of nationals cannot be upheld as was provided for in article 5 (1) BUV.\textsuperscript{151}

\begin{flushright}
\textsuperscript{143} Article 11 § 7 of the Belgian law implementing the EAW, supra § 4.2.6.1. a. \\
\textsuperscript{144} Article 14 of the Belgian law implementing the EAW, see supra § 4.2.6.1. a. \\
\textsuperscript{145} Article 16 of the Belgian law implementing the EAW, see supra § 4.2.6.1. a. \\
\textsuperscript{146} Supreme Court January 24\textsuperscript{th} 2001, R.D.P. 201, 721 in appeal on a decision from the Chamber of Accusation from November 9\textsuperscript{th} 2000, R.D.P. 2001, 761. \\
\textsuperscript{147} Source: Prof. Dr. B. Spriet in Strafprocesrecht en extratorrialiteit, Les dossiers de la revue de droit penal et de criminology, La Charta, Brussel, Die Keure, Brugge, 2002, p. 14, under note 32. \\
\textsuperscript{148} Europees Verdrag betreffende de Uitlevering, gedaan te Parijs op 13 December 1957. \\
\textsuperscript{149} Supreme Court Augustus 24\textsuperscript{th} 2004, number P041211N and December 8\textsuperscript{th} 2004, S.A., J.T. 2005, 133, annotated by J. Castiaux and A. Weyembergh. \\
\textsuperscript{150} Verdrag aangaande de uitlevering en de rechtshulp in strafzaken tussen het Koninkrijk Belgie, het Groothertogdom Luxemburg en het Koninkrijk der Nederlanden, (Benelux Extradition Treaty) signed in Brussel on June 27th 1962. \\
\end{flushright}
It is very doubtful that this decision can be upheld for two reasons:
- The VCLT doesn’t provide for the option of a unilateral retreat.
- Unilateral retreat by Belgium and Luxembourg would also have consequences for the position of the Netherlands.

Wouters and Vidal suggest another approach, namely by making an analogous comparison as far as the succession of Treaties as in provided for in article 30 paragraph 4 of the Vienna Convention on the Law of Treaties\textsuperscript{152}. They prefer the simple solution provided for by article 28 paragraph 3 of the Vienna Treaty, which enables Member States to regulate surrender procedures by uniformity of law. States can do so by a declaration addressed at the Secretary-General of the Council of Europe\textsuperscript{153}.

It could be interesting to see what the Belgian EAW jurisprudence looks like in EAW territoriality procedures.

c Decisions from the Courts regarding the territoriality principle in EAW procedures

In EAW procedures, the following two cases can serve as a guideline for the current position of the Belgian judicial authorities.

- Chambre des mises en accusation de la Cour d’appel de Liege, Chambre des vacations – August 18th 2004\textsuperscript{154}(Executing Authority)

Issuing Authority: Juge d’instruction au Tribunal de Grande Instance de Charleville Meizieres (France).

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\textsuperscript{152} One has to keep in mind at all times that the EAW FD in itself is not a Treaty and therefor doesn’t have direct consequences. It is an agreement from an international organisation from which all EU Member States are party to. At the same time it obliges these Member States on the basis of article 32 (2) (b) of the EU Treaty to implement this agreement into national legislation.

\textsuperscript{153} As has indeed been done by Belgium.

\textsuperscript{154} Source: Belgian Case Law – European Arrest Warrant: Anne Weyembergh & Juan Castiaux.

Requested person: French national.

Defence raised: The file presented to the requested person contained only the EAW from and nothing else to verify the existence of a ground for refusal especially the ground based on the territoriality exception as provided for in article 6 paragraph 5 of the Wet van 19 December 2003.

Decision: The defence neglects the principle of mutual recognition of judicial decisions within the EU and the fact that the Belgian law only requires the issuing State to issue an EAW and no enclosed documents.

- Cour de Appeal, French section, 2\textsuperscript{nd} Chamber – July 19th 2005 - No: P.05.0952.F\textsuperscript{155}.

Issuing Authority: Vice Procureur près le Tribunal de Grande Instance de Lyon (France)

Requested person: Djellab Labidi, Algerian nationality

European Arrest Warrant issued for prosecution.

Defence raised: Djellab argued that the facts which grounded the EAW were identical to those which he was prosecuted for in Belgium. In its ruling dated 1\textsuperscript{st} July 2005, the Chambre des mises en accusation confirmed the decision to execute the EAW in spite of the arguments raised by the defence of the requested person, these arguments being based on two facultative grounds for refusal, namely Articles 6.1. and 6.5. of the Belgian Law of 19 December 2003 implementing the EAW.

(...) Djellab considered that the Chambre de mises en accusation infringed also especially Articles 6.5, 17, § 4 and 16, § 1\textsuperscript{st} of the Belgian Law of 19 December 2003 concerning the EAW by not answering the defence pleadings concerning the violation of Article 6.5.

Decision: The recourse is rejected (...) The Court of appeal states that the Chambre des mises en accusation sufficiently answers the arguments raised concerning Article 6.5. of the Belgian law implementing the EAW.

\textsuperscript{155} Executing Authority Chambre des mises en accusation, Cour d’appel de Bruxelles, decision of 01/07/2005. Source: Belgian Case Law – European Arrest Warrant: Anne Weyembergh & Juan Castiaux.
6.3. Summary territoriality principle in Belgian EAW procedure

As we have seen in the EAW surrender procedure the situation is unique in so far that States have transferred part of their autonomy to external instances with a normative capacity. This common norm that member States have declared to share by way of mutual trust and mutual recognition, is embodied by the Framework decision itself.

However this may be, the Belgian legislator did not choose for an unconditional reliance of the mutual recognition principle. The Belgian legislator has explicitly mentioned the acts of Abortion and Euthanasia as not included into the category of offences known as murder in the list in article 5 (2) of the Belgian EAW implementation law. Also, the Belgian legislator has not found it necessary to pinpoint the list of 32 offences that are mentioned in article 2 (2) of the EAW FD to specific criminal provisions in article 5 (4) of the Belgian Criminal Code. This leaves much –if not too much- room for interpretation.

