



## **EVALUATION MUTUAL DETENTION ARRANGEMENTS**

### **INSPECTION OF THE FUNCTIONING OF THE FOUR MUTUAL DETENTION ARRANGEMENTS**

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Law Enforcement Council

June 2022

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## List of abbreviations used

AT	Arrest team
AVV	Generally binding regulation
BES	Bonaire, Sint Eustatius and Saba
BOT	Special support team
BPZ	Basic Police Care
BM	Policy officer
CCvR	Central Board for Probation Service
CN	Caribbean Netherlands
DIZ	Division of Individual Affairs
DJI	Department of Correctional Institutions
EM	Electronic Monitoring
ECHR	European Convention on Human Rights
FOBA	Forensic Observation and Guidance Department
GBA	Municipal Personal Records Database
GRIP	Detainees Criminal Investigation Information Point
HAEX	Head Execution Unit
HOvJ	Chief Public Prosecutor
IOS	International Transfer of Sentences
ICCPR	International Covenant on Civil and Political Rights
JenV	Justice and Security
JICN	Caribbean Netherlands Correctional Institution
JVO	Judicial Quadripartite Consultation
KIA	Correctional Institution Aruba
KMar	Royal Netherlands Marechaussee
KPA	Police Force Aruba
KPC	Police Force Curacao
KPCN	Police Force Caribbean Netherlands
KPSM	Police Force Sint Maarten
LBHAM	National decree containing general measures
MB	Ministerial Decree
MW	Social Work
NP	Dutch National Police Force
OM	Public Prosecutor's Office
ORD	Mutual detention arrangement
OvJ	Public Prosecutor
PB	Pointe Blanche Prison
PIJ	Placement in a juvenile institution
PG	Sollicitor General
PPG	Office of the Sollicitor General
RN	Dutch Probation Office
SDKK	Curaçao Detention and Correction Center
SRCN	Foundation for Rehabilitation of the Dutch Caribbean
TBS	Making available to Government (Posting)
V.i.	Conditional release
WETS	Mutual Recognition and Enforcement and the Measures Involving Deprivation of Liberty Act
WOTS	Enforcement of Criminal Judgements Transfer Act

## Preface

The countries of Curaçao, Aruba and Sint Maarten as well as Caribbean Netherlands each have one correctional institution. It is inevitable that at times situations may arise in which it is desirable to transfer a detainee from one correctional institution to another within the Kingdom. For example, because its own institution is full, because it is safer to place the detainee elsewhere, or, because necessary medical assistance is not available in the country where the person concerned was convicted. Also, because Caribbean Netherlands has one correctional facility which is located in Bonaire, detainees from Sint Eustatius and Saba must be housed there. For situations such as these, the countries that belong to the Kingdom of the Netherlands made joint agreements. These agreements are laid down in four 'mutual detention arrangements', the so-called ORDs.

At the request of the Judicial Quadripartite Consultation (JVO), the Law Enforcement Council (the Council) evaluated the ORDs. The findings of this evaluation can be read in this report. The Council concludes that three of the four ORDs (ORD1, ORD2 and ORD3) *broadly* meet the purpose for which they were made. Of equal significance is the fact that, the Council noted that the countries are making efforts and also cooperate well with each other to properly execute these ORDs. This finding gives the Council the confidence that the countries will give follow up to its recommendations on these ORDs and on their execution in an appropriate manner.

The application of the ORD on the transport of detainees between the islands of Caribbean Netherlands (ORD4) is not yet adequate. The Council is counting on the organisations involved in Caribbean Netherlands to adjust their working methods as a result of this report.

The Council was able to conduct this evaluation thanks to the *input* of employees of all organisations involved. They answered written questions, participated in interviews or, otherwise provided information to the Council's research team.

The Council would like to thank all these persons for their cooperation.

Lastly, the Council thanks the JVO for the confidence shown.

### DE RAAD VOOR DE RECHTSHANDHAVING

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# Summary and recommendations

## Summary

### 1 Introduction

At the request of the JVO<sup>1</sup>, the bi-annual convention of the Ministers of Justice (and Security) of the Netherlands, Curacao, Aruba and Sint Maarten, the Law Enforcement Council (hereinafter referred to as: the Council) evaluated the four mutual detention arrangements<sup>2</sup> (the ORDs). The four countries of the Kingdom of the Netherlands agreed on these ORDs in 2014. ORD1, which applies exclusively to the Caribbean part of the Kingdom, and ORD2, which applies to the entire Kingdom, offer the countries the possibility to request each other to temporarily take in a detainee for reasons of, for example, lack of capacity, safety, or health. ORD3 offers the possibility to transfer the execution of a prison sentence to another country of the Kingdom in connection with the resocialization interest of the detainee concerned. ORD4 specifically relates to the transport of detainees between Bonaire, St. Eustatius and Saba.

The Council has formulated the following central question for this evaluation research:

*To what extent do the ORDs meet the purpose for which they were established?*

In order to answer this question, the Council collected information from the organizations in the four countries involved with the ORDs by means of written questionnaires and in-depth interviews in the second half of 2021.

### 2 Main themes

#### *Organizations involved*

The Public Prosecutor's Offices of the Solicitor General (PPG) in Curacao and Aruba play a central role in the execution of the ORDs. Further involved in the application of the ORDs are the Ministries of Justice (and Security) of the four countries, the Public Prosecutors' Offices in first instance (in particular the *executive prosecutors*), the correctional institutions on Curacao, on Aruba, on St. Maarten and on Bonaire, the police forces of Curacao, Aruba, Sint Maarten and the Caribbean Netherlands, as well as the Royal Netherlands Marechaussee (KMar).

#### *Mid-term evaluation*

Commissioned by the JVO, a committee consisting of representatives of the organizations involved, carried out an interim evaluation of the ORDs in 2017. In its report of December 2017, this committee identified various bottlenecks. In connection with these bottlenecks, it made a number of recommendations. The Council has taken these recommendations and their follow-up into account in its evaluation.

#### *Nature of the ORDs*

In article 36 of the Charter for the Kingdom of the Netherlands (hereinafter referred to as the 'Kingdom Charter' or 'Charter') it is regulated that the countries of the Kingdom are to provide each other with assistance and support. Based on article 38(1) of the Charter,

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<sup>1</sup> JVO: Judicial Quadripartite Consultation

<sup>2</sup> Staatscourant 2014, 3557 (ORD1); Staatscourant 2014, 17851 (ORD2), Staatscourant 2014, 17853 (ORD3) and Staatscourant. 2014, 3558 (ORD4).

countries can establish mutual arrangements. The four ORDs are such arrangements. They provide clarity on the situations in which countries can request and expect assistance in the area of detention. Representatives of all the organizations involved from the four countries were generally positive about the ORDs.

The ORDs are 'form-free arrangements'. Form-free arrangements or regulations cannot contain provisions that deviate from generally binding regulations (AVV) nor provisions that can directly bind citizens. When citizens' rights and obligations are at stake, it will be necessary to opt for a national law or for a general measure of government. Case law shows that on the basis of article 40 of the Kingdom Charter and with due observance of the legal provisions of the country where the execution of the criminal judgment takes place, detainees can be (temporarily) transferred within the Kingdom, provided that the requirements of proportionality and subsidiarity are met. Based on a decision of the Common Court of Justice in 2017, the Council considers that it can be concluded that the ORDs in their own nature cannot legitimize a transfer, since the basis for this is article 40 of the Kingdom Charter. According to the Council, the need to implement the mutual arrangements in national legislation, as recommended by the interim evaluation committee, arises from the legal nature of the ORDs. Where there is a conflict with the law and/or direct binding of citizens is envisaged, mutual arrangements should be provided with a legal basis by law. To the extent that the countries with the ORDs have intended to establish rights and obligations for citizens, a legal provision must therefore be made. This is the case, for example, with ORD3 because the countries have agreed that detainees must request a transfer themselves with a view to their resocialization. According to the Council, the countries have therefore intended a right for the detainees, which has not (yet) been legally established. According to the Council, a solution must also be realized for the safeguarding of fundamental rights, such as the right to family life (visit family), as well as for reimbursing the costs of returning a detainee from St. Eustatius or Saba after the end of detention on Bonaire. The Council encourages the countries to achieve a solution for all ORDs by implementing the (relevant provisions of the) ORDs in national regulations of the countries.

### *Legal status of the detainee*

Transferring a detainee to another country, whether for reasons of lack of capacity, safety, medical treatment or resocialization, will in most cases have a significant impact on the daily life of the person concerned. In view of the far-reaching consequences of the transfer, the Council considers that the detainee concerned should have a legal remedy available if he does not agree with a decision in the context of an ORD. The Council is of the opinion that – apart from the criminal interlocutory proceedings (*strafvorderlijk kort geding*) as a 'residual provision' – it is up to the countries to make a specific provision to improve or guarantee the legal protection of detainees in the context of ORD decisions. If the countries decide to make mutual arrangements with which they intend to grant a right to the detainee, then a good legal position of the detainee concerned should be part of that mutual arrangement. This also applies to the situation in which (temporarily) fundamental rights of a detainee are restricted as a result of the transfer.

### *Use of ORDs*

The overview below shows the number of ORD transfers in the period 2014-2021.

Number of ORD transfers in the period 2014-2021		
ORD1 <sup>3</sup>	21	+ 1 extension
ORD2 <sup>4</sup>	102	+ ca. 140 extensions
ORD3	29	
ORD4	'a few per year'	

In that period, about fifty applications for the application of an ORD were also rejected. The majority of these (38 cases) concerned ORD3. The Council noted that the figures for the various organizations were not entirely consistent and that no data had been recorded on some aspects. According to the Council, the registration can be improved. According to the Council, better and more detailed registration can provide important management and control information. Following previous Council recommendations on improving registration and information, the Council encourages countries to invest in automated registration of ORD cases.

#### *Administrative procedure*

Those involved experience the procedures for handling ORD cases as too bureaucratic, in particular the extension procedure of ORD2. The Council proposes simplifying the procedures.

Pursuant to ORD4, the Ministers of Justice of St. Maarten and Curacao must be informed in advance about an intended transport of a detainee from St. Eustatius or Saba to the Caribbean Netherlands Correctional Institution (JICN) on Bonaire. In practice, a notification is often omitted. Since the transports usually pass through the two countries mentioned and the ministers of those countries are responsible for what happens on their territory, the Council considers it important that the prescribed notification is duly made.

ORD2 and ORD3 are also used for transfers between the Caribbean part and the European part of the Netherlands. The formal ORD procedure via the PPG in Curacao and the Department of Correctional Institutions (DJI) of the Dutch Ministry of Justice and Security is prescribed for this purpose. Because the Caribbean and European parts of the Netherlands are part of one country, the Council finds it peculiar that the aforementioned ORDs are used for transfers back and forth between these parts of the Netherlands. After all, the ORDs are agreements between different countries on the basis of article 38 of the Kingdom Charter.

#### *Cooperation*

For the handling of ORD requests, there are numerous forms of cooperation between the various organizations involved in the countries and also between the countries.

DJI and the PPG in Curacao usually have consultations once a month. Consultations with the PPG Aruba take place less frequently than agreed. The Council considers it important that all parties involved regularly (continue to) participate in the consultations.

The Council is generally positive about the various cooperation efforts. The differences in the way in which ORD requests are handled by the prosecutors' office (*parketten in eerste aanleg*) are a point of attention. In the Council's view, greater clarity should be sought and acted in accordance with the prescribed procedures.

#### *Information (provision)*

In 2016, the JVO initiated the establishment of a Detainees Criminal Investigation Information Point (GRIP) per country. The GRIP is intended as a point where information about detainees is collected and exchanged. The GRIPs are vested in the police forces. In

<sup>3</sup> ORD1 has the possibility of a onetime extension of up to six months.

<sup>4</sup> ORD2 has no limitation on the number of extensions. Extension is possible with a maximum of six months each time.

practice, the GRIPs do not appear to function structurally. It is the information desks of the police forces and the correctional institutions that play an important role in the ORDs. However, the fact that the GRIPs do not function in the intended way does not result in any significant bottlenecks in practice. The countries manage to exchange relevant information on detainees. But there are several points in the field of information provision that can be achieved.

The probation/rehabilitation organizations are not involved in ORD3 cases, even though the explanation of that ORD explicitly mentions that possibility. According to the Council, the involvement of these organizations can have an added value in the assessment of ORD3 requests because of their expertise in the field of resocialization.

For detainees, information sheets are available on ORDs 1, 2 and 3. In practice, detainees are not proactively informed, they have to request information themselves. The Council expects an active provision of information and therefore also an information sheet on ORD4.

### *Transport of detainees*

The countries use fixed working methods when carrying out transports by air. Among other things, agreements are made with the immigration services and the security staff of the airports. Concrete agreements are also made with the airlines. There are differences in the use of special handcuffs during the flight. And only for the special weapons and tactics team of Curacao (arrestatieteam), which accompanies the transports of Curacao detainees, a transport procedure has been put in place. Although the Council is of the opinion that the countries have made sufficient provisions to guarantee the safety of the detainees and of third parties, it considers it advisable that the other countries, just as for Curacao has been done, would also ensure that the procedures – including the use of handcuffs and agreements with those involved such as the airlines – were recorded. In addition, the use of handcuffs should not be the automated standard.

