

pro facto

Eindrapport

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Bijlage 5: English summary

This research was conducted in response to the observation that in 2018 there were approximately 11,000 people who were given a prison sentence in the Netherlands, but whose sentence has not yet been (fully) served. Because these people have not reported to serve their sentences and/or because the investigative authorities are unable to arrest these people, they have been designated as 'untraceable convicts'. The Minister for Legal Protection has said this is an undesirable situation and that measures must be taken to ensure that these people do serve their prison sentences.

Because earlier research in 2018 showed that 90% of the untraceable convicts are (probably) abroad, specific attention is requested for international cooperation with regard to tracing and the enforcement of sentences. This international perspective is the starting point in this study. The ultimate goal was to examine what opportunities there are for improving international cooperation and what legal aspects play a role in this. In order to gain inspiration, we also looked at the issue of 'untraceable convicts' in other countries and how the approach in these countries might give us ideas for improving our approach in the Netherlands.

Course of the research

At the start of the research, it was assumed that in other countries the group of untraceable convicts is identified, and that in a number of countries proceedings have started to enforce the serving of the prison sentences. After the start of the case studies these assumptions soon proved to be incorrect. This presented challenges on two fronts: it turned out to be very difficult to find people who believed themselves to be sufficiently competent to participate in the research, and the original research design also proved to be difficult to implement in terms of content.

This led to a change in the research approach. For the case study we sought to form the best possible picture of the legal system and the enforcement of sentences. The objective was to place the Dutch situation in an international context. The main aim in this was to explain why the issue of 'untraceable convicts' appears to be relatively important in the Netherlands, while other countries have neither defined the issue nor set up a programmatic approach to reduce the number of unserved prison sentences. The absence of such an approach in any of the countries also means there are very few lessons to be learned with regard to improving how we deal with the issue in the Netherlands.

On the basis of interviews with experts in the academic world and in the professional field, an attempt was then made to collect as many wide-ranging solutions as possible (and comments on these) that could be conducive to our approach to reducing the number of unserved prison sentences here in the Netherlands.

The Dutch situation in an international perspective

For this study, research was conducted in nine countries into how the issue of 'untraceable convicts' is dealt with. Document and literature research was done and an attempt was made to get in touch with experts on the spot who could tell us more about the approach in practice. These case studies made slow progress, which in itself is an important finding. People who were approached, both in the academic world and in the professional field,

never considered themselves experts on this subject, neither did they know who might have a good idea of the number of untraceable convicts and how this issue is dealt with (if at all). In none of the countries studied have we been able to obtain quantitative data on the number of unserved sentences, let alone on the composition of the group of convicts involved. In most countries we have even been explicitly informed that such registrations do not exist. If there were any data on fugitive convicts, a clear picture of how that group is composed and who the convicts whose sentences have not yet been served are, was nowhere to be found.

The Netherlands is therefore in a unique position when it comes to registering the number of unserved sentences and the details of the suspects with regard to origin and nationality. In other countries, as far as we have been able to ascertain, people do not have a good idea as to the number and the composition of the population who have been given a prison sentence. This is also in line with the experience of interviewees who we talked to about how tracing and the serving of sentences is approached in the Netherlands. Neither people in the professional field, nor academics who deal with the subject are aware of a targeted approach to the phenomenon of untraceable convicts in countries comparable to the Netherlands.

Some of these countries face problems such as overcrowding in prisons (e.g. Romania) and/or capacity shortages, which prevent sentences from being served (Belgium). These countries do not appear to have an interest in locating fugitive convicts, as other criminal justice issues have priority.

In the Netherlands, the approach to (international cooperation in) the enforcement of prison sentences has, with regard to as many aspects as possible, been entrusted to a single centralized body. This ensures that the various processes run as smoothly as possible and that the expertise is optimally built-up and maintained. In other countries, a more decentralized approach is generally taken with regard to one or more of these aspects.

This raises the question of whether the Netherlands really does have a (relatively) large problem with regard to the number of unserved prison sentences and how this is dealt with. The picture that emerged from the case studies and interviews and was also confirmed during the expert meeting at the end of the research, is that it is mainly a matter of perception that the number of unserved prison sentences in the Netherlands is large. The researchers endorse this finding. This perception is largely fuelled by the fact that the numbers and how they are composed are exceptionally well portrayed in the Netherlands. During this research, the practice in other countries did not yield any insights with regard to unused instruments or improvements to processes in the Netherlands. On the contrary, the Netherlands appears to be more vigorous in its approach to this issue than the other countries we looked at.