It is hard to imagine how the Belgian judge will be able to qualify the offences as mentioned in the EAW without appliance of the Belgian national qualification of the offence. In this way the abolishment of the double criminality principle seems illusionary in Belgian EAW practice.

From the Advocaten voor de Wereld Case it follows that the requirement that follows from the principle of equality is a substantive one, guaranteeing equal treatment in equal cases. This implies equality in the allocation of provisions of which the judicial authorities cannot deviate without reasonable ground. Consequently, there is no equality when different judges come to a different verdict in the same case.

So as a result, the Belgian judge simply takes notice of the request and not of the case in substance. Therefor he doesn't evaluate the evidence that is being presented, nor does he give an ordeal on the matter of guilt or liability. Therefore in the Belgian EAW procedure, the judge has to simply take notice whether the basic requirements regarding the surrender request have been fulfilled.

The question is whether this will be any different in Appeal. At first sight, the Belgian appeal procedure seems rather complicated. This is somewhat compensated by the strict time limits within which the decisions by the Chambers have to be issued.

Nevertheless, as seen in the previous paragraph, different Chambers are likely to decide differently in similar cases, quite possibly resulting in a breach of the principle of legal certainty. Finally, the unifying capacity of the Belgian Supreme Court could be obstructed because the ground for refusal as is provided for by article 6 paragraph 5 of the Belgian Implementation Law is a discretionary one.

\[156\]Conclusion Advocat-General D. Ruiz-Jarabo Colomer, in Case C-303/05, September 12th 2006, paragraph 42 and 43.

\[157\]Article 2 of the EAW FD.

\[158\]Not to mention the examination of the requirement of the 3 year custodial sentence as prescribed by article 2 (2) EAW FD.


\[160\]According to some scholars, the decision to either refuse or grant a surrender request will be based on grounds that rest with the executive branch and not with a judicial authority. Stessen, Het Europees Aanhoudingsbevel, Wet van 19 December 2003, Rechtskundig Weekblad, 2004-15, p. 570.
7 Conclusion

As we have seen in previous chapters, as a matter of checks and balances, the scope of the territoriality principle are weighed against:

a) Implications of Tampere and the principle of mutual trust.
b) The fundamental rights of the accused
c) The proper administration of justice

These elements will serve as a guideline in comparing the scope of the territoriality principle in Germany, France, Belgium and the Netherlands, based on EAW legislation and case law.

7.1 Conclusion Dutch territoriality principle in EAW procedure

a) The implications of Tampere and the principle of Mutual Trust

An important point of consideration in the Dutch EAW procedure is the fulfillment of the aim within the EU of an unrestricted traffic of goods and persons.

From the Prosecutors Office point of view the Dutch EAW procedure should be based on compliance with a surrender request unless there are contra-indications that such is not allowed\(^{161}\). The Prosecutors Office suggest that the IRK relies too much on the opposite, being the refusal of a surrender request unless there are special circumstances allowing surrender.

The guardian function that the IRK fulfills in the EAW procedure itself is not contested by the PO. However the PO is not too happy with the way this guardian function is executed. According to the PO it is not up to the IRK to display an evident absence of mutual trust towards foreign Prosecution instances. Only if there are clearly not enough fundamental safeguards for the requested rights in the requesting State, should an EAW surrender request be rejected\(^{162}\). Unsurprisingly, and quite rightly, the IRK strongly rejects this point of view.

In their pre-advice Glerum and Rozemond doubt the expediency with which the IRK directs the balancing of interests of judicial authorities and the requested person involved.

At the same time they argue that the IRK’s autonomously developed testing policy deviates from the character and the scope of the Framework Decision. In particularly the unique application of the hardship clause on the basis of the territoriality exception to Public Prosecution Office with respect to formulating policy rules concerning the way in which the interests of the requested person are weighted, make a mark on the EAW surrender procedure. They consider this undesirable for several reasons.

The principle of mutual recognition is being obstructed because of this excursion as well as the free movement persons within the EU. The danger of inequality before the law with respect to the extradition practice is thus certainly not imaginary. I personally do not share this vision. As I have tried to show before the principles of mutual trust, mutual recognition and State responsibility are interdependent. Therefore the judicial authorities of the EU Member States have an obligation towards the requested persons fundamentals rights that is also explicitly embodied in the EAW Preamble. Apart from that the ECHR helps to establish superior and universally accepted fundamental rights that must be protected by the State on which territory one is.

b) The Fundamental rights of the accused

So, the principle of mutual trust between member states apparently is not of an unconditional nature\(^ {163}\). Contrary to this factual circumstance there is a multitude of Treaties and Framework decisions within the EU that are undisputedly aimed at the realisation of an united EU on the basis of mutual recognition and mutual trust.

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\(^{161}\) The Prosecutors Office – in their own words– always apply the proportionality and subsidiarity test. In case of doubt the requesting State gets the benefit of doubt.

\(^{162}\) This should be more than just a mere suggestion by the requested person.

\(^{163}\) See also: Over de reikwijdte van het vertrouwensbeginsel: N. Keijzer, ‘Goede trouw in het uitleveringsrecht’, p. 494 under noot 18, and p. 498 e.v., DD 5, 34.
Initiatives like Europol, Eurojust and the Joint Investigation Teams represent the embodiment of this aim. The Dutch legislator has contributed to these contradictory signals by the way it has interpreted the EAW Framework Decision. Examples of this being the fact that two main issues, the first being the human rights exceptions in article 11 OLW and the second the fact that the territoriality principle that has been formulated as a compulsory ground for refusal, turning it into a fundamental right in itself.

In EAW practice, Prosecutors Office and the IRK at times stand miles apart as far as their interpretation the EAW legislation in these matters. The PPO's special appeal procedure before the Supreme Court (Cassatie in het belang der wet) in the cases Ceyhan, Ruznic and Van Dam can serve as proof. Fact is that despite the Supreme Courts ruling in these cases, the IRK refuses to regard itself as a 'marginally testing surrender factory'. The IRK continues to measure, weigh and balance on a case-by-case basis. As far as legal certainty is concerned, this can be considered as a comforting thought for the requested person.