The Council also draws attention to the position of detainees who are transferred from St. Eustatius or Saba to the JICN on Bonaire. This transfer means that their right to receive (family) visits is difficult to achieve. In general, the Council considers that it is important to safeguard the fundamental rights of detainees in the event of temporary transfers and that a better solution should be found.

### *Reimbursement of costs*

ORDs 1, 2 and 3 stipulate that the requesting country is accountable for the transport costs. The temporary detention in another country on the basis of ORD1 and ORD 2 is also for the account of the requesting country. In practice, DJI often takes into account the problematic financial situation of the countries of Curacao, Aruba and Sint Maarten and does not send charge for detainees who have been placed in the European part of the Netherlands on the basis of ORD2. The Council believes that the provisions on the reimbursement of costs in the ORDs should be enforceable and is concerned about the potential debt that the Caribbean countries are accumulating. In his view, a more realistic solution should therefore be sought, taking into account the specific financial situation of the countries.

ORD4 contains the provision that the Netherlands must reimburse the costs arising from the application of this scheme. However, it is not clear which organization is responsible for this. In practice, the OM BES reimburses these costs. It happens that detainees are discharged from the JICN without being in possession of a ticket to travel back to St. Eustatius or Saba. In the opinion of the Council, the authorities that transfer a detainee from St. Eustatius or Saba to Bonaire are obliged to facilitate the return journey upon termination of the detention.

### 3 The four ORDs separately

Further to the abovementioned, the Council notes the following, specifically on the individual ORDs.

#### **ORD1**

In ORD1 cases, timely execution of conditional release (v.i.) can be a problem if the detainee concerned does not return in time. Decision-making by the Central Probation Board (CCvR) in Curacao about whether or not to grant conditional release usually takes place only one week before the effective date of the possible release. In view of the time needed to retrieve someone who is still detained in another country, the Council believes that the decision on v.i. should be taken earlier. This requires that the CCvR is informed in time about the stay in a judicial institution abroad of a detainee who may be eligible for conditional release.

The exchange of information about detainees who have been temporarily transferred on the basis of ORD1 is another point of attention. There is little exchange of information between the requested and the requesting country on the situation and behavior of the transferred detainee. Because the CCvR also takes into account the behavior of the detainee when deciding on the granting of conditional release, it is important that the CCvR also has information about the behavior of the person concerned during his detention in a judicial institution abroad.

#### **ORD2**

Approximately three-quarters of the ORD2 requests granted are temporary transfers for security reasons. The circumstances on the basis of which temporary transfer is necessary in the context of security are often partly related to the quality of a number of judicial institutions in the Caribbean part of the Kingdom. The recommendations made by the Council in previous reports to improve this quality are still fully valid.

The initial period of placement in a judicial institution in another country is a maximum of six months. In practice, extensions are requested and obtained in almost all cases. The Council considers that extending the initial and extension periods from six to twelve months and simplifying the renewal procedure will reduce the administrative burden for ORD2.

In some cases, the transfer will be more permanent. The Council thinks it would be a good idea for the countries to make further agreements on such cases. Article 40 of the Kingdom Charter provides a basis for this.

Unlike the other organizations involved, DJI understands 'presence of medical complications' to mean only somatic complications. However, the explanatory memorandum to ORD2 explicitly mentions psychiatric complications in this context. Therefore, the Council does not consider DJI's interpretation of this point to be correct.

ORD2 cannot be applied for imposed measures such as TBS<sup>5</sup> or PIJ<sup>6</sup>. Nevertheless, the lack of a facility in the region for the implementation of TBS or PIJ measures is a bottleneck. The Council believes that the countries should reach a workable solution as soon as possible. The subject is already on the agenda of the JVO.

ORD2 lists the grounds for rejecting an application for temporary transfer. The investigation has shown that DJI – in cases where the Netherlands is the requested country – sometimes uses other grounds for rejection. Because the list contains limited grounds for rejection, that should not be allowed.

Due to the nature of ORD2, the Council considers it important that decisions are taken in a timely manner. The Council has understood that it sometimes takes a long time for an opinion or decision to be issued. It encourages the services concerned to act expeditiously.

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<sup>5</sup> TBS: terbeschikkingstelling.

<sup>6</sup> PIJ: placement in an institution for young people.

The Council also stresses the importance of returning the detainee concerned to the sentencing country as soon as the need for transfer has been removed. In addition, the execution of an outstanding judgment in the European part of the Netherlands sometimes appears to be inevitable, with the result that the detainee does not return.

### **ORD3**

ORD3 offers a detainee the possibility, with respect to his resocialization, to request transfer to a judicial institution in another country of the Kingdom. As the Council has already pointed out above, it considers it desirable to address the legal position of the detainees concerned. The Council also considers it important that detainees who may be eligible for transfer on the basis of ORD3 have access to receive adequate assistance in making the respective request.

The Council considers the grounds for rejection of 'public interest' and 'resocialization interest' as mentioned in ORD3, to be so broad that, without their elaboration in a policy document, the outcome of the assessment of an ORD3 request is uncertain. In the Council's view, the aspects that play a role in the assessment of the grounds for rejection in question should be further elaborated on or be specified.

Specifically for transfer to the Netherlands, the criterion applies that the person concerned must have had his main residence there for at least three years. According to the Council, strict application of this criterion is difficult to reconcile with the principle laid down in laws and also in international treaties that detention must be aimed at preparing for the return of the person concerned to society. In addition, the Council finds it difficult to explain that this criterion of at least three years' main residence only applies to transfer to the Netherlands. Particular attention should be paid to the execution of a compensation measure following the transfer of the detainee concerned to another country. It cannot be the intention that victims miss out on compensation due to the (permanent) transfer of the convicted person concerned to another country. It is therefore important that the country to which the person concerned has been transferred enforces that measure.

ORD3 mentions the period (sixty days) within which the Minister of Justice of the 'requesting' country must decide on an ORD3 request from a detainee. No time limit has been set for the Minister of Justice of the 'requested' country. The investigation has shown that it sometimes takes a long time for the requested country to take a decision. The Council therefore finds it advisable to include a decision-making timeframe in this ORD for the requested country as well.

### **ORD4**

ORD4 stipulates that the public entities Bonaire, St. Eustatius and Saba, in the application of this regulation, strive to ensure that the transport of a detainee takes place on one day. The role attributed to them is not clear, and in fact the public entities do not play any role in the implementation of this ORD. The Council considers that this should be clarified and that this provision should possibly be deleted.

In practice, the KPCN teams on St. Eustatius and Saba arrange the transfer of a detainee to the JICN on Bonaire and a case manager from the JICN organizes the return to those islands. Close to always, transport succeeds within one day.

## **4 Answering the central question**

The Council considers that ORDs 1, 2 and 3 largely fulfil the purpose for which they were made. This does not alter the fact that improvements are possible, in particular in implementation. In the areas of information provision and legal protection, more attention should be paid to the interests of the detainees.

ORD4 is not properly implemented on several important points, such as informing the ministers involved and reimbursement of costs. For this reason, the Council is of the opinion that this ORD fulfils the purpose for which it was made.

## Recommendations

On the basis of the results of this evaluation research, the Council makes a number of general and specific recommendations. For the background and substantiation of the general recommendations, the Council refers to Chapter 2 of this report. The background and substantiation of the specific recommendations can be found in chapters 3 to 6.

According to the Council, follow-up on these recommendations will contribute to even better regulations on the one hand and to better implementation of the arrangements on the other. The Council assumes that the recommendations will be followed up in the shortest possible timeframe.

### *General recommendations*

1. Ensure implementation of the (relevant provisions of the) ORDs in national regulations of the countries.
2. Find a specific provision to improve the legal protection of detainees in the context of ORD decisions.
3. Do not use an ORD for temporary transfers between the Caribbean and the European part of the Netherlands.
4. Provide better and more detailed automated registration of ORD cases.
5. Simplify procedures, in particular with regard to ORD2 extensions.
6. Ensure that all parties involved regularly (continue to) participate in the consultations and act in accordance with the prescribed procedures unambiguously.
7. Ensure active provision of information to detainees about the existence of the ORDs.
8. Ensure that the fundamental rights of detainees are safeguarded in the event of temporary transfers, such as the right to family life (visits).
9. Describe the transport procedure for each country, paying attention to the use of handcuffs and to agreements with the airlines concerned.
10. Provide a more realistic solution to the reimbursement of costs mentioned in ORDs 1, 2 and 3.

### *Specific recommendations*

#### **ORD1**

11. Inform the CCvR in due time that a detainee who may be eligible for conditional release (v.i.) is staying abroad, so that the decision whether or not to grant v.i. can be taken in time and the return journey of the detainee can be arranged in time.
12. In accordance with the provision in the ORD:
  - always make concrete and written agreements about the interim reporting on the behavior and condition of the detainee;
  - adhere to the agreements made (plan, do, check, act).
13. Agree on the minimum requirements that must be met by the recording of information within the various judicial institutions.
14. Establish that the judicial institution of the requesting country always makes the calculation of the sentence.
15. Adhere to the agreement on periodic consultations.

## **ORD2**

16. For ORD2, extend both the initial and extension period from six to twelve months.
17. In the context of requests related to security, make further arrangements for cases that have a foreseeably longer or more permanent character.
18. In the case of a request on medical grounds, apply the term medical complications in accordance with its explanatory notes.
19. Find a workable solution for TBS and PIJ measures for countries as soon as possible.
20. Reject applications only on the basis of the limited grounds for refusal.
21. Make sure that decisions are duly motivated.
22. In the context of medical requests, make further arrangements regarding the assessment of these requests.
23. Provide more clarity to the detainees about the possibilities for leave.
24. Take a decision within the prescribed period.
25. Ensure that the detainee returns as soon as the need for transfer has ceased to exist.

## **ORD3**

26. In the second paragraph of article 2 of ORD3, make it clear that an application must be submitted to the Minister of Justice of the convicting country.
27. Elaborate on the grounds for rejection of 'public interest' and 'resocialization interest'.
28. Reconsider the criterion of 'three years' principal residence in the Netherlands' and the way in which that criterion is applied.
29. Make sure that the information sheet on ORD3 is easy to consult for detainees.
30. Ensure that the correctional institutions proactively inform detainees who may be eligible for the application of ORD3 of the possibility of applying for it.
31. Ensure that the compensation measure is implemented, in compliance with article 40 of the Kingdom Charter.
32. Record the cases in which ORD3 applications are made to the relevant judicial institution and from the probation service, with a view to assessing the resocialization interest and the chances of resocialization of the person concerned.
33. Find a facility for adequate assistance to detainees who may be eligible for transfer on the basis of ORD3.
34. Include in ORD3 a timeframe (deadline) within which the requested country must decide on an ORD3 request.

## **ORD4**

35. Reconsider the provision on the role of public entities and adapt the arrangements if necessary.
36. Always inform the PPG in Curacao in due course of time about an intended transport.
37. Prepare an information sheet for ORD4.
38. Establish the procedure for the (reimbursement of the costs of the) inbound and return journey.
39. Ensure that the ministers of Justice concerned are always informed via the PPG in Curacao of an intended transport that is carried out via Sint Maarten and Curacao.

# 1 Introduction

## 1.1 Background

In 2014, the countries of the Netherlands, Aruba, Curaçao and Sint Maarten made four mutual arrangements in the area of detention. These four mutual arrangements (the ORDs) contain principles and procedural descriptions for the mutual provision of detention capacity, for the transfer of enforcement of irrevocable criminal sentences and for the transport of detainees between Bonaire, Sint Eustatius and Saba.

In January 2020, the Ministers of Justice (and Security)<sup>7</sup> of the four countries in their bi-annual consultation (the Judicial Quadripartite Consultation; (JVO)) decided to request the Law Enforcement Council (the Council)<sup>8</sup> to carry out a comprehensive evaluation of the four ORDs. The Council granted this request.

On account of the COVID19 pandemic and related measures, the Council did not conduct the evaluation until the second half of 2021. The execution took place based on the Council's inspection powers within the context of its regular investigative work, as is indicated in the Kingdom Act on the Law Enforcement Council (hereinafter: the Kingdom Act).

## 1.2 Objective

With this evaluation, the Council sought to examine to what extent and in what way provision of detention capacity, transfer of enforcement of criminal sentences and transport of detainees takes place on the basis of the four ORDs, to what extent the countries involved are acting in accordance with the relevant legal provisions in implementing the ORDs, as well as what the experiences of the parties are involved in the application of the ORDs. With this evaluation, the Council also wanted to identify possible areas for improvement.