Explaining the number of unserved prison sentences

The number of unserved prison sentences that are registered in the Netherlands are not found in the case study countries. The case studies show that this may firstly stem from the fact that the Netherlands has opted for a clear registration of this group. The international comparison also provides a number of reasons for the formation of this group in the Netherlands and the fact that this is probably relatively large. The main cause lies in the fact that the prison sentences imposed in the Netherlands tend to be relatively much shorter. A comparison of European countries within our selection of case studies shows that the per-

centage of prisoners who have been sentenced for less than six months in the Netherlands is three to four times higher than in other countries.²⁸¹

This has major consequences for the possibilities to make use of international cooperation. For investigations with the purpose of enforcing unserved prison sentences the Public Prosecution Service can issue a European Arrest Warrant (EAW) which enables authorities in other European countries to undertake actions aimed at apprehending the convicted person. This EAW can only be issued if the person is wanted for an unserved prison sentence of at least 120 days. For 88% of the unserved prison sentences in the Netherlands this means that an EAW can not be issued because of this limitation. Around 92% of the sentences is shorter than 180 days, which leads to the transfer of these sentences to another EU Member State being rejected by a number of countries. They do this on the basis of a ground for refusal in the *Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement*, which states that the transfer of (unserved) prison sentences of less than 180 days can be refused.

The Netherlands also has a relatively long limitation period for the execution of sentences for criminal offences for which short sentences are imposed, compared to the countries studied. In the Netherlands, relatively short prison sentences can be enforced within eight years, while many other countries have set a limitation period of around five years. Bringing the limitation periods in the Netherlands in line with most other European countries would (by an accounting intervention) automatically reduce the number of unserved prison sentences.

The possibility of adjusting international agreements

Despite the fact that the Netherlands appears to be at the forefront with regard to enforcing prison sentences, a number of opportunities for further improvements to the approach have emerged from this research (or been discussed again). The report looks at these opportunities in detail. In this summary we limit ourselves to the most important.

First of all, we have to conclude that the framework decision underlying the EAW does not offer any options for making bilateral agreements that lead to further cooperation with regard to tracing convicts abroad. So there is currently no opportunity for the Netherlands to conclude treaties such as the Nordic Arrest Warrant²⁸² in this area.

There are, however, possibilities for transferring criminal judgments on the basis of the Mutual Recognition of Criminal Judgment Enforcement Act. The underlying framework decision contains an optional ground for refusal by which a Member State may choose to refuse requests to transfer sentences where the sentence of imprisonment is less than 180 days. The Netherlands could agree bilaterally that this ground for refusal for requests between the Netherlands and the other Member States will not be applied or that a different lower limit will be applied. The main complication with this measure is that the bargaining position for the Netherlands would not be particularly strong. The countries of origin where the group of untraceable convicts is the largest, and with which the Netherlands would prefer to make

²⁸¹ The exception to this is Germany, which seems to be roughly in line with the Netherlands on this point. Based on our case study in Germany and the input of an expert in this field, we question the available figures; Germany's criminal law is based on the principle that a short prison sentence has an unnecessarily desocializing effect and can therefore only be imposed in exceptional cases.

²⁸² This is a treaty among Scandinavian countries (including Iceland and Finland), which has been in effect since before the implementation of the EAW. It entails agreements about more extensive international cooperation on tracing and signalling people.

bilateral agreements the most, do not themselves have many convicted Dutch people whose sentences they would like to see served and as a result have little to gain from changing current agreements.

Cooperation on implementation

In the context of CrossBES²⁸³, various recommendations have been made about intensifying cooperation in criminal investigations. During our research, particular attention was again drawn to the option of sharing access to personal registers or detention registers of cooperating countries. This has been done on a trial basis in the past, with promising results for a broader and more structural use of this instrument.

Possible measures in the Netherlands

This report also presents a number of suggestions that could impact upon the number of unserved prison sentences and which the Netherlands could implement independently. Some of these are very controversial and have many disadvantages, some are more feasible.

Changes could be made to the application of guidelines used by the Public Prosecution Service for determining punishment requests. Unserved prison sentences are relatively difficult to enforce under European law, while the transfer of community service orders and fines has fewer barriers. If the enforceability of the sentence to be imposed is taken into account in the punishment, the inflow of prison sentences could be limited, while the execution of community service or a fine may be more easily transferred later.

The second measure could entail looking at the lower limit that the Public Prosecution Service currently uses as a guideline for issuing EAW alerts. This is because the Public Prosecution Service looks at the unserved (net) sentence that must be at least four months, while the framework decision sets the (gross) sentence of four months as the lower limit. So there are still possibilities here to issue an EAW alert when tracing untraceable convicts.

Finally

Despite its adjusted design, this research has nevertheless yielded insights into the issue of untraceable convicts and the enforcement of their sentences. Firstly, this was done by clearly placing the problem in an international context. We can conclude that, insofar as the number of unserved prison sentences in the Netherlands is relatively large, this is not the result of major missed opportunities in dealing with these numbers. Possible solutions should be sought in further cooperation at operational level or diplomatic negotiations, although it cannot be expected that this will significantly reduce the numbers. In the long term, this would require limiting the inflow into the numbers (mainly short prison sentences) and perhaps increasing the administrative outflow from the numbers by lowering enforcement limitation periods.

²⁸³ The CrossBES (Cross Border Execution of Sentences)-project is aimed at cooperation for the cross border execution of sentences and sanctions between the Netherlands, Belgium and Germany (specifically North Rhine-Westphalia). The project focusses on improvement of the cooperation regarding cross border investigation, prosecution and execution of sentences in the border area.