It should come as no surprise that in the near future the defendant will call upon article 8 ECHR. This will happen not only in relation to the humanitarian exception ex article 11 OLW but also in relation to territoriality principle as embodie in article 13 OLW. In Dutch EAW practice the defendant could be profiting from the IRK’s policy to demand a more profound motivation from the Public Prosecutor Office ex article 13 (2) OLW. This more substantial motivation has been introduced by the IRK and has served as an extra safeguard for the defendant in situations where the PPO makes use of its discretionary powers to file a request to obstruct the IRK’s decision of non-surrender of the requested person.

However, according to the Supreme Court, the IRK has overstepped its legal powers and duties by doing so. Nonetheless, it seems like the absence of an appeal procedure in Dutch EAW procedures might continue to play a role in the IRK’s persistence to maintain their interpretation of the discretionary powers they have as far as the proper administration of justice.

\textbf{c \hspace{1cm} The proper administration of justice}

Ever since Tampere, the Public Prosecutors Office bases its function and duties within the sythematics of the EAW procedure more rapidly and more profound on the aforementioned focal points within the EU. The IRK appears to be more cautious which leads to friction with the Public Prosecutors Office in the Netherlands as well as in the requesting State. This happens regardless of the consistency with which the decisions of the IRK are taken. An important issue is the amount of drugscases with which the EAW procedure becomes saturated.

Study the IRK’s decisions it appears that the following factors are instrumental in the EAW procedure:

\begin{itemize}
\item which legal order has been damaged most
\item is the requested person a national or privileged resident
\item is there a fixed or otherwise permanent residency
\item where did the prosecution started
\item the stage of the prosecution (preliminary or final)
\item where (most) victims are
\item where (most) conspirators are, with regard to them either being in custody, on trial or already convicted.
\item the type of offence (light to very serious),
\item Procedural economic factors like police co-operation or joint investigation teams.
\item the availability of evidence\footnote{The fact that on first sight there is more evidence in the either the requesting or the requested State is a factor that can influence the IRK’s decisions. As a rule the IRK does not touch upon a ‘bewijsverweer’ unless the requested person can prove without a trace of doubt that he could not have committed the crime for which the EAw has been issued.}
\item the personal circumstances of the requested person like work situation, age, health condition including that of his partner and children and the economic dependency of other family members on the requested person.
\item the available resources for resocialisation in either the requested or the requesting State.
\end{itemize}
The PPO maintains the view that the requested person has consciously participated in this type of cross-border crime because of the high profits involved. The risk of being surrendered therefore should be considered as one that comes with the job.

One very important difference between the IRK’s and the PPO’s view regarding the proper administration of justice regards the right to family life as provided for in article 8 of the ECHR.

The PPO’s policy regarding the requested person’s right to family life seems inconsistent. On the one hand they claim that as a rule they take this right into consideration, but at the same time they seem to retain a very restrictive policy in Court as far as the requested person’s interests in relation to ‘the right to a family life’. Obviously this effects the determination of the proper administration of justice.

The importance of article 8 ECHR also becomes evident in cases where the EAW has been found executable but the requested person has applied for postponement of the surrender based on the hardship clause that is contained in article 35 (3) OLW165. If the PPO opposes to this postponement, the requested person can lodge an appeal for a summary jurisdiction and procedure in matters of special urgency, at the District Court in The Hague166.

For both IRK and PPO besides the disrupted legal order, it is in particular the aforementioned procedural aspects that count. With respect to the importance of the Joint Investigation Teams, the PPO maintains the view that the IRK’s policy in reality implies the interference of joint agreements between the PPO’s of the EU Member States.

Verrest and Kraniotis call upon the IRK to respect the primacy of the proper administration of justice between sovereign States and the danger of watering down State sovereignty in criminal matters in case of a persistent appeal on the hardship clause in relation to article 13.

I understand their concern but at the same time I disagree with their conclusion167. The Dutch article 13 OLW jurisprudence is dominated by cases in which the balancing exercise by IRK regarding the proper administration of justice leads to compliance with the surrender request168.

Notwithstanding the fact that the IRK indeed has chosen for a unique approach of the principle of proper administration of justice, this approach has proven its worth repeatedly. The main reason for this being the preciseness and the profoundness with which the IRK reaches its decisions in almost every single case169.

Contrary to what Verrest and Kranoti fear, in the long run this can only have a favourable effect on the independent and adequate functioning of the PPO’s, as well as on the political, police and judicial relations between the Netherlands and other EU Member States.

Nontheless the Supreme Court has rejected the IRK’s view insofar that it has been decided that the personal interests of the requested person are of no significant importance while determining the proper administration of justice170.

To make matters even more complicated the Supreme has also decided that it need not to be determined exactly what the scope of the proper administration of justice is. So as a result, the Supreme Court expects the IRK to disregard the humanitarian interests of the requested person in the balancing of interests, without determining exactly what then exactly the proper administration of justice should entail.

One can expect the IRK to formulate an adjusted policy based on these Supreme Courts decision, but not necessarily in conformity herewith.