## 1.3 Research questions

For this evaluation, the Council formulated the following main question:  
**To what extent do the four mutual detention arrangements meet the purpose for which they were established?**

<sup>7</sup> Where reference is made in this report to Minister(s) of Justice', the Minister of Justice and Security (of the Netherlands) is also meant. In the report, several times mention is also made of the Minister for Legal Protection. In the Netherlands, this minister is responsible for the prison system and the application of criminal law, among other things.

<sup>8</sup> The Council is responsible for the general inspection of the organizations of the judicial chain in Caribbean Netherlands (Bonaire, Sint Eustatius and Saba), in Curaçao and in Sint Maarten. In this respect, the Council reviews the effectiveness, the quality of the task performance and management. In addition, the Council is charged with the general inspection of the quality and effectiveness of the judicial cooperation between the islands of Caribbean Netherlands, Curaçao and Sint Maarten. The supervisory area of the Council does not extend to Aruba and European Netherlands. With their request to the Council to evaluate the four ORDs, the Minister of Justice and Security of the Netherlands and the Minister of Justice of Aruba agreed to a temporary expansion of the Council's supervisory tasks to include European Netherlands and Aruba, insofar as necessary and for the duration of this evaluation.

In order to answer this central question, the Council formulated the following sub-questions:

1.
  - a. In what manner and to what extent is the mutual arrangement aimed at providing detention capacity (ORD1) used?
  - b. To what extent do bottlenecks arise in the application of ORD1?
  - c. To what extent does ORD1 meet the needs and the expectations?
2.
  - a. In what manner and to what extent is the mutual arrangement aimed at providing detention capacity on medical grounds or in connection with urgent safety reasons (ORD2) used?
  - b. To what extent do bottlenecks arise in the application of ORD2?
  - c. To what extent does ORD2 meet the needs and the expectations?
3.
  - a. In what manner and to what extent is the mutual arrangement aimed at transferring the execution of irrevocable criminal sentences for the purpose of rehabilitation (ORD3) used?
  - b. To what extent do bottlenecks arise in the application of ORD3?
  - c. To what extent does ORD3 meet the needs and the expectations?
4.
  - a. In what manner and to what extent is the mutual arrangement for the transport of detainees between Bonaire, Sint Eustatius and Saba via Curaçao and/or Sint Maarten (ORD4) used?
  - b. To what extent do bottlenecks arise in the application of ORD4?
  - c. To what extent does ORD4 meet the needs and the expectations?

#### 1.4 Demarcation and scope

##### *Research period*

ORD1 and ORD4 have been in force since February 2014, ORD2 and ORD3 since July 2014. This study covers the period February 2014 to mid-2021.

##### *Aruba and European part of the Netherlands*

Pursuant to the Kingdom Act, the Council is authorised to conduct research in Curaçao, Sint Maarten and the Caribbean part of the Netherlands. At the request of the JVO, the Council is also conducting this evaluation research for Aruba and for the European part of the Netherlands. Where necessary, the Council makes a distinction between the Caribbean part and the European part of the Netherlands.

##### *Scope of the research*

This research deals with the *functioning* and the *execution* of the four ORDs.

##### *Organisations involved*

The Council examined the roles and responsibilities of the organisations involved in the execution of the ORDs and the manner in which they fulfil those roles and responsibilities. The Council did not question any detainees about their experiences with the ORDs.

##### *Detainees*

Where in this report, the Council refers to 'detainees', it is consistent with the definition in the ORDs. 'Detainees' are understood to mean persons who are legally deprived of their liberty based on a detention order, a pre-trial detention order or a sentence of imprisonment.

## 1.5 Assessment Framework

The Council prepared an assessment framework for this research. For this assessment framework, the Council made use of the following documents:

- covenants and other laws and regulations;
- the four ORDs;
- the assessment framework used by the Council for its periodic inspections of the detention facilities in the Caribbean part of the Kingdom;
- other relevant documents such as policy documents and reports, including the report of the interim evaluation committee.<sup>9</sup>

The standards used in this assessment framework by the Council are included in Chapters 3 up to and including Chapter 6.

## 1.6 Approach to research

In June 2021, within the framework of the evaluation, the Council issued written questionnaires to the Ministries of Justice of the four countries, to the office of the Solicitor General (PPG) of Curaçao, Sint Maarten and the BES islands (hereinafter referred to as: the PPG in Curaçao), to the PPG in Aruba, to the Public Prosecutor's Offices in first instance of Aruba, Curaçao, Sint Maarten and the BES islands, as well as to the correctional institutions of Curaçao, Sint Maarten, Aruba and that for Caribbean Netherlands.

Subsequently, inspectors of the Council conducted interviews with representatives of the organisations involved in the four countries (see Appendix 2). The interviews took place in September and October 2021. Due to circumstances, the Council was unable to conduct the planned file research at the PPG in Curaçao and at the PPG in Aruba. However, additional written information was obtained from the two Public Prosecutor's Offices referred to. In response to the latter, the Council received, among other things, a number of examples of ministerial decrees in response to ORD applications.

In March 2022, based on all information collected, the Council prepared a draft report, which it submitted to the ministers and the organisations concerned for reaction, in accordance with Article 30, paragraph 2 of the Kingdom Act. After processing the responses, the Council adopted the report.

## 1.7 Reading guide

Chapter 2 contains background information on the four ORDs and the evaluation in broad terms on the basis of a number of general topics related to the ORDs. Chapters 3 to chapter 6 contain, for each ORD separately, the detailed findings of the investigation and their assessment by the Council. These findings form the basis for this evaluation report. Chapter 7 contains a final remark in which the Council also answers the central question of this evaluation research. Lastly, the report contains two appendices. Appendix 1 provides an overview of the four separate ORDs. The ORDs and their explanatory notes can be accessed via the corresponding *links*. Appendix 2 contains an overview of the organisations, the representatives of which were interviewed for this evaluation research.

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<sup>9</sup> At the request of the JVO, the ORDs were already subjected to an interim evaluation by a committee consisting of representatives of the detention facilities in the Caribbean part of the Kingdom, representatives of the DJI and of the PPG in Curaçao, as well as the execution prosecutor of the Public Prosecutor's Office (OM) in Aruba. Wherever the Council refers to the committee in this report, this interim evaluation committee is meant.

## 2 Main topics

### Introduction

In the context of this evaluation, the Council examined the way in which the four ORDs are applied. In this Chapter 2, besides background information, the Council also opted to describe a number of topics that are relevant for each ORD, or at least for more than one ORD. As such, this chapter broadly contains the Council's general view on, among other things, the functioning of the ORDs. For reasons of readability, the Council included the detailed description of the results of this evaluation for each ORD separately in the Chapters 3 up to and including Chapter 6 of this report.

### 2.1 Legal basis for mutual detention arrangements

Article 36 of the Charter for the Kingdom of the Netherlands stipulates that the countries shall provide mutual assistance and support to each other.

Article 38, paragraph 1 of the Charter provides the opportunity to the Netherlands, Aruba, Curaçao and Sint Maarten to make mutual arrangements.

Article 40 of the Charter concerns the enforcement of judgements in the Kingdom and reads as follows:

*'Judgements rendered by the court in the Netherlands, Aruba, Curaçao or Sint Maarten, and orders issued by the court, together with copies of authentic instruments, executed locally, can be enforced throughout the Kingdom, with due observance of the legal provisions of the country where the enforcement takes place.'*

In the preparation for the dismantling of the Netherlands Antilles, because of the need for uniformity in the criteria for transfers within the Kingdom, work was done on the Mutual arrangement concerning the cooperation between Curaçao, Sint Maarten and the Netherlands in connection with the mutual provision of detention capacity as implementation of Article 40 of the Charter.<sup>10</sup>

Subsequently, in the JVO in 2013, it was stated that Aruba will participate in this mutual arrangement. In 2014, pursuant to Article 38, paragraph 1, the four countries made the following three mutual arrangements:

- Mutual arrangement, regulating cooperation between the four countries in the area of mutual provision of detention capacity (ORD1).<sup>11</sup>
- Mutual arrangement, regulating cooperation between the four countries in the area of the mutual provision of detention capacity on medical grounds or in connection with urgent safety reasons (ORD2).<sup>12</sup>

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<sup>10</sup> Government Gazette 2010, no. 3440.

<sup>11</sup> Government Gazette 2014, 3557

<sup>12</sup> Government Gazette 2014, 17851

- Mutual arrangement, regulating cooperation between the four countries in the area of the transfer of persons who are legally deprived of their freedom on the basis of a sentence of imprisonment (ORD3).<sup>13</sup>

In addition, pursuant to Article 38, paragraph 1, a fourth mutual arrangement, which Aruba is not party of, was made:

- Mutual arrangement, regulating the cooperation between the Netherlands, Curaçao, and Sint Maarten for the transport of detainees between Bonaire, Sint Eustatius and Saba (ORD4).<sup>14</sup>

In section 2.4, the Council describes the scope of these four ORDs and further elaborates on their legal nature.

In Chapters 3 up to and including Chapter 6, the Council briefly describes this for each ORD. The *links* to the four mutual arrangements and their corresponding explanatory notes are set out in Appendix 1.

## 2.2 Organisations involved

In the application of the ORDs, mainly the Ministries of Justice of the four countries are involved; these include for the Netherlands, in particular the Department of Correctional Institutions (DJI), the offices of the Solicitor General, the Public Prosecutor's Office in First Instance (especially the execution prosecutors) of Aruba, of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba, the penitentiary institutions in Curaçao, in Aruba, in Sint Maarten and in Bonaire, the police forces of Curaçao, of Aruba, of Sint Maarten and of Caribbean Netherlands, as well as the Royal Netherlands Marechaussee (KMar).

The offices of the PG in Curaçao and in Aruba play a central role in the application of the ORDs. In their jointly prepared Manual Procedure Description Assistance – 2018 (the Manual) they described in detail the procedures ought to be followed per ORD. This report contains information taken from that Manual, insofar necessary for a proper understanding of the working method in the application of the ORDs.

As far as the Dutch Ministry of Justice and Security is concerned, the DJI, and more specifically the Division Individual Cases (DIZ), is the organisational entity involved. DJI plays a specific role in the execution of any transports in the context of ORD1, ORD2 and ORD3. Since 10 October 2010, the Caribbean Netherlands Correctional Institution (JICN) in Bonaire is under management of DJI.

## 2.3 Interim evaluation

During the JVO of January 2017, the four Ministers of Justice decided to subject the ORDs informally to an interim evaluation in anticipation of an 'official' evaluation after five years, as is stipulated in three of the four ORDs. To this end, the four countries established an interim evaluation committee, consisting of the directors of the detention centers in the Caribbean part of the Kingdom, DJI representatives and the Solicitor General Office in Curaçao, as well as the execution prosecutor of the Public Prosecutor's Office in Aruba. The committee conducted its evaluation in 2017 and based on the latter, adopted a report in December 2017. The committee noted that several matters went well in the implementation of the

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<sup>13</sup> Government Gazette 2014, 17853

<sup>14</sup> Government Gazette 2014, 3558

ORDs. But the committee also identified a number of bottlenecks. In the summary of its report, the committee mentioned in particular:

- missing or incomplete procedural agreements;
- lack of knowledge of the procedural agreements ('rules of the game');
- non-compliance with the procedural agreements;
- insufficient provision of information;
- lack of knowledge of ORD4.

With regard to these bottlenecks, the committee made seven recommendations, such as:

- supplement the Manual;
- draw up information sheets on ORDs 1, 2 and 3 for detainees;
- introduction of fixed frequency of meetings for organisations concerned;
- further development of the Detainees Criminal Investigation Information Points (GRIP's).

Furthermore, in the summary of its report, the committee identified some concrete points, based on which the texts of ORDs 1, 2 and 3 should be adjusted and made a recommendation to that effect.

Lastly, the committee recommended that its recommendations be implemented by 1 June 2018.

The report of the committee also contains a number of suggestions that were not formulated as recommendations. In some cases, the committee proposed not to change anything at all, for example, with regard to the possible extension of the grounds for rejection of ORD3.

The Ministers of Justice of the Netherlands, Curaçao and Aruba endorsed the recommendations. The Minister of Justice of Sint Maarten wished to take a closer look at them first.<sup>15</sup>

In a memo dated 2 July 2018 to the JVO, the committee noted that in the meantime, most of its recommendations were implemented. The follow-up of some of them, such as the preparation of information sheets for detainees, was still being worked on. With regard to the proposed adjustment of the ORDs (see chapters 3 to 5), it is mentioned in this memo that said adjustment was entrusted to the directorates/Legal Affairs' Departments of the different countries and that meetings of lawyers of the different countries had already taken place.

For the purpose of the JVO of July 2019, the committee provided an update on the state of affairs on 18 June 2019. According to the committee, the pending recommendations had also largely been carried out. The Solicitor General's Office in Curaçao had conducted the recommended information sessions on the ORDs for chain partners, and for detainees, information sheets on the ORDs 1, 2 and 3 were prepared in different languages. According to the interim committee, the further development of the GRIPs was a task for the police forces, but the coordinating information officer at the PPG in Curaçao would be lending a helping hand with that.

During the update, the committee specifically asked the attention of the JVO for the legal and operational issues proceeding from the interim evaluation and which are part of the recommendation on the adjustment of the texts of the ORDs. In that respect, the committee identified six concrete points, including the extension of the (initial) transfer period (ORD1 and ORD2) from six to twelve months and the possible merger of ORD1 and ORD2. In the

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<sup>15</sup> Memo from the committee interim evaluation of ORDs dated 2 July 2018 to the JVO.

appendix to the update, the evaluation committee outlined the state of affairs on the seven recommendations made in the summary of the 2017 report.

The countries agreed to await the outcome of the formal evaluation before addressing the committee's recommendations, in so far as they relate to the contents of the ORDs or to their related legal issues.<sup>16</sup>

Whenever relevant, the Council will focus on the committee's recommendations below or when discussing the ORDs separately (chapters 3 to 6).

## 2.4 Function and legal nature of ORDs

In the Kingdom of the Netherlands, criminal sentences are usually enforced in the country where the sentence was handed down. The countries each have the responsibility to ensure sufficient detention capacity of sufficient quality. Due to circumstances, there may be reasons to have to make use of each other's detention capacity, for example because as a result of special circumstances, a country temporarily does not have sufficient detention capacity, based on medical grounds, because the safety of persons concerned is at stake in case of detention in their 'own' country, or, because the future of the person concerned after detention lies in another country of the Kingdom (interest of rehabilitation).

The quality of the correctional institutions in the different countries varies greatly. In addition, the detention capacity in one country is a bigger bottleneck than in another country. Such is the case, when a part of the detention facility of Sint Maarten was seriously damaged as a result of the hurricanes in 2017 and it was necessary to accommodate dozens of detainees elsewhere. At that time, a number of detainees with long-term sentences were transferred 'en groupe' to the European part of the Netherlands and to Curaçao, and some of them are still in detention there. The correctional institutions of Curaçao, Aruba and Sint Maarten are struggling with infrastructural problems that make it difficult to keep separate regimes. Moreover, the correctional institutions are overcrowded and there is a shortage of prison staff. In such cases, it is important that it is possible to (temporarily) house a detainee in a correctional institution of another country of the Kingdom.

At the end of 2021, there were more than thirty detainees in the European part of the Netherlands based on ORD2. From the European part of the Netherlands, no detainees were placed in the Caribbean part of the Kingdom. In more than half of the transfers based on ORD3, the European part of the Netherlands was the destination<sup>17</sup>.

In general, the persons involved from all countries speak positively about the ORDs.

Article 36 of the Kingdom Charter stipulates that the Netherlands, Aruba, Curaçao and Sint Maarten 'shall provide mutual assistance and support to each other'. In addition to the detention in the country of sentencing, the rule is that the countries of the Kingdom will assist each other, if necessary. As indicated above, the countries may make arrangements among themselves pursuant to Article 38, paragraph 1 of the Kingdom Charter. Article 40 of the Charter is the basis for the enforcement of sentences in the Kingdom. In order to clarify the cases in which assistance can be sought and to streamline the procedures to do so, the four countries agreed on the mutual arrangements on detention capacity.<sup>18</sup> Interviewees from all countries concerned expressed general satisfaction with the arrangements as a whole. 'With

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<sup>16</sup> This follows from the interview with DJI dated October 2021.

<sup>17</sup> See for more statistical information section 2.6 and chapter 3 up to and including chapter 6, in which the four ORDs are discussed separately.

<sup>18</sup> Articles 36 and Article 40 of the Charter for the Kingdom of the Netherlands.

*these arrangements, the countries have given substance to the conditions under which detainees can be transferred within the Kingdom', this is how one of the interviewees described the significance of the ORDs.*

Article 38 of the Charter gives the Netherlands, Aruba, Curaçao and Sint Maarten the possibility to make mutual arrangements. This could be in the form of a Kingdom Act (paragraph 2), a general measure of the government (paragraph 2) or 'form-free' (paragraph 1). The Council agrees with the following definition of a form-free arrangement: *"(...) any formalised arrangement or agreement committing the governments of two or more countries to each other under their sphere of competencies."*<sup>19</sup>

The form-free arrangement has advantages, but also limitations. The arrangement is *'a simple and quickly deployable instrument in which the equality of the countries (...) is visibly expressed. In cases where there is a need for cooperation between countries, it is logical and appropriate that the necessary agreements, common principles and rules are laid down in a mutual arrangement. But the instrument also has clear limitations.'*<sup>20</sup>

For example, a form-free mutual arrangement cannot contain provisions that deviate from generally binding regulations (hereinafter also referred to as: AVV) nor can it contain provisions that can directly bind citizens, according to the view in the (legal) literature.<sup>21</sup> If the rights and obligations of citizens are at stake (or if it concerns the transfer of regulatory powers), one will have to choose for one of the other two forms mentioned in Article 38 of the Kingdom Charter.<sup>22</sup>

In 2011, the Joint Court of Justice ruled that the nature of the mutual arrangement precludes detainees from possible (directly) derived rights from the mutual arrangement<sup>23</sup> and this was reiterated by the Joint Court of Justice in 2020<sup>24</sup>. In the aforementioned judgement of 2011, the Court considered in this respect the following:

*'In the opinion of the Joint Court of Justice, the mutual arrangement is not intended to be an exclusively functioning arrangement, in the sense that it prevents that prison directors within the Kingdom make agreements with each other about the transfer of a detainee and executing such. Neither would this be in conformity with the provisions laid down in Article 40 and Article 36 of the Kingdom Charter.'* Moreover, within the context of a transfer decision, the Joint Court of Justice considered the following:

*"However, a transfer decision must meet the requirements of proportionality and subsidiarity."*

Pursuant to Article 40 of the Kingdom Charter and with due observance of the legal provisions of the country where the execution takes place, detainees can be (temporarily)

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<sup>19</sup> C. Borman. *The Charter for the Kingdom*, Deventer, Kluwer 2012, p. 182

<sup>20</sup> S. Hillebrink, 'The form-free mutual arrangement – an alternative for government regulations?', Conference on Constitutional Law Nijmegen: 18 December 2015, p.2.

<sup>21</sup> Borman, *The Charter for the Kingdom* Deventer: Kluwer 2012. See also: [Information in accordance with Article 18, second paragraph, of the Law on the Council of State regarding possibilities for phased restructuring of the BES islands. - Council of State](#) and [Information about a vision of the Kingdom to be developed. - Council of State](#).

<sup>22</sup> [Information in accordance with Article 18, second paragraph, of the Law on the Council of State regarding possibilities for phased restructuring of the BES islands. - Council of State](#)

<sup>23</sup> [ECLI:NL:OGHACMB:2011:BP9119, formerly LJN BP9119, Common Court of Justice of Aruba, Curaçao, St. Maarten and Bonaire, St. Eustatius and Saba, H-164/10 \(rechtspraak.nl\)](#)

<sup>24</sup> [ECLI:NL:OGEAM:2020:50, Court of First Instance of Sint Maarten, SXM202000289 \(rechtspraak.nl\)](#)

transferred within the Kingdom provided that the requirements of proportionality and subsidiarity are met.

In 2017, a defendant appealed the decision taken following his criminal summary proceedings against his temporary transfer from Sint Maarten to the JICN in Bonaire. The Solicitor General (PG) of Curaçao, of Sint Maarten and of the BES islands ordered the preliminary arrest of the suspect within the context of an extradition request and wanted to enforce this order in another country within the Kingdom.

The Joint Court of Justice found that the 'supra-national capacity' derived from Article 2, paragraph 2 of the Kingdom Act on public prosecution services of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba (Kingdom Act Public Prosecution Service) does not lead to the fact that the Solicitor General of Curaçao, of Sint Maarten and of the BES islands can just have at his disposal the penitentiary institutions within the Kingdom in the context of executing a warrant for preliminary arrest. Furthermore, according to the Common Court of Justice, the mutual arrangement on the availability of detention capacity, which said Solicitor General wished to apply by analogy, was not established under the Kingdom Act on Public Prosecutor's Offices of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba. Lastly, the Common Court of Justice took into consideration that Article 9, paragraph 2 of the Extradition Decree is incompatible with the reasoning of the Solicitor General that transfer to another country would also be possible in cases other than those mentioned in the relevant article. Based on the preceding, the Court ruled that:

*'In connection with what was envisaged in the interim decision of 4 January 2017, it is evident from the foregoing, that the intended transport, which would constitute an invasion of personal privacy, is not legitimised 'by or pursuant to national ordinance', as is stipulated in Article 5 paragraph 1 of the Constitution of Sint Maarten. The contested decision will therefore be annulled, and the requested ban will be imposed'.<sup>25</sup>*

In response to this ruling, the interim evaluation committee indicated in its report that, according to the Common Court of Justice, the ORDs still have to obtain the character of an AVV (General Binding Regulation). The committee also indicated that although opinions are divided among the lawyers about this ruling, it still seemed advisable to act upon the ruling. In that context, Sint Maarten should lay down in a National Decree, containing general measures (LBHAM), that the ORDs are more detailed regulations, as referred to in Article 12 of the National Ordinance on principles of the prison system. It should also be examined whether the way of implementing the ORDs is satisfactory in the other countries.

Seeing that the ruling concerns a provision in the Constitution (of Sint Maarten) and the Constitutions of the other countries contain the same provision, the ruling applies to the ORDs analogously for all countries. On the basis of this ruling of the Common Court of Justice, it can be concluded, according to the Council, that the ORDs (being agreements between the governments of the countries) cannot in themselves constitute grounds for a transfer nor legitimise a transfer. For, Article 40 of the Charter constitutes the basis for

transfer. Insofar the ORDs are intended as policy rules, these should be in conformity with Article 40 of the Kingdom Charter and should operate accordingly. The need to implement the mutual arrangements by national legislation arises from the legal nature of the ORDs, i.e., form-free mutual arrangements. This means that, when there is a violation of the law

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<sup>25</sup> 22 February 2017, issue H.A.R. 166/2016

and/or direct binding of citizens is envisaged, mutual arrangements should be provided with a legal basis.

To the extent that the establishment of rights and obligations is envisaged for detainees by the countries, legal provisions must be made. This aspect plays a role in ORD3, for example, because the countries have agreed that, in the context of rehabilitation, detainees themselves can request a permanent transfer by means of a petition. According to the Council, by doing so, the countries envisaged a right for the detainee, which is not (yet) legally established. According to the Council, a solution must also be found for safeguarding fundamental rights, such as the right to family life (visit), as well as for reimbursing the costs of returning a detainee from Sint Eustatius or Saba after the end of the detention in Bonaire. The Council urges the countries to bring about a solution for all ORDs by implementing the (relevant provisions of the) ORDs in the national regulations of the countries.

Three recommendations of the interim committee are important for ORD1 and ORD2. These concern the topics of merging ORD1 and ORD2, the uncertainty about the applicable legislation on conditional release in case of transfer of execution based on ORD3 and adjustment of the wording of ORD1 and ORD2.

The opinions of the interviewees about the desirability of merging ORD1 and ORD2 are divided, but in this respect, virtually none of the interviewees see insurmountable objections, as long as the current principles of the ORDs are maintained and adhered to. In particular, simplification of the arrangements, less different requests and more favourable turnaround times are listed as an argument for merging.

Although there is an overlap of the 'safety' ground, the two arrangements differ on essential points, which are the applicable grounds, the parties involved in the arrangement and the options for extension. The Council does not consider any of the aforementioned arguments for merging convincing. During this research, the Council did not find any other compelling reasons that would require a merger.

Furthermore, in practice there is a lack of clarity about the applicable legislation on conditional release in case of a temporary transfer of the detainee in the context of ORD1 and ORD2. In this respect, it was indicated that a provision should be included in the two ORDs, which explicitly states that the legislation on conditional release of the country where the sentence was handed down will continue to apply in case of a transfer.

The Council cannot agree with this line of reasoning and in that respect, points out that, under Article 40 of the Kingdom Charter, in case of temporary transfers, the legal provisions of the country in which enforcement takes place, must be taken into consideration. In this respect, the Council also notes that the scope of a legal provision cannot be altered based on mutual agreements between the countries. In this respect, the Council refers again to the judgements of the Common Court of Justice of 2011 and 2020, which refer to Articles 36 and 40 of the Charter. Article 40 of the Kingdom Charter constitutes the basis for enforcement of sentences (including temporary transfer). This is also compatible with Article 5, paragraph 1

of ORD2 and Article 7, paragraph 1 of ORD3. As a result of the foregoing, the inclusion of a provision in the ORD indicating that the legislation on conditional release of the sentencing country remains applicable, would have no effect on the scope of the applicable legal provisions. According to the Council, there is therefore no need to include any additional provision on this matter. In order to prevent bottlenecks about this in practice, the detainee

must therefore be brought back in time so that the legislation on conditional release of the requesting country can be applied and implemented. This is also in the interest of the rehabilitation of the person concerned.