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165 V. Glerum (m.v. V. Koppe) p. 38.
166 Summary jurisdiction and procedure in matters of special urgency (Kort Geding), District Court The Hague, September 30th 2004, LJN AR 3286.
169 Quite possibly the Dutch PPO maintains a slightly different view.
170 LJN: AY6631, Hoge Raad, 00730/06 CW (Van Dam)
7.2. Conclusion German territoriality principle in EAW procedures

a Implications of Tampere and the principle of mutual trust

As we have seen in previous paragraphs the principles of mutual trust, mutual recognition and State responsibility are so closely connected that each of them has to keep pace with the others for all of them to retain their credibility. The Darkanzali judgement has proven just that. The German Constitutional Court held that "the co-operation that is put into practice in the Third Pillar of the EU in the shape of mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is appropriate in terms of subsidiarity".171

In the words of Pfützner: "The principle of mutual trust cannot restrict the constitutional guarantee of fundamental rights. The Framework Decision as a measure under the third pillar is still governed by international public law which urges us to apply a stricter human rights test."172

Or, in the words of Judge Bross in his dissenting opinion: "...it is above all in such cases that the State’s duty to protect and the principle of subsidiarity must prove their worth and not only in the case of offences with a strong domestic connecting factor".173

However, the German legislator apparently does not share this view, since Article 79 in conjunction with Article 74 IRG as a starting point still set out a general obligation to approve surrender. The application of the territoriality principle as implemented in the new Act regarding the German surrender procedure will have to confirm this.174

b The fundamental rights of the accused

As has been said before, the principle of mutual trust is not unconditional.175 As a result, according to the territoriality principle as laid down in the new Article 80, the basis for surrender has become smaller. At the same time, the responsibility of the State for the wellbeing of the requested person in general could tip the balance in favour of refusal to surrender nationals and privileged foreigners in particular.

Furthermore, the amount and availability of evidence in either the issuing or the requested State will also be deciding factors in determining whether or not the requested person will have to tolerate a breach of his/her fundamental rights.

Therefore it seems safe to assume that notwithstanding Tampere:

- as a result of the strict application of the territoriality principle in the new German EAW Implementation Act, and
- as far as nationals and privileged foreigners are concerned, the protection of fundamental rights in relation to State responsibility could – as a basic rule – very well outweigh the principles of mutual trust and mutual recognition in judicial matters.

Finally it should be noted that The Recitals in the Preamble can be considered – in a way comparable to Article 73 of the IRG – as general grounds for refusal that are not found under the specific grounds for refusal listed elsewhere in the EAW.176

173 Judge Bross’s dissenting opinion in Darkanzali. Paragraph 142. 4, p. 28.
174 a. These are cases where both the elements of the act and its effects are situated outside German territory, or
b. Cases that are considered very serious and of a typical cross-border nature, such trafficking in drugs and humans, and have been committed at least partially on the territory of a foreign State.
175 In other words: In case of a threat of a violation of fundamental rights, a State can only comply with surrender on mutual trust, when there are no substantial grounds for believing, that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.
The proper administration of justice

In its judgement the German Constitutional Court held that: "the cooperation that is put into practice in the Third Pillar of the EU in the shape of mutual recognition, is a way of preserving national identity and Statehood in a single European judicial area, which is appropriate in terms of subsidiarity".¹⁷⁷

With this judgement in mind, in all cases, regardless of the *locus delicti* and its effects, the balancing of rights by the competent judicial authorities will have to take place on three levels:¹⁷⁸

- regarding the rights of the requested person and other individuals, such as the victims and the general public.
- Regarding the instruments applied in the EAW procedure with a view to the requirements of proportionality and subsidiarity.
- regarding the priorities of a State: what should prevail in individual cases? Mutual trust or State responsibility?

As we have seen in the previous Chapters, a significant link of the offence to Germany will, as a rule, be present where the act or omission, in its entirety or in part, was committed on German territory and the result of the act or omission occurred at least in significant part, on German territory. With the extensive German interpretation of territoriality in mind –especially in drug-related cases – it can be expected that requests to surrender nationals and privileged foreigners will only be considered admissible in exceptional cases¹⁷⁹.

As far as the German appeal procedure is concerned, Article 79 (2) provides for judicial review only of the application of the optional grounds for refusal in Article 83 IRG. This means that the scope of the review is limited to only the first stage of the procedure and does not extend to the final stage dealing with the judicial admissibility of the application.

It can be assumed that in the case of minor offences the fundamental rights of the requested person will weigh more heavily than in the case of a serious criminal offence.

Nevertheless, the alleged offence will also have to be considered in the light of the seriousness of the suspicion as well as the amount of evidence at hand in either the issuing State or the requested State. The principles of proportionality and subsidiarity must be taken into account by the judicial authorities, being the Staatsanwalt as the Approving Authority as well as the authority that decides on whether surrender is allowed.

Finally we have to bear in mind that under the new German Act, if a public prosecutor or a court decides not to prosecute or to terminate prosecution for the offence that is the subject of the extradition request, this decision and the reasons underlying it have to be included in the balancing exercise.¹⁸⁰

So, as a result, in the process of balancing the various interests, it is in particular the alleged offence, the practical exigencies or possibilities for effective prosecution, and the constitutionally protected interests of the requested person, that need to be weighed and of which it must be determined what their mutual relationship should be, with due regard to the goals inherent in the creation of a European Judicial Area.¹⁸¹

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¹⁷⁸ Including mixed cases as mentioned in Article 80 (2) (3).
¹⁷⁹ See also Judge Lübbe-Wolff dissenting: (...) *The specific relationship to the central question of balancing of interests and protection of legitimate expectations that are posed in the context of extradition under European arrest warrants means that the legislator must make use of the possibilities offered by Art. 4 nos 7a and 7b of the Framework decision (...).* Paragraph 164, p. 32. English version taken from the Common Market Law Reports 2006, no. 16; 2005 WL 3626269 (BVerfG (Ger)), [2006] 1 C.M.L.R. 16.

¹⁸⁰ The same applies where a court has decided that a case shall be tried in full or shall lead to the imposition of a Strafbefehl.

¹⁸¹ We will further elaborate on this in Chapter 2.2. under Section III.
7.3. Conclusion French territoriality principle in EAW procedures

a The implications of Tampere and the principle of Mutual Trust

Based on French legal provisions and Case law, one could come to the conclusion that the French maintain a rather extensive interpretation of the territoriality principle. With the Declaration of Tampere in mind—and more specifically the principles of mutual trust—it is therefore essential to determine to what extent on the basis of the principle of mutual trust the French judicial authorities judge upon EAW’s within this fairly extensive area of French jurisdiction. Unfortunately, no definite answer could be deduced from the studied case law.

b The Fundamental rights of the accused.