Lastly, the committee suggests that the wording of the ORDs should be adjusted. Since the ORDs are also applied in Bonaire, according to the Committee the wording is inconsistent with this, because the ORDs refers to transport from country to country. Furthermore, the Committee indicated that article 5 of ORD2 must be adjusted, because that article refers to 'transfer' whereas 'transport' would have been meant. In its reaction, DJI stated that it shared this view of the Committee and in that respect, referred to a ruling of the District Court of Rotterdam from 2009. The Council holds the view that indeed, Article 40 of the Kingdom Charter could not be applied in the case related to the sentence, because the Public Prosecutor's Office in the Netherlands wanted to apply it officially, without a transfer taking place. The Council is of the opinion, that it is obvious from the aforementioned ruling, that the ORDs must have a legal basis insofar fundamental rights are restricted. In that case, it concerned the right to respect for personal privacy, which right is enshrined in the Constitution.

Where the wording refers to 'transport from country to country', the Council is of the opinion that this needs no adjustment, since pursuant to Article 1, paragraph 2 of the Kingdom Charter, Bonaire, Sint Eustatius and Saba are part of the Dutch state structure. In addition, the Council believes that, in view of Article 40 of the Kingdom Charter, Article 5 of ORD2 rightly refers to transfer rather than transport. The (legal) literature also refers to temporary and permanent transfer.<sup>26</sup> Consequently, this provision needs no adjustment either.

*Recommendation:*

- Ensure implementation of the (relevant provisions of the) ORDs in national regulations of the countries.

## 2.5 Legal Status of the detainee

Making use of ORD1, 2 or 3 means that the detainee concerned is transported to a country other than the country in which he was convicted. Oftentimes, the transfer is in the interest of this detainee himself. In the case of ORD1 and ORD2, the safety or health of the person concerned is usually the reason for temporarily transferring him, sometimes a lack of cell capacity is the reason. As stated before, a transfer based on ORD3 only takes place at the request of the detainee himself.

Whatever the reason for the transfer may be, it is evident that in most cases, this will have a major impact on the daily life of the person concerned. For example, it is possible that the person concerned after transfer for safety or for medical reasons will be deprived of family visits for a long time. Or, that he ends up in a correctional institution where predominantly a different language is spoken. And the decision, whether positive or negative, on a request made by a detainee himself for transfer based on ORD3, can have major consequences for the preparation of the person concerned for his return to society and thus for his future. In view of the far-reaching consequences of the transfer based on ORD, or of rejection of an ORD3 request, the authorities are required to exercise due care and diligence when processing ORD cases.

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<sup>26</sup> See Reijntjes, The interregional criminal law of the Kingdom of the Netherlands, page 80, ISBN No 9789462901216.

In chapters 6 up to and including 9, the Council discusses in detail per ORD the way in which the authorities involved deal with ORD cases.

Apart from the desired care and diligence on the part of the authorities, it can be expected that the detainee concerned has a legal remedy at his disposal, if he does not agree with a decision in the context of an ORD.

As far as enforcement decisions are concerned, as a rule, the person concerned can institute criminal summary proceedings, since there is no specific legal procedure available. Similarly, in 2017 the District Court of The Hague declared a detainee inadmissible in the civil case (summary proceedings) filed by the person concerned against the Dutch State. In that case, the person concerned wanted to prevent being returned to Curaçao from a penitentiary institution in the Netherlands, to which he had been transferred for urgent safety reasons based on ORD2 at the end of 2014. The Public Prosecutor's office in Curaçao wanted to bring him back, because according to Public Prosecutor's office, there was no longer any danger in connection with which he had been transferred to the Netherlands. In his ruling, the court in summary proceedings took the following into consideration regarding the civil case initiated:

*'Plaintiff may be exclusively admitted in the current proceedings if no other competent court or special judicial process is designated. But, if that is the case and that designated court or judicial process provides sufficient legal protection, the plaintiff must be declared inadmissible. In urgent cases, such as those at issue here, the court in first instance must also examine whether the plaintiff can achieve a result comparable to the summary proceedings by means of that other legal procedure.'*

*In the opinion of the court in first instance, the criminal summary proceedings pursuant to Article 43 of the Curaçao Code of Criminal Procedure must be regarded as a legal procedure with sufficient guarantees as referred to above. Summary proceedings based on this Article may also be conducted during the execution phase of criminal sentences which have become irrevocable. (...)'*

In this regard, the court declared the person concerned inadmissible.<sup>27</sup>

The Council is of the opinion that – apart from the criminal summary proceedings as a 'residual provision' - it is up to the countries to make a specific provision to improve or to guarantee the legal protection of detainees in the context of ORD decisions. The Council is of the opinion that when the countries decide to make mutual arrangements aimed at granting a right to detainees (for example, to provide detainees the opportunity under ORD3 to initiate a legal action for the purpose of applying that arrangement), or, as a result of the transfer, to (temporarily) limit fundamental rights of detainees (for example, temporarily no family visits within the context of the right to family and family life), to properly safeguard the legal status of those detainees should then be part of that mutual arrangement. Therefore,

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<sup>27</sup> District Court of The Hague, 8 May 2017, C/09/531370/KG ZA 17/527. See also the article 'The criminal court as execution judge in the context of criminal summary proceedings (Article 43 of the Penal Code), attorney F.J.P. Lock, LL.M., *Caribisch Juristenblad*, issue 4, 2011. In it, the author notes that, according to established case law of the Common Court of Justice, the question whether Article 43 of the Code of Criminal Procedure ('criminal summary proceedings') also extends to the execution phase, should be answered in the affirmative.

the Council urges the countries to make a specific provision for that purpose, independently of the criminal summary proceedings.

#### *Recommendation*

- Make a specific provision to improve the legal protection of detainees in the context of ORD decisions

### **2.6 Making use of ORDs**

The PPG in Curaçao, the PPG in Aruba and DJI provided the Council, upon its request, with information about the number of ORD cases (ORD1, 2, 3 and 4) in the years 2014 up to and including 2021. The figures listed below are the result of a reconstruction by the Council of the figures provided. In Chapters 3 to up to and including 6, the Council discusses the figures in more detail.

#### **ORD1**

In the period 2014-2021, a total of 21 detainees were temporarily housed in another country on the basis of ORD1. The number ranged from one to seven per year. In these years, only one extension of an ORD1 placement and all ORD1 requests were granted.

In eleven cases a detainee was temporarily transferred to Curaçao, in six cases to the JICN in Bonaire, in three cases to Aruba and in one case to Sint Maarten.

ORD1 was mostly applied on account of a shortage of cells or because of the need to lock up detainees separately due to complex investigations or sensitive cases.

#### **ORD2**

In the aforementioned period, ORD2 was applied considerably more times than ORD1. These concern 102 transfers based on ORD2, which is an average of about thirteen per year. In three quarters of those cases (76) safety reasons were the grounds for transfer, in the remaining cases (26) the transfer was based on medical reasons. Besides the initial transfer requests, 138 requests for extension were submitted during this period. These requests for extension were all granted. In almost half of the transfer cases (47 out of 102), the destination was the European part of the Netherlands. In thirty cases the detainees were transferred to Curaçao, in fourteen cases they were transferred to Aruba and in eleven cases to the Caribbean part of the Netherlands. Sint Maarten did not take in any detainees based on ORD2, but from that country, 22 detainees were transferred to another country within the Kingdom. In this period, Curaçao was the only country to take in more detainees for medical reasons (18) than for safety reasons (12). The Caribbean part of the Netherlands requested three temporary transfers to the European part of the Netherlands for medical reasons, and made two requests for an extension. The European part of the Netherlands made one request for a temporary transfer to the Caribbean part of the Netherlands. In addition, the Caribbean part of the Netherlands requested nine temporary transfers to the European part of the Netherlands for safety reasons and in this respect, made 31 requests for an extension. For these ORD2 requests, the regular procedure was followed via the PPG in Curaçao and DJI.

During this period, thirteen ORD2 requests were rejected. Reasons for rejecting 'medical' ORD2 cases (4 cases) were that the medical treatment could take place in the country itself or that the remaining detention time was too short. As reasons for rejecting 'safety' ORD2 cases, the PPG in Curaçao mentioned ties of the person concerned with detainees in the requested country, the lack of urgent safety reasons or the absence of a threat intelligence product.

### **ORD3**

In the period from 2014 to 2021, 67 ORD3 requests were processed. A total of 29 detainees were transferred under ORD3 during that period, so on average about four per year. Sixteen cases were related to a transfer to the European part of the Netherlands and eleven cases concerned a transfer to Curaçao. For the remaining two cases, Aruba and Bonaire were the destinations.

In 38 cases, a request for transfer by a convict based on ORD3 was rejected. The PPG in Curaçao, which plays a central role in almost all ORD3 cases, indicated that in about three-quarters of these cases the rejection came from the requesting country.

### **ORD4**

The KPCN and BES Public Prosecutor's Office indicated that transporting a detainee from Sint Eustatius and Saba to Bonaire takes place 'a few times a year', but they could not provide an overview of the exact numbers. Since the COVID pandemic, the BES Prosecutor's office has been cautious to have litigants transported to the JICN in Bonaire. The COVID19 measures, which were taken by the various countries, make transportations of detainees through two different countries very complex and costly operations.

### **In summary**

In the period 2014-2021, a total of 152 detainees were transferred under ORD1, 2 or 3. This means that there was an average of twenty transfers on an annual basis. Besides these 152 transfers, in 51 cases an ORD request was turned down. In addition, 139 requests for extension were made. Hence, in about seven years, in total, 342 times, ORD1, ORD2 and ORD3 were invoked.

Of the four ORDs, ORD2 is by far the most often applied, on average more than once a month. The countries make frequent use of the extension option offered by this ORD. The number of transfers based on ORD1 and ORD3 is on average three to four per year.

In the case of transfers based on ORD2 and ORD3, in about half of the cases the European part of the Netherlands was the destination. The Council thinks it is remarkable that ORD2 and ORD3 are applied for transfers between the Caribbean part and the European part of the Netherlands. As was indicated before, the ORDs are agreements between the different countries pursuant to Article 38 of the Kingdom Charter. Since the Caribbean part and the European part of the Netherlands are part of one country<sup>28</sup>, the Council would therefore expect that for those cases the formal ORD procedure through the PPG in Curaçao and the Department of Correctional Institutions (DJI) of the Dutch Ministry of Justice and Security will not be followed.

Because the information from the various organizations did not always match, the numbers mentioned are not entirely reliable. In some aspects, such as the ratio between the number of ORD3 rejections originating from the requesting country and that from the requested country nor on the number of ORD4 transports, no accurate information was available. Consequently, the Council concludes that the registration of ORD cases could be improved. A better and more detailed automated registration of ORD data can produce important management and control information. The Council therefore urges the countries to invest in an automated registration of ORD cases. This recommendation is also consistent with previous recommendations given by the Council in the context of registration and

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<sup>28</sup> Also see Article 1 of the Charter of the Kingdom of the Netherlands and Article 132a of the Constitution

information<sup>29</sup>.

### *Recommendations*

- Do not use an ORD for temporary transfers between the Caribbean and the European part of the Netherlands.
- Provide better and more detailed automated registration of ORD cases.

## **2.7 Administrative procedure**

In all four ORDs, the procedures to be adopted are described in general terms. In addition, each ORD is accompanied by an explanatory note. This contains additional information on various subjects, for example on the procedure to be followed and the specific periods to be used. The two PPGs and DJI have a central role in the procedure. The Manual describes in detail the procedural steps to be followed for ORD1, ORD2 and ORD3. On the one hand, this brings about clarity for the stakeholders about the responsibilities, for example. On the other hand, the procedure to be followed is mainly administrative in nature, which – as became evident from the Council's discussions with many stakeholders – is perceived as too bureaucratic. This is especially true for extension requests within the framework of ORD2, due to the time-consuming administrative process involved. Some stakeholders consider the extension of the initial period from six to twelve months as a solution for this problem.

The evaluation committee also made a recommendation to this effect. The Council does not consider it necessary to adjust the initial and extension period for ORD1, because it can only be extended once and generally speaking, the periods work very well in practice. However, the Council sees benefits in adjusting the periods for ORD2. According to the Council, extending the initial period of ORD2 only produces limited benefits, because subsequently, in the case of the often-lengthy ORD2 placements, an extension procedure must still be initiated every six months. For that reason, the Council is of the opinion that besides the initial period, the extension period of ORD2 should also be adjusted from six to twelve months. According to the Council, in addition to extending the periods for ORD2, simplification of the extension procedure for both ORDs can provide relief. In that respect, one could think of the use of standard forms and– in the case of ORD2 requests for medical reasons – apply the basic assumption that the opinion of the medical doctor of the requesting country is basically the guiding principle.

Needless to say, the Council points out that ORD1 and ORD2 placements should last as long as necessary. As soon as a detainee is able to return to the country of conviction, he should be repatriated.