From the wordings of the Courts decision one could conclude that the mere prosecution by the French authorities alone is not enough to bar surrender on the basis of the territoriality principle in article 695 – 24 CCP. Apparently the Court gives considerable weight to the principle of proportionality and proper administration of justice when deciding upon a surrender request.

The Court emphasises the importance of the principle of proportionality between the alleged offence, the imposing of a pre-trial custodial sentence, the presumption of innocence and the fundamental right to freedom as protected by the ECHR.

However, this may be, in another case, according to the Cour de Cassation, the discretionary powers contained in article 695-24 of the French Penal Code can not be exercised when there is no mention of the exact offences for which the requested person is being held in pre-trial detention by the French authorities.

This could imply that the CdC is inclined to balance the alleged offence against the offence for which the requested person has been prosecuted by the French authorities to apply the principle of proportionality. Another option is that the double criminality requirement is being re-introduced despite the abolishment in EAW procedures.

c The proper administration of justice

As we have seen in Chapter 3, the French authorities shall have jurisdiction and French criminal law will be applicable to offences committed in whole or in part on French territory. This includes offences that are committed abroad in whole or in part, as long as it has been established that parts of the offence that have been committed on French territory are inseparably connected with other parts of the offence that are committed abroad.

Following article 113 paragraph 5 of the CP, French Criminal law shall also be applicable to whoever is an accomplice in the territory of the Republic of a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable under both French law and the foreign law and if it has been established by a final decision of the foreign court. This provision seems to expand and restrict the scope of the French territoriality principle in one single provision.

The last sentence of paragraph 5 however bars the exercise of French jurisdiction as long as there is no final decision by a foreign court. This implies that without a prosecution by a foreign authority, the requirements of paragraph 5 will never be met.

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182 Judgement of the European Court of Justice of 11 February 2003 in Joined Cases C-187/01 and C-385/01, Huseyin Gözütok and Klaus Brugge.
183 Arrêt n° 05-81230, Cour de Cassation, 16 Mars 2005
184 Arrêt n° 04-84978, Cour de cassation, 19 Août 2004
185 La loi pénale française est applicable à quiconque s’est rendu coupable sur le territoire de la République, comme complice, d’un crime ou d’un délit commis à l’étranger si le crime ou le délit est puni à la fois par la loi française et par la loi étrangère et s’il a été constaté par une décision définitive de la juridiction étrangère.
186 The first part of article 113 (5) extends French jurisdiction over accomplices of both offences and misdemeanours when these acts have been committed on French territory and the double criminality requirement is met with.
This is true even if the accomplice has confessed his role in the offence. Similarly, an out of court settlement by the foreign authorities will bar prosecution by the French authorities, despite a confession or other proof of guilt.

As a result, once it is established that the acts originated from France, be it from a French national or a French legal person, or that one of the constituting elements of the act has been committed on French territory, the French authorities will be entitled to exercise jurisdiction. It should be noted that this prosecution will not only be directed against nationals and legal persons in France, but also against perpetrators abroad.

Based on French legal provisions and Case law, one could come to the conclusion that the French maintain a rather extensive interpretation of the territoriality principle. This could have consequences for the legal practice since as we have seen the referral to the *ordre public* as a guiding principle is not uncommon in French EAW case law.

Accordingly, when trying to accomplish a proper administration of justice, the Courts could very well be inclined to utilise their discretionary powers as provided for in article 695 (24) CCP, to reject those surrender requests that contain at least a meaningful link with French territory. They can accomplish that either through the scope of article 113 (5) CCP or in virtue of the *ordre public* itself.
7.4. **Conclusion Belgian territoriality principle in EAW procedures**

*a The implications of Tampere and the principle of Mutual Trust*

This common norm that member States have declared to share by way of mutual trust and mutual recognition, is embodied by the Framework decision itself. However it is clear that the Belgian legislator didn’t chose for an unconditional appliance of the mutual recognition principle.

First of all the list of 32 offences which are mentioned in article 2 paragraph 2 of the EAW FD refer to certain forms of criminal offences and not to specific articles in the Criminal Codes. From a EU point of view this is fairly logical. However, as the Belgian legislator has not found it necessary to pinpoint these criminal offences to specific criminal provisions in article 5 paragraph 4 of the Belgian Criminal Code, much –if not too much- room for interpretation is left. This also seems to be contrary the aim of the EU agreement on mutual recognition in judicial criminal matters.

Finally, if the Belgium Supreme Court upholds that even in cases with a undisputed territorial connection with Belgium that the principle of mutual recognition is indeed the cornerstone of the EAW procedure, this could result in a blow for the defences right.

*b The Fundamental rights of the accused.*

As we’ve seen in the previous chapters territorial legislation, principles of mutual trust and mutual recognition play a major role in the sense that both the issuing and the requested state must be able to fully rely on each other to abide to these major principles in criminal judicial co-operative matters.\(^{187}\)

Article 4 paragraph 7 sub a of the EAW FD provides that it is the requested States prerogative to decide whether or not an offence has been committed on a States own territory. In one of the key decisions in the EAW procedure, the Court emphasised that defence neglects the principle of mutual recognition of judicial decisions within the EU\(^{188}\).

It’s significant that the Court relies so heavy on the principle of mutual recognition whereas the Belgian legislator clearly indicates that this principle is not to be considered as unconditional. It seems to me that this principle should serve as a guideline for judicial authorities in an EAW surrender procedure and not as a legal ‘crowbar’ to gain entry to an area of unrestricted surrender\(^{189}\).

If this decision becomes a starting point for the Belgian Chambers dealing with defences based on the territoriality principle, the Belgian EAW surrender procedure will be very predictable despite the fact that the territoriality principle has been embedded in the Belgian legislation as a discretionary option. It simply will not leave the requested person much room to successfully fight the decision to be surrendered.

That fact that the Supreme Court can play an unifying role in this matter however, is not sufficient to guarantee the right to legal certainty for the requested person in practice. The only certainty is in the time limits by which all Chambers are bound to observe.