The investigation shows that, in practice, the prescribed procedure regarding the notification to the Ministers of Justice of Sint Maarten and of Curaçao in the case of transfers based on ORD4 is not followed. The interim evaluation committee already took note of this. Because of the responsibilities assigned to those ministers for what happens in their territory, the Council is of the opinion, that the notification in question should take place. (See Chapter 9). According to the Council, this need not be a time-consuming procedural step.

Both the PPG in Curaçao as well as the Correctional Institution of Aruba (KIA) have expressed the desire to have an automated administration system, such as an ORD database or dashboard in which information can be centrally stored. It could also be used to monitor and it should have, among other things, access authorisations related to privacy and

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<sup>29</sup> See, inter alia, the States of the Law Enforcement 2020 for Curaçao, Sint Maarten and Bonaire, Saba and Sint Eustatius

security. The Council is of the opinion, that it is up to the countries to determine the scope of such a computerised system based on the work carried out.

#### *Recommendations*

- Simplify the procedures, in particular with regard to ORD2 extensions.

### 2.8 Cooperation

There is cooperation between various organisations in the requesting country and between organisations and/or officials of the requesting and the requested country. These include: the correctional institutions, the police and the KMar (intelligence units and transport escorts), offices of public prosecutors in first instance (particularly the execution prosecutors, the PPG in Curaçao, the PPG in Aruba and DJI).

There is close contact between the prison directors concerned of Aruba, Curaçao, Sint Maarten and the BES islands when there is an intention to temporarily transfer a detainee. In addition, a directors meeting and a Detention Task Force have been established, which is attended by the directors of the correctional institutions of Aruba, Curaçao, Sint Maarten and the BES islands. In these platforms, among other things, aspects of transferring detainees in the context of the ORDs are discussed.

The intelligence units of the police force of the requesting country draw up a threat intelligence product<sup>30</sup> (see also 3.6) and send that to the PPG concerned. The prison directors of Curaçao, Aruba and the BES islands inform the Public Prosecution Office of the requesting country about the safety risks surrounding a detainee. In 2021, the KIA set up a 'working group' to handle ORD cases. The correctional institution in Sint Maarten itself does not establish any threat intelligence products (this is done by the Sint Maarten Police Force (KPSM)).

The execution Public Prosecutors, or, the case officer concerned of the countries of the Caribbean part of the Kingdom submit a request through their respective PPG to house a detainee from their country elsewhere. The Public Prosecutor concerned is responsible for collecting all relevant documents for the PPG that takes care of the further processing. The policy officer Surveillance and Protection System at the Public Prosecutor's Office in Curaçao also plays a role in this aspect. The Public Prosecutor concerned is in close contact with the police and the prison staff in connection with establishing the threat intelligence product and carrying out the transport.

DJI/DIZ and the PPG in Curaçao meet on a regular basis, usually once a month, to collect all relevant documents and information, to get a good risk assessment and to discuss current affairs. At the time of the research, cooperation/contacts between DJI and the PPG in Curaçao with the PPG in Aruba was (were) on the back burner. Only once did the PPG in Aruba take part in a meeting with DJI/DIZ and the PPG in Curaçao. According to DJI, it was discussed that the PPG in Aruba would join the monthly meetings.

In general, during this evaluation, the Council received many positive comments about the role the PPG in Curaçao plays in the processing of ORD cases.

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<sup>30</sup> These products may be: a threat assessment (concrete and/or conceivable threat intelligence available for interpretation), threat analysis (a comprehensive analysis of concrete and conceivable threats from the perspective of the person threatened), risk analysis (a threat analysis including investigation into the resistance that "threatened" person has against identified threats) or an informal threat report (emergency product (from intelligence unit) with basic information).

The Council has a positive opinion about the cooperation between the various organisations in the countries and also between the countries to process ORD requests. However, the Council has noted that there are differences in the way said requests are processed by the public prosecutors in first instance, despite the fact that there is a Manual detailing the procedures. (See Chapters 6 to 9). In the opinion of the Council, one should strive for greater uniformity and comply in accordance with the procedures laid down.

#### *Recommendation*

- Ensure that all parties involved (continue to) participate on a regular basis in the meetings and act unambiguously and in accordance with the procedures laid down.

### **2.9 (Provision of) Information**

In the context of the ORDs, it is important that the countries involved provide each other with relevant and necessary information. Furthermore, it is essential that detainees are well informed about the four arrangements.

In 2016, the JVO initiated - per country - the establishment of a GRIP, i.e., an intelligence hub where information about detainees is collected and exchanged. The GRIP was created to improve the exchange of information between the Public Prosecutor's Offices in the first instance, the police and the prison system in connection with the transfer of detainees within the Kingdom. This is also taking into consideration order and safety in the correctional institutions, among other things. The different GRIPs are placed at the police forces in the Caribbean countries of the Kingdom. In practice, it appears that these GRIPs do not function, or do not function structurally. It is the info-desks of the different countries and of the correctional institutions (the KIA has its own analyst) that, with the preparation of threat intelligence products, have a role to play in case of the ORDs. This requires a special training in the police force, namely to become a threat assessor. It became evident from the Council's evaluation that only one or a few analysts in the police forces received this training. Especially, Curaçao is vulnerable in this respect, because it has only one analyst. The limited analyst capacity there causes delays in the procedure. The other countries each have a few analysts.

In order to inform all chain partners involved about the functioning of the ORDs, the PPG in Curaçao gave presentations to the investigative units, prison managements, social workers of the correctional institutions, lawyers, the Public Prosecutor's Office and the cabinet of the Minister of Justice. During those presentations, various ORD topics were discussed. On the BES islands, the probation office also participated in these information sessions.

Most info-desks and the correctional institutions in the different countries do not work together on threat intelligence products. They do not establish the products together but parallel to each other. Neither do the info desks have any possibility to access information from the correctional institutions, despite the fact that this is the most important source of information, according to an interviewee. Furthermore, the provision of information, the justification of requests, the registration of information, available systems and/or the quality thereof within a number of correctional institutions (Sint Maarten, Aruba and Curaçao) constitute points of attention. The employees of the correctional institutions are aware of this and partly blame this on a shortage of capacity and a lack of registration discipline.

Despite the fact that not all the GRIPs in the different countries function as intended, according to the Council, this does not create any significant bottlenecks in practice. The countries manage to exchange relevant information about the detainee, even though improvement could be made in various areas. Consequently, the Council believes that focusing on the already known points of attention, as mentioned in the previous paragraph, will benefit the provision of information. Furthermore, focusing on the timely application of threat intelligence products for the purpose of extension requests at the info unit in Curaçao may lead to a more efficient use of the limited capacity.

The explanatory note to the provisions on the admissibility of ORD3 requests states that enquiries can be made at the probation authorities. However, during the research on the admissibility of ORD3 requests, in practice, no information is requested from the probation organisations. Because of their expertise, these organizations are of the opinion that never involving them in these types of cases, is a shortcoming. The Council is of the opinion that involving the probation organisations can have an added value in assessing ORD3 requests, because of their specific expertise in the field of rehabilitation (see Chapter 5).

Information sheets on ORD1, ORD2 and ORD3 are available for prisoners in different languages (Dutch, English and Papiamentu). In its response, the PPG in Curaçao indicates that detainees can, if desired, obtain an information sheet in Spanish. There is no information sheet for ORD4.

The Council welcomes the fact that information to the detainees about the ORDs is taking place. In practice, apparently, detainees in the different countries are not proactively provided with information about the ORDs. This usually only happens when the detainee himself asks for information. Since the ORDs are in the interest of the detainees, the Council expects the correctional institutions to actively provide information about the existence of the ORDs. Furthermore, the Council is looking forward to seeing an information sheet on ORD4 (see Chapter 6).

#### *Recommendation*

- Ensure active provision of information to detainees about the existence of the ORDs.

### **2.10 Transport of detainees**

The transport of detainees within the Kingdom requires that the safety of everyone is guaranteed and that the rights of detainees are respected.<sup>31</sup>

Under the Kingdom Act on the Police (Article 13) and the Mutual Arrangement official instructions (Article 29), it is possible to make use of restraining devices (handcuffs).

National laws and regulations include a number of provisions concerning the stay (temporarily in custody), transport (with regard to foreign States) and restraining devices (handcuffs). Based on the preceding, establishing the procedures and making concrete agreements with the airlines are essential prerequisites.

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<sup>31</sup> <https://rm.coe.int/16808b631d> According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the transport of detainees must be executed in a 'humane, secure and safe manner'.

The Council notes that, the countries make use of fixed working methods when carrying out a transport by air. Before the transport is carried out, an assessment is made of the possible threat to the detainee concerned. Subsequently, an interview is held with the detainee concerned. Agreements are made with the immigration services and KMar and the security staff of the airports responsible for the on-site handling and the necessary security measures. Furthermore, with the exception of the use of handcuffs, concrete agreements are made with the airlines concerning boarding, disembarking and the seats in the aircraft. Special handcuffs are available for in-flight use, but there are differences in how to use them. Only for the arrest team of Curaçao a transport procedure is described.

The Council is of the opinion that, despite the fact that most countries did not write down any transport procedures, sufficient provisions were made to guarantee safety. Nevertheless, the Council is of the opinion that it would be good if the other countries, as is the case in Curaçao, would ensure that the procedures are written down, including the use of handcuffs and making agreements with the airlines concerned. At any rate, when establishing the procedures, the laws and regulations on the use of handcuffs must be observed. One of the basic principles is that the use of handcuffs should never be an automatic procedure. The use should be limited to those cases where the police can demonstrate that there are concrete facts and circumstances – such as a flight risk, danger to the safety of the person concerned, the police officer, or third parties - which would lead to putting on handcuffs.<sup>32</sup>

In case a detainee residing in Sint Eustatius or in Saba has to be locked up in a detention facility or in a correctional institution, his transport to Bonaire is necessary, since these three islands belong to one jurisdiction and there is no detention facility nor prison in Sint Eustatius nor in Saba. This implies, therefore, that the right of the Statians and Sabans to receive

(family) visits within the context of the right to family and family life is difficult to achieve. For, the costs of traveling to Bonaire are high and the trip is time-consuming. A plan to build a detention facility in Sint Eustatius did not come to fruition.

On the whole, the Council is of the opinion, that safeguarding the fundamental rights of detainees, such as the right to respect for family life as stated in Article 8 of the European Convention on Human Rights (ECHR)<sup>33</sup> and its equivalent Article 17 of the International Covenant on Civil and Political Rights (ICCPR), in case of temporary transfers is essential and that a better solution should be found for this matter.

### *Recommendations*

- Ensure safeguarding the fundamental rights of detainees in the event of temporary transfers, such as the right to family and family life (visits).
- Describe the transportation procedure for each country and pay attention to the use of handcuffs and to agreements with the airlines concerned.

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<sup>32</sup> See for example the reports of the national Ombudsman, date: 27 April 2000. Report number: 2000/166; date: 9 June 2011 Report number: 2011/017.

<sup>33</sup> Everyone has the right to respect for his private and family life, his home and his correspondence.

### 2.11 Reimbursement of costs

Usually, the transportation costs under ORD1, ORD2 and ORD3 are reimbursed by Aruba, Curaçao and Sint Maarten if they are the requesting country. According to several interviewees, it sometimes happens that a country, because of its tight budget, would call on the KMar to carry out a transport to the European part of the Netherlands under ORD2 and ORD3. ORD1 and ORD2 provide that, besides the transportation costs, the requesting country shall also pay for the costs of the temporary detention in the requested country. Due to a lack of sufficient financial resources in the countries of Aruba, Curaçao and Sint Maarten, it is difficult to comply with this provision. DJI recognizes that the countries are financially unable to reimburse the costs and often does not send a bill for detainees who are detained in the European part of the Netherlands under ORD2. An interviewee indicated that it cannot be ruled out that in future the costs will be charged, also because of the high detention costs for each detainee.

As far as the transportation of detainees between Bonaire, Sint Eustatius and Saba is concerned, Article 2 of ORD4 stipulates that the Netherlands should reimburse the costs arising from the application of the arrangement. However, in practice, it is not clear, which organisation is responsible for the payment of the costs. In practice, this means that the BES Public Prosecutor's Office would just go ahead and reimburse the travel expenses of the detainees and their escorts. The lack of clarity on this point is sometimes aggravated in cases when a detainee from Sint Eustatius or Saba is released from the JICN in Bonaire. It is the Council's understanding that, it happens that these detainees leave the JICN without having in their possession a return ticket to Sint Eustatius or Saba. In the opinion of the Council, the authorities that transport a detainee from Sint Eustatius or Saba to Bonaire are required to facilitate his return to his 'home island' after the end of his detention. The Council is of the opinion that the Netherlands should provide clarity about the return travel to Sint Eustatius and Saba (see Chapter 6).

The Council notes that the problematic financial situation of Aruba, Curaçao and Sint Maarten also manifests itself in the implementation of the ORDs. Nevertheless, this aspect so far has not hindered the execution of the ORDs. However, the Council notes that as a result of this, Aruba, Curaçao and Sint Maarten are potentially accumulating a debt and deems this undesirable. The Council wonders whether, in the near future, the countries will be able to reimburse these costs. The provisions on the reimbursement of costs in the ORDs should be enforceable. In the opinion of the Council, a more realistic solution should therefore be sought, taking more into account the specific financial situation of the countries. At any rate, it should not be the case that these countries, because of their precarious financial situation, become extra reluctant in the application of the ORDs and as a result, the objective of the ORDs is not realised.

#### *Recommendation*

- Provide a more realistic solution for the reimbursement of costs mentioned in the ORDs 1, 2 and 3.

## Chapter 3 ORD1

### 3.1 The arrangement and explanatory note

ORD1 contains eight articles, five of which concern the provisions on the temporary provision of detention capacity. The last three articles are related to the evaluation, amendment and enforcement.

The first article concerns the provision of detention capacity (paragraph 1), what is meant by detention capacity (paragraph 2) and the applicability of the arrangement (paragraph 3). As far as the Netherlands is concerned, the mutual arrangement is restricted to Bonaire, Sint Eustatius and Saba.

The countries must ensure that in their own territory, they have sufficient detention capacity, that meets the (inter)national standards set therein (Article 2). Under ORD1, the temporary provision of detention capacity is based on four grounds, including those where, due to special circumstances or a large-scale police action, their own detention capacity is temporarily insufficient and those with a view to maintaining order or safety in the institution (Article 3, paragraph 1). Furthermore, it is stipulated that housing the detainee shall take place in the country closest to the detainees place of residence (paragraph 2). It also regulates when the detainee will return (paragraph 3 and paragraph 5). Furthermore, there is a provision on the reimbursement of costs. This basically means that the countries shall reimburse each other for the costs related to the provision of detention capacity (paragraph 4). The countries shall also give each other full cooperation and make written agreements on interim reporting on the conduct and condition of the detainee (paragraph 4). The explanatory note states that the requesting country is responsible for the costs of accommodation and the costs of the departure and return trip. The explanatory note further states that the costs must be specified.

In addition, the procedure is included regarding the request for the provision of detention capacity (Article 4, paragraph 1), the documents required for the assessment of the request (paragraph 2) and the six exhaustive grounds for rejection (paragraph 3). One reason for rejecting a request is, for example, that the requested capacity is not available. Furthermore, a decision must be taken within fourteen days (paragraph 4). And the detainee must return to the country where the pre-trial detention or imprisonment was imposed if the need for accommodation no longer exists (paragraph 5).

According to the explanatory note, a request shall be rejected in writing, giving reasons. Furthermore, - in the event the request is granted - written agreements must be made about the return of the detainee at the end of his punishment. In order to facilitate good resocialisation, the detainee shall return to the country where he has his residence within six months from the time of temporary transfer. In the explanatory note it is mentioned that the extension of the placement in the requested country can be requested in writing, at least six weeks before the expiry of the first period and only once for six months on the grounds of urgent safety reasons and/or the presence of medical and/or psychological complications. The extension will be decided upon and notification will be given within ten working days.

Finally, the implementation of this ORD should be the subject of periodic consultations between the public prosecutors' offices of the countries. The directors of the detention facilities of the countries must be involved (Article 5).

### 3.2 Information sheet

In the ORD1 information sheet, an explanation is given about the temporary transfer, in which cases it is involved and it is indicated that the basic principle is that the detainee is placed in the country closest to the place of residence. Furthermore, a brief explanation is given on the maximum duration of the transfer, how the decision-making takes place and what the detainee is allowed to bring.

### 3.3 Manual Description Assistance Procedure

The Manual mentions about ORD1, among others, that the chief public prosecutor or the prosecutor in charge of the execution has access to information (for example from the prison director) on the basis of which he considers the transfer of a detainee to be necessary. A request must meet certain criteria and (for the ground on which the request is made) it must be supplemented with other relevant information such as reports on the convict and a threat analysis. According to the Manual, this can be requested from the GRIP of the sending country via the police information desk. Assessment of the request also takes place based on the ORD1 checklist by the policy officer of the PPG and approval by the PG. The PPG policy officer dispatches, records, files, informs, monitors the deadlines and provides feedback. The prosecutor in charge of the execution ensures that the departments involved are notified of the date of Electronic Monitoring (EM), the date of conditional release and the detention end date and, if necessary, takes care of the timely repatriation of the detainee. The requesting country is responsible for the practical execution and the prosecutor in charge of the execution of the requesting country determines when the transport will take place. The prosecutor in charge of the execution will also verify who will accompany the detainee during the transport and will provide the necessary information and communication. According to the Manual, a detainee cannot derive any (direct) rights from ORD1.

In the case of extension and re-transfer, it is determined who is responsible for monitoring the time periods, the assessment, drafting of the request and the required information. This also applies to the subjects of approval, dispatch, registration, filing, providing information and feedback. The Manual also contains the agreements on the retransfer of the detainee in connection with the end of his penalty period.

### 3.4 Interim evaluation

With regard to ORD1, the committee's recommendation on adapting the texts of the ORDs is relevant. In the report, this recommendation consisted of four sections (a to d) and in the 2019 update of five sections (a to e). In its update, the committee indicates that various components still need to be reviewed and implemented for ORD1. These concern:

- a. the extension of the (initial) transfer period;
- b. the (possible) merging of ORD1 and ORD2;
- c. the inclusion of a provision in ORD1 (and ORD2) which expressly states that the legislation on conditional release of the sentencing country remains applicable in the event of a transfer;
- d. textual adaptation of ORD1 (and ORD2) where it refers to transfers from country to country.

### 3.5 Making use of ORD1

#### **Parquet PG**

Based on its registration, the PPG in Curaçao provided an approximation of the number of decisions per year, per ORD and per country movement<sup>34</sup>. In the registration, a distinction is made between Aruba, Curaçao, Sint Maarten, the Caribbean part of the Netherlands and the European part of the Netherlands.

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<sup>34</sup> Some of the requests are not processed in 1 year, so it may happen that the initial request that takes place in year X, is decided upon in the following year, but that the request for extension is also initiated.

In the period from 2014 to 2021 (up to and including 15 November), 24 requests were made to transfer detainees on the basis of ORD1. In total, 22 of these requests were granted and two were denied. In addition, two applications for extension were made. Of the 24 requests for temporary transfer in the region, eleven requests were made to Curaçao, six requests to the Caribbean part of the Netherlands, three to Aruba, one to Sint Maarten and one to the European part of the Netherlands<sup>35</sup>. The requests to the other countries were made by the Caribbean part of the Netherlands (13), Sint Maarten (6), Curaçao (2) and Aruba (1). The (most common) grounds for the majority of requests are cell shortage and risk of collusion (want to separate suspects in complex or sensitive investigations).

### **Office Solicitor General Aruba**

Based on the registration of the KIA, the PPG in Aruba provided insight into the requests under ORD1. In the context of a transfer per detainee, the KIA registers, among other things, the requesting country, the detention location, the ORD applied and the number of extensions.

The PPG in Aruba indicates that one ORD1 request was made by Aruba. This was the case in 2020 for a temporary transfer from Aruba to Bonaire. It was regarding an acute situation, in which the detainee was transferred immediately and only shortly afterwards, the formal part was dealt with in writing. According to the PPG in Aruba, no request under ORD1 was ever made to Aruba, but the PPG in Curaçao claims, - as indicated above - that three requests were made. In its response, the PPG in Aruba states that the public prosecutor's office in Aruba and the KIA keep their own registration, as a result of which there are differences in the registration.

## **3.6 ORD 1 in practice**

In the following description and assessment of how ORD1 is implemented in practice, the Council follows the design of the assessment framework for this research.

### **3.6.1 Concept definition and applicability of ORD**

The concepts used are sufficiently clear to the parties involved and are interpreted in the same way. There is no ambiguity about which ORD should be applied for which case.

#### *Findings*

Almost all interviewees indicate that in general, ORD1 meets the need and they do not mention concepts that are not sufficiently clear as such. Furthermore, there is no ambiguity regarding the application of the ORD.

#### *Assessment*

With respect to the concept definition and applicability of ORD1, there are no obstacles as such.

### **3.6.2 Maximum duration transfer**

The maximum duration set for the temporary transfer is realistic in view of the grounds mentioned in the ORD and the circumstances on the basis of which a temporary transfer is needed can be resolved within the stipulated period.

#### *Findings*

In general, the maximum duration for most grounds set with regard to the temporary transfer is considered realistic. However, in case of safety reasons, the interviewees are in favour of

<sup>35</sup> Until February 2014, only ORD1 was applicable between the Netherlands, Sint Maarten and Curaçao, and because of this safety status, heavy-calibre prisoners could only be placed in the European Netherlands.

adapting the initial transfer period from six to twelve months, with possibly an interim review moment. The current initial period is considered too short, because in the case of safety reasons, there is often no short-term solution available. See further section 4.6.2.

### Assessment

Generally, the maximum duration of the transfer is not a serious problem, except if there are safety reasons. On the basis of the figures provided, the Council concludes that very limited extensions are requested under ORD1. According to the Council, the need to adapt the initial transfer period is therefore particularly relevant for ORD2. Therefore, the Council does not consider it necessary to adapt the initial and extension periods for ORD1. Yet, the Council is of the opinion that simplification of the procedure will provide administrative relief for ORD1 cases. The Council already gave examples of this in section 2.7 and made a recommendation in that context.

### 3.6.3 Legal framework

When transferring detainees, the countries involved shall observe generally applicable human rights, the *European Prison Rules* and *Standard Minimum Rules* on the transport of detainees and the applicable national laws and regulations in the context of transporting detainees. In the event that the mutual arrangement for the provision of detention capacity is not applicable or is not sufficient, other treaty law or legal provisions will be applied to still achieve the objective of temporary transfer.

### Findings

In Chapter 2, the Council already commented in general terms on the legal framework and the legal character of the ORDs, respectively. Based on various treaties<sup>36</sup>, the Charter for the Kingdom of the Netherlands<sup>37</sup> and the Constitutions respectively the Dutch Constitution, human rights must be observed at all times within the Kingdom, hence also when applying the four ORDs. This specifically concerns the prohibition of torture, the right to respect for private and family life, the right to resocialisation and access to justice.

According to the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), the transport of detainees must be carried out 'humane, secure and in a safe manner'.<sup>38</sup> In both the *European Prison Rules*<sup>39</sup> and the *Standard Minimum Rules*<sup>40</sup> there are three general rules on the transport of prisoners, one of which is important for the ORD: the transport takes place at the expense and under the responsibility of the government. Furthermore, the *standard minimum rules* also contain rules on restraining measures and informing family in the event of a transfer.

As indicated before, based on the National Police Act<sup>41</sup> (Article 13) and the Mutual Arrangement on Official Instruction (Article 29)<sup>42</sup>, restraining devices (handcuffs) may be used. National laws and regulations also include a number of provisions on residence

<sup>36</sup> Articles 3, 8 and 13 Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 7, 10, 17 International Covenant on Civil and Political Rights.

<sup>37</sup> Article 43 Charter for the Kingdom of the Netherlands.

<sup>38</sup> <https://rm.coe.int/16808b631d>

<sup>39</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d8d25](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8d25)

<sup>40</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>

<sup>41</sup> Kingdom Act of 7 July 2010, regulating the establishment, organisation, authority and management of the police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba and the mutual cooperation between the police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba (Kingdom Act on the Police of Curaçao, Sint Maarten and Bonaire, Sint Eustatius and Saba).

<sup>42</sup> Mutual arrangement containing an official instruction for the police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba, Government Gazette 2010, 11406

(temporarily in house of detention), transport (with regard to foreign States) and restraining devices (handcuffs).

It is evident from the research, that the family often does not receive prior notification of a transfer, which is in connection with the safety of the detainee. During transport, restraining devices, namely handcuffs, are used. For the findings related to this, see the sections 2.10, 4.6.11 and 6.6.6.