Surprisingly, another mandatory ground, the *humanitarian exception* has been added even though it had not been listed in the EAW FD. This mandatory ground is based on article 1 paragraph 3 of the EAW FD in conjunction with article 6 of the EU Treaty, prohibiting the violation of fundamental rights as mentioned in the ECHR\(^{190}\).

\(^{187}\) It goes without saying that the same applies to the classical Belgian surrender procedure which is based on an agreement between sovereign states while the principle of autonomy is unhampered.

\(^{188}\) Chambre des mises en accusation de la Cour d’appel de Liege, Chambre des vacations – August 18th 2004.

\(^{189}\) See also Supreme Courts verdicts from January 24th 2001, R.D.P. 201, 721.

\(^{190}\) As we have already seen in the Dutch chapter of this research.
Notwithstanding the comments that were raised while discussing the implications of this choice, it’s obvious that by explicitly listing the humanitarian exception as a mandatory ground for refusal, upholding the principle of mutual trust as the most elementary factor in EAW procedures seems rather inconsistent.

This is especially true compared to standard surrender situations to third-states, where fear of breach of fundamental rights is more likely to happen than within the EU\textsuperscript{191}

\textit{c The proper administration of justice,}

In the EAW surrender procedure, States have in the light of a supranational judicial system transferred part of their autonomy to external instances with a normative capacity\textsuperscript{192}. In case of appeal, the Belgian procedure allows that despite a different ruling by the highest appeal Chamber, different Chambers of Accusation can come to the same conclusion.

At the same time, because of the discretionary character of the ground for refusal, different Investigation Chambers are likely to decide differently in similar cases, resulting in a possible breach of the principle of expediency.

As a result of the way the Belgian appeal procedure has been set up, and due to the fact that the territoriality principle has been implemented as a discretionary power, the concept of proper administration of justice seems dependent on too many different factors embedded in the Belgian EAW legislation to function as a consistent guideline within the surrender procedure.

If this is really the case could not be deduced from the studied case law.

\textsuperscript{192} Conclusion Advocat-General D. Ruiz-Jarabo Colomer, in Case C-303/05, September 12th 2006, paragraph 42 and 43.
7.5. Connecting the results.

The territoriality principle attributes powers to national territories. The Area of Freedom, Security and Justice connects national territories into a new homogeneous space—or as one wish, pseudo-territory—within Europe. The principles of national territoriality and the supranational Area of Freedom, Security and Justice are connecting and conflicting on multiple levels:

- **Procedural**, (f.i. how to assess the EAW in the light of the violated *Ordre Public* of the requested State),
- **Practical**, (f.i. how to balance the principles of mutual trust, national sovereignty and reciprocity) and
- **political/ideological** as in: living up to the expectations of the Tampere Declaration of one Area of Freedom, Security and Justice.

All EAW procedures are linked. There is no way to investigate the EAW procedure in one Member State without taking the procedures of other Member States into consideration. Since the EAW procedure has been dominated by drugs-related cases from the beginning, we should take into account the following aspects that apply to all Member States:

- drugs-related offences are more often than not cross-border crimes and therefore concern multiple territories in Europe;
- national sovereignty and the exercise of jurisdiction are often hard to reconcile with the Area of Freedom, Security and Justice;
- Dutch drugs policy and the relative mild sanctioning of drug offences in Holland, are an important factor in other Member States' determination to exercise jurisdiction even when their public order has not been seriously violated.

Establishing to what extent the *Ordre Public* has been violated is an important factor in determining the proper administration of justice. This applies to all EU Member States. However, there seems to be vast differences between Holland and the other Member States, regarding the disruptive effect that can be attributed to drug offences on the *Ordre Public*.

The Dutch territoriality principle is characterised by an obligatory ground for refusal as far as offences that were committed in whole or in part on Dutch territory. The Dutch legislator apparently foresaw the practical and political implications of Dutch criminal sovereignty and the atypical drug policy in relation to other EU member States.

The obligation to refuse a surrender request in case there is a strong link with Dutch territory has proven to be an important factor in the Dutch EAW procedures, especially in drugs-related cases.

As a result, the PPO uses its discretionary powers under Article 13 (2) OLV to counterbalance the IRK's policy and to bring the Dutch EAW procedures more in line with the expectations of other EU Member States in the light of Tampere.

*How does the Dutch EAW procedure affect the German (a), Belgium (b) and French (c) EAW procedures and vice versa?*

**A German and Dutch EAW procedures**

After the *Darkanzali* judgement, the German legislator has sought a way to balance the territoriality principle and the protected position of nationals and privileged residents in the new EAW legislation. As a result the German territoriality principle now has a strong basis in the national legislation that could affect the presumed symmetry that underlies the principle of reciprocity between EU Member States.

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193 Even though the Supreme Court has sanctioned some of the IRK’s decisions, there seems to be room for upholding the IRK’s ratio that the personal interests of the requested person are an important factor in determining the proper administration of justice. Accordingly the decision to comply with or reject an EAW is in part dependent upon the attributed weight of these personal interests.

As far as non-proviliged German citizens, there is no jurisprudence available yet to determine to what extent this territoriality principle is being utilized on their behalf.

It can be expected that given Germany’s reliance on the universality principle especially in drugsrelated cases, regardless of the principle of mutual trust, the surrender of non-privileged citizens will be strongly opposed by German authorities as well. Similarly, it even if Germany has only been used as transit country this will not bar the issuance of EAW’s against suspects in Holland\textsuperscript{195}.

\textbf{B Belgian and Dutch EAW procedures}

Belgium has chosen to implement the territoriality principle as an optional ground for refusal. Case law seems to indicate that in Belgian EAW procedures, the principle of mutual trust carries more weight that an appeal upon the territoriality principle.

The question is if this will be equally true as far as drugsoffences that have been committed on Belgian territory as well as on Dutch territory. The issuance of Belgian EAW’s in such cases against suspects in Holland is no exception\textsuperscript{196}.

Will the Belgian authorities for instance be inclined to surrender requested persons for prosecution in Holland or will they decide that prosecution by the Belgian authorities is more convenient in the light of a proper administration of justice?

The fact that the ubiquity principle is being upheld in Belgian criminal law can serve as a strong point of reference in doing so as opposed to the principle of mutual trust when confronted with any surrender request.

\textbf{C French and Dutch EAW procedures}

The French territoriality principle has been implemented as an optional ground for refusal as well. However, contrary to Belgian case law, French decisions seem to indicate that much weight is given to the disturbance of the French ordre public to such an extent that surrender is refused.

French case law also indicates appreciation of the requested persons’ fundamental rights that are protected by the ECHR in conjunction with the EAW FD. Following these decisions can it be expected that while dealing with cases in which France can be considered as a transit country for drugs transports, this line of reasoning will be upheld as well?

Since the French can also rely on the extensive scope of the territoriality principle in article 113 (5) of the Code Penal.

Finally, it remains to be seen whether the French if and how the French will display their appreciation of the fundamental rights protected by the ECHR when they are the requesting State. Dutch EAW practice regarding French surrender requests, seems to indicate differently.

Based on the comparisons under a., b. And c., it seems that Germany, Belgium and France seem to expect that expectations from Dutch authorities to abide to the principle of mutual trust when confronted with EAW’s from these countries must be tempered.

The IRK refuses to settle for a application of the principle of mutual trust without thoroughly considering all the interests involved –including the requested persons- in the underlying case. This applies to all incoming EAW’s

As a result, releasing the tension between the expectations of the EAW procedure, seems to boil down to the way the following questions are answered regarding the scope of the Tampere Declaration in relation to national sovereignty of EU Member States.

\textsuperscript{195} Hoge Raad LJN: AY6631, 00730/06 CW/ German EAW and Hoge Raad LJN: AY6634, 01398/06 CW/ German EAW.

\textsuperscript{196} LJN AY2631.
These questions are:

- Are the principle of mutual trust and the principle of reciprocity of equal importance in the EAW procedures?

- Does the principle of *culpa in causa* entitle judicial authorities to attribute greater weight to the interest of the requesting State?

- Can State responsibility be incurred in both the requesting and the requested State for wrongful surrender\(^{197}\)?

- Can the transferral of proceedings from the requesting State to the requested State be considered as an adequate way of redirecting the principle of mutual trust in EAW procedures\(^{198}\)?

In order to resolve the friction between national sovereignty and EU supremacy, it can be expected that when determining the scope of the national territoriality principle as opposed to a supranational area of *Freedom, Security and Justice* we are likely to witness the following practices in EAW procedures:

- Utilisation of Joint Investigation Teams to control jurisdiction;

- Opportunistic prosecutorial tactics and politics;

- Circumstantial application of the principle of reciprocity.

In any case there seems to be more than enough material for future research projects.

Amsterdam, February 12th 2007, Ricardo Wijngaarde


\(^{198}\) H.G. van der Wilt, *Apres Soering*, p. 80.
Appendix

I Literature


S. Brammertz e.a., Strafprocesrecht en extraterritorialiteit, Les dossiers de la revue de droit penal et de criminology, La Charta, Brussel, Die Keure, Brugge, 2002.

V. Glerum (m.m.v. V. Koppe), De Overleveringswet: Overlevering door Nederland, Praktijkcahiers Strafrecht, deel 2, 1-ste druk, Sdu Uitgevers, Den Haag, 2005.


- Articles


Council of the European Union, addendum to the note from the Belgian delegation to the Co-operation in Criminal Matters Working Party, 11518/05, ADD1, Brussels, September 2nd 2005.

Prof. Dr. D. Van Daele, Belgie en het Europees aanhoudingsbevel: Een commentaar bij de wet van 19 December 2003.


Member States comments to Report form the Commission based on Article 34 of the Council framework Decision of June 13th 2002 on the European arrest warrant and the surrender procedures between member States.


R. Blekxtoon, 'Checks and balances van het Kaderbesluit Europees Aanhoudingsbevel'

E. M. ter Braak, 'Uitwerking concept wederzijdse erkenning in recente kaderbesluiten', Delikt en Delinkwent (DD) 2005, p. 842-857


II Legislative documents and explanatory reports

- Tweede Kamer, vergaderjaar 2001-2002, 23 490, 218; Ontwerpbesluiten Unieverdrag;
  Verslag van een algemeen overleg naar aanleiding van een brief van de minister van Justitie inzake Europese strafrechtelijke samenwerking (J-01-567) en inzake de stand van zaken rond de ontwerp kaderbesluiten inzake Terrorismebestrijding en het Europees Aanhoudingsbevel (23 490, nr. 209).

- Government Bill Dutch EAW Implementation Act (Overleveringswet), Parliamentary Documents II 2002/03, 29 042, nr. 1-2

- Explanatory Statement accompanying the Dutch Implementation Act (Overleveringswet) Parliamentary Documents II 2002/03, 29 042, nr.3


- Eerste Kamer, vergaderjaar 2003-2004, 29 042 nrs. A t/m E.
III  Jurisprudence

Netherlands
- IRK Amsterdam July 2nd 2004, LJN AQ6068 / Hamzas
  (balancing of the personal interests of the requested person while
determining the proper administration of justice)
- IRK Amsterdam July 30th 2004, LJN AQ6069 (position victims)
- IRK Amsterdam October 15th 2004, LJN AR4326
  (reasonableness PPO’s request and the position of the victims)
- IRK Amsterdam October 22nd 2004, LJN AR4509
- IRK Amsterdam November 5th 2004, LJN AR5600
  (reasonableness PPO’s request and the position of the victims)
- IRK Amsterdam November 19th 2004, LJN AR5994
- IRK Amsterdam November 26th 2004, LJN AR6679
  (reasonableness PPO’s request and the role of the victims)
- IRK Amsterdam, December 3rd 2004, LJN AR7213; (German
  undercover agent; surrender despite violation of Dutch Sovereignty)
- IRK Amsterdam December 3rd 2004, LJN AR7229
  (health of requested person/ position of victims)
- IRK Amsterdam January 14th 2005; LJN AS2599
  (reasonableness PPO’s request and the role of the victims)
- IRK Amsterdam February 18th 2005, RK number 04/4867
- IRK Amsterdam April 1st 2005, LJN AT3133; obligation to motivate 13(2)
- IRK Amsterdam, April 1st 2005, LJN AT3330 (Ruznic);
  NJ 2005, 278 (more substantial obligation to motivate)
- IRK Amsterdam May 20th 2005, LJN AT6265 / Beuke
  (more substantial obligation to motivate)
- IRK Amsterdam June 3rd 2005, LJN AT7154 (care for sick child)
- IRK Amsterdam Juli 1st 2005, RK number 05/1640
- IRK Amsterdam September 30th 2005, RK nummer 05/2745
- IRK Amsterdam October 25th 2005, LJN AU4909 (Cybercrime, multiple
  loci delicti?)
- IRK Amsterdam January 6th 2006, LJN AX 1643 (Ceyhan)
- IRK Amsterdam May 12th 2006, LJN AX 1557 (Da Silva)
- IRK Amsterdam March 11th 2005: 13.097293.04, RK number: 05/227
- IRK Amsterdam March 18th 2005: 13/497007-05, RK number: 05/393
- IRK Amsterdam January 14th: 13/097233-04, RK number: 04/4852
- IRK Amsterdam July 7th 2006, LJN: AY2631, RK. number. 06/1850
- Hooge Raad LJN: AY2631, 00730/06 CW/ (Van Dam) German EAW.
- Hooge Raad LJN: AY6633, 01397/06 CW (Ruznic) Austrian EAW.
- Hooge Raad LJN: AY6634, 01398/06 CW/ (Ceyhan) German EAW.

Germany
- BundesverfassungsGericht, July 18th 2005 – 2 BvR 2236/04

France
- Arrêt no 05-81513, Cour de Cassation, Avril 5th 2005 Chambre criminelle
- Arrêt no 05-81229, Cour de Cassation, Mars 16th 2005 Chambre criminelle
- Cour de Appeal, French section, 2nd Chamber – July 19th 2005 -No:
P.05.0952.F
- Casse Criminelle, August 18th 1987, D. 1988, somm. 194

Belgium
- Arrêt no 05-81230, Cour de Cassation, Mars 16th 2005
- Arrêt no 04-84978, Cour de cassation, Août 19th 2004
- Chambre des mises en accusation de la Cour d’appel de Liege, Chambre
des vacations – August 18th 2004.
- Case C-303/05, September 12th 2006, Advocaten voor de Wereld
  vs. Leden van de Ministerraad; Reference for a preliminary ruling from the
Belgian AIRKitragehof; Also: Conclusion by Advocat-General D. Ruiz-Jarabo
Colomer.

European Court of Justice
- ECJ February 11th 2003 in Joined Cases C-187/01 and C-385/01,
  Huseyin Gözütk and Klaus Brugge.

European Court of Human Rights
- ECHR March 7th 2000, T.I. v. UK.
- ECHR June 16th 2005 C-105/03, Pupino, Grand Chamber
- ECHR Grand Chamber, Mamattkulov and Askarov vs. Turkey, nr
  46827/99 en 46951/99
- ECHR November 15th 1996, NL 1997, 301, Chahal vs. UK.
IV. Possible complications regarding Cybercrime and the intention to commit cross-border crime.

Because of its cross-border nature, the prosecution of Cybercrime could cause controversy in EAW procedures. The reason for this being its relation to the territoriality principle in the Member States. The Dutch authorities will have to deal with an additional complicating factor that Cybercrime has not been transferred in Dutch EAW legislation as a list offence under Cybercrime but as informatica criminality. This will not be without effect since informatica criminality has a significantly narrower scope compared to cybercrimes ubiquitous scope. This will influence the applicability of the territoriality exception in EAW requests regarding computer related crimes.

Since cybercrime has a ubiquitous nature, every State can claim jurisdiction. The question then is on basis of what judicial authorities will decide to comply with or reject an EAW. Here we have to differentiate between Member States that have listed Cybercrime as a list offence and those –like the Netherlands- who have not done so.

Scenario 1: In case there is no double criminality, the act is not punishable under the law of the requested Member State as a list offence, so the requested person walks free since there is no obligation to surrender your own nationals.

Scenario 2: If however the act for which the EAW has been issued is a list offence according to the EAW FD, the double criminality requirement is abolished. However, as a result of the territoriality exception 4 (7) EAW FD, there is no obligation to surrender -regardless of the requested persons’ nationality. 

The following case may serve as an example in which a German EAW was issued against a Dutch national based on the fact that the requested person had distributed revisionistic and anti-semitic publications on the Internet. The facts were considered to be committed by the requested person as an accomplice in Belgium and Germany.

The defence argues that the offence regarded the worldwide accessibility and distribution of anti-semitical and Internet publications based on revisionist theories and sympathies. Therefore following article 13 (1) OLW, the EAW must be rejected since the offences have been committed on Dutch territory as well.

Contrary to this, the PPO argued that the EAW should be complied with:
- since the facts had only been committed in part in Holland,
- prosecution had already started in Germany and
- the Minister of Justice had ordered the PPO to terminate the prosecution for racial discrimination, in favour of a concentration of prosecution in one country, namely Germany.

The IRK decides that in the balancing exercise of the requested persons interest in a trial in Holland and that of the requesting State in a prosecution and trial, the latter should prevail. In its decision the IRK refrains from indicating to what extend the Minister of Justices decision had been instrumental in tipping the balance in favour of the requesting State.

Consequently the IRK allows the surrender for racial discrimination but rejects the EAW as far as information criminality.

199 Addendum to the note, Parliamentary Documents II 2003/04 29 042 nr. 12 p9
200 Article 13 OLW functions as a safeguard in those cases where an act is not punishable under Dutch law and the territoriality exception serves as an escape from foreign prosecution. This applies not only to cases concerning legal abortion and euthanasia for which the Dutch legislator has chosen to implement this principle as an obligatory ground for refusal, but also for other acts.