ORD1 does not contain any provision on a legal remedy for detainees in case they should not agree with the temporary transfer or retransfer. As early as 2011, the Court of Appeal ruled on the mutual arrangement between Curaçao, Sint Maarten and the Netherlands in connection with the mutual provision of detention capacity<sup>43</sup> that:

*'In view of the provisions laid down in Article 38, paragraph 1 of the Kingdom Charter and the contents of the mutual arrangement, as well as in view of the explanatory note thereof, the mutual arrangement must be understood as an arrangement whereby the countries of Curaçao, Sint Maarten and the Netherlands provided a number of rules regarding cooperation in the field of the temporary provision of detention capacity to each other. The Court of Appeal is of the opinion that this characteristic of the mutual arrangement precludes detainees from (directly) deriving rights from the mutual arrangement.'*<sup>44</sup>

In the 2020 summary proceedings in which 37 detainees requested that Country Sint Maarten/ the Minister of Justice be condemned to temporarily detain them in (the Caribbean or European part of) the Netherlands because of the poor prison conditions in Sint Maarten, the Court considered about the mutual arrangements the following:

*"(...) The Mutual Arrangements, which the plaintiffs did not invoke in their petition, but did so at the hearing, do not alter this. These Mutual Arrangements concern inter-country arrangements within the Kingdom. They do not directly give the detainees a legal claim against the Country in which territory, they are detained (see judgment of the Common Court of Justice of 4 February 2011, ECLI:NL:OGHACMB:2011:BP9119). However, plaintiffs may request the Public Prosecutor's Office, which is the authority charged with the enforcement of pre-trial detention and execution of sentences, to transfer them to another PI (penitentiary) within the Kingdom. As a matter of fact, this can also be done independent of the Mutual Arrangement. However, it is neither stated nor proven that plaintiffs made such a request to the Public Prosecutor's Office. If they would have done so and the Public Prosecutor's Office would have refused to submit this to the Minister of Justice, plaintiffs would have been able to invoke the decision of the criminal court on this matter based on Article 43 of the Code of Criminal Procedure (the so-called criminal summary proceedings).'*<sup>45</sup>

According to interviewees, in practice, the preceding is often not an obstacle, because the detainees are aware that they are at risk in the institution where they are confined. Similarly, the transfer is often so urgent and the situation so threatening that this will prevail. According to them, independent of the ORD, Article 40 of the Kingdom Charter can be invoked, if necessary.

### Assessment

The Council did not find evidence that, the countries when transferring detainees on the basis of ORD1, do not observe generally applicable human rights, the minimum requirements for the transport of detainees or the national laws and regulations applicable to such transport. According to the Council, transportation takes place in a *'humane, secure and in a safe manner'*. The Council understands that the safety aspect with regard to the detainee must sometimes prevail over prior notification of his family. However, the Council

<sup>43</sup> [Mutual arrangement regarding the cooperation between Curaçao, St. Maarten and the Netherlands in connection with the mutual provision of detention capacity](#), Government Gazette, March 8, 2010, no. 3440.

<sup>44</sup> [ECLI:EN:OGHACMB:2011:BP9119, formerly LJN BP9119, Common Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba, H-164/10 \(rechtspraak.nl\)](#)

<sup>45</sup> [ECLI:EN:OGEAM:2020:50, Court in First Instance of Sint Maarten, SXM202000289 \(rechtspraak.nl\)](#)

assumes that as soon as it is possible after the transfer, the family will still be informed about the temporary transfer by the authorities responsible for this. Of course, it is essential for the family to be notified.

Contrary to international criminal law, in interregional criminal law, the *lex mitior* rule does not apply, which implies that the convicted person may not be placed in a less favourable position in the transfer of an execution. In the (legal) literature, however, it is assumed that, in the absence of an explicit legal basis, a convicted person within the Kingdom may not be placed against his will in a less favourable position than the judge intended when imposing the sentence.<sup>46</sup>

In Chapter 2, the Council already indicated that any transfer under an ORD requires a legal basis, namely Article 40 of the Kingdom Charter. Under this Article, enforcement shall be in accordance with the law of the requested country. This applies to both temporary and permanent transfers.<sup>47</sup>

With regard to the Council's view on legal protection and handcuffs, the Council refers to sections 2.5 and 2.10 respectively. The recommendation on legal protection, as set out in Chapter 2, applies in full here. For that reason, the Council does not formulate a separate recommendation here.

#### 3.6.4 (Provision of) Information

Relevant information about the detainee in the context of the provision of detention capacity shall be made available to the requested country. Suspects and convicted persons will be given information about ORD1 and about its application and (any) resulting rights and obligations.

### Findings

#### Detainees Criminal Investigation Information Point

The research clearly shows that GRIP NL and GRIP BES are operational. The majority of the countries have a good (ad hoc) contact with GRIP NL, in particular. There is a need for GRIP consultations and all interviewees recognise its added value. Yet, for quite some time, these are no longer held in Curaçao, Aruba, Sint Maarten, nor structurally (Bonaire) or no longer in the same composition (Aruba). The KIA reports that formerly, several chain partners were involved, but that at the time, without giving reasons and despite their information position, KIA's presence was no longer considered necessary. The PPG in Curaçao is not the driving force behind the GRIP, but yet, it has tried to revive the consultations for Curaçao and Sint Maarten. However, this was without any success. A few persons are of the opinion that the GRIP would be better placed at the correctional institution (given their information position) or at the Public Prosecutor's Office (given the responsibility for execution), rather than with the police. In its response, the PPG in Curaçao indicates that in this respect, it foresees difficulties in the area of information gathering and privacy. The Board of Chiefs of Police has no responsibility in the GRIP story. Yet, one interviewee sees a role for this board in the further development of the GRIPs based on the initiatives it already started in the areas of information, cooperation and trainings. However, in order to be able to realize the further development, support is needed in terms of attention, expertise and finances. Furthermore, no joint consultations are held between the GRIPs of the countries, but between the countries' info units. According to agreements made, the correctional institutions of Curaçao and Sint Maarten provide GRIP lists to the info-desks of the respective police forces on a monthly basis. The lists contain relevant information about

<sup>46</sup> See Reijntjes, *Het interregionale strafrecht van het Koninkrijk der Nederlanden*, page 75, ISBN nr. 9789462901216.

<sup>47</sup> See Reijntjes, *Het interregionale strafrecht van het Koninkrijk der Nederlanden*, page 80, ISBN No 9789462901216.

the detainees. In Sint Maarten, the info-unit is experiencing a stop in the flow of this information, as a result of which the info-unit itself has to seek the information.

### **Threat Intelligence Products**

In section 2.9 the difficulty about the necessity and vulnerability of analysts is identified. It is also briefly pointed out in the section concerned, that preparing the products, usually threat assessments, by the info-unit and the corresponding correctional institution of the Caribbean island/country – with the exception of Bonaire – does not take place jointly but parallel to each other. According to interviewees, this does not always benefit efficiency. The respective correctional institutions prepare their own threat information products, upon request, based on their own internal information. The KIA has its own analyst and this person also actively asks for information at the information desk of the Aruba Police Force (KPA), with mixed results. The risk analysis of the JICN Intelligence security office, together with information from the info-unit, serves as a basis for the risk analysis of the GRIP BES.

### **Provision of Information**

There is a request from the info desk of the KPC (Police Force Caribbean Netherlands) to the Sentro di Detenshon i Korekshon Kòrsou (SDKK) (Curaçao Detention and Correction Center) for access authorization into the SDKK's system, partly because questioning that detention facility involves risks.

### **ORD database**

The desire to have an automated administration system such as an ORD database or *dashboard* was already discussed in section 2.7.

### **Probation Service**

The probation service does not play a direct (advisory or supervisory) role in ORD1. The probation service in Curaçao, for example, only becomes aware of a transfer in the final phase of the sentence, namely at the meeting of the Central Board for Probation Service (CCvR) in Curaçao on conditional release and Electronic Monitoring (see further section 3.6.7). Sint Maarten and Aruba also have such a board. As far as the Netherlands is concerned, advice is provided by the DJI and the Probation Service. The Probation Service in Curaçao would like to be informed earlier about a transfer, because it may have relevant information. The directors' meeting of the probation organizations, which takes place twice a year, may provide a good platform to explore what the ORD experiences have been so far, according to Curaçao Probation Service.

### **Information**

Although, as indicated before, information sheets are available in several languages, suspects and convicts are not actively educated in a general sense about ORD1 (and ORD2), about its application and about (any) resulting rights and obligations. Only when the detainee is seeking concrete information, this is provided to the detainee by the social worker, for example. Nevertheless, the detainees are aware of the existence of the ORDs through fellow detainees. Only the officials directly involved in the transfer are informed of the actual transfer and transport, also in connection with the safety of the detainee. In addition, a detainee – and at times his family – is usually informed shortly beforehand in the event of an upcoming transfer and the transport in that respect. The parties involved in the implementation of the arrangements and other stakeholders such as the police, lawyers and judges were actively informed (digitally) by the PPG in Curaçao from May 2019 to June 2021 and were provided with the written information about it. (Digital) information sessions are also held for newcomers, such as in the case of cabinet changes.

### **Assessment**

(Providing) information plays an important role in ORD1, especially in the context of safety. Although the GRIPs and the consultations in that context in and between the various

countries do not (all) function as intended, according to the Council, this does not result in any significant obstacles in the short term. Like the interviewees, the Council sees an added value of the GRIP, including for ORD matters, because in a GRIP, several departments and teams are represented that can provide specific information. This is important to facilitate centralizing information and promotes the efficiency needed. In view of the fact that the scope of information of the police forces is broader than that of other departments, the Council understands the choice to have the information products compiled by the info-units. Based on the foregoing, the Council is of the opinion that, placing the GRIP at the various police forces would be in line with this.

Moreover, the Council notes that relevant information about the detainee is made available to the requested country in the context of providing detention capacity. The Council is of the opinion that focusing on timely applying for extension at the info-unit in Curaçao may result in a more efficient use of the limited capacity.

An (automated) system is often accompanied by a boost in efficiency. In this regard, the Council refers to section 2.6.

In section 2.9, the Council already pointed to the added value that the probation organisations can have in the context of providing advice.

The Council welcomes the fact that, an information sheet about the ORD is available to inform suspects and convicts. Since the application of an ORD can have far-reaching consequences for the detainees involved, the Council expects that information should be actively provided about the existence of the different ORDs. The recommendation concerning that, as set out in Chapter 2, applies in full here.

### 3.6.5 Provision, sufficient detention capacity and accommodation

The countries shall provide detention capacity to each other in the manner laid down in ORD1. Each of the countries shall make an effort to ensure sufficient detention capacity in its own territory, which meets the relevant national and international standards set. In the case of several options, accommodation will be provided in the country closest to the place of residence of the detainee.

#### *Findings*

The Council noted in various inspection reports that the correctional institutions of Sint Maarten and Curaçao do not or (only) partially meet (inter)national standards.<sup>48</sup> The latter also applies to the correctional institution of Aruba. This correctional institution was inspected several times by the Inspectorate Justice and Security of the Ministry of Justice and Security.<sup>49</sup> There is a qualitative difference between the correctional institutions in Bonaire and in the European part of the Netherlands on the one hand, and those of the other countries in the Kingdom on the other. According to interviewees, this also has consequences for the possibilities with respect to the safety of detainees. The (poor) infrastructure as well as the overall condition of the correctional institutions of Sint Maarten, Aruba and Curaçao and the lack of structural improvements in that area, play a role in the internal possibilities with respect to the safety of detainees. In Curaçao, due to a lack of other internal possibilities, eighteen detainees are currently housed for their own safety in the isolation cells condemned by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT). Although SDKK management raised this issue with the Ministry of Justice, no solution was achieved as yet. In Sint Maarten, detainees are housed in the infirmary, isolation cells or police station cells, which are not intended for that purpose. Nevertheless, the countries make efforts to provide detention

<sup>48</sup> See for the reports on the prisons in Sint Maarten and Curaçao [www.raadrechtshandhaving.com](http://www.raadrechtshandhaving.com)

<sup>49</sup> See for the prison in Aruba (KIA), the reports and inspection letters on [www.inspectie-jenv.nl](http://www.inspectie-jenv.nl)

capacity to each other. Several interviewees report that an internal solution is always sought first. In the event that is not possible, it is examined whether temporary transfer in the Caribbean part of the Kingdom is possible.

The issue with *gangs* brings with it limitations in the region. In the European part of the Netherlands, there are many more placement and spread possibilities and the facilities have higher levels of safety. However, a temporary transfer to the European part of the Netherlands with ORD2 is only an option. The PPG in Curaçao indicates that, in principle, with requests under ORD1, neither the condition nor the quality of the prison are taken into consideration, but the acute necessity. However, due to the lack of capacity, efforts are made to relieve the prison in Sint Maarten as much as possible. In cases where the requested prisons are struggling with a lack of capacity, the parties involved try to swap the detainees temporarily in order to still be able to honor the request. The KIA tries to engage in an exchange more often than other institutions. For example, two detainees were exchanged between the KIA and the SDKK. According to the KIA, during this selection, oftentimes the safety risk of the detainees is taken into account.

The perception exists that the organizations are prepared to help each other whenever they can. However, the SDKK has the idea that the SDKK is being called upon more often, because this institution is viewed as the 'big brother'. In this respect, the PPG in Curaçao also refers to the fact that only the SDKK has a FOBA at its disposal. Often Curaçao itself gets in touch with the JICN or the KIA. In the case of flight risk detainees, particularly the JICN (or an institution in the European part of the Netherlands in the case of ORD2) comes into focus. The JICN is usually considered to function as the requested correctional institution, especially in major cases of Sint Maarten and Curaçao. Oftentimes, the KIA approaches the SDKK first, because it is the quickest to respond and the easiest to do business with. Or otherwise, the KIA approaches the JICN. As the designated department, the DJI processes the ORD1 and ORD2 requests of the PPG in Curaçao for the Minister of Justice of the Netherlands. The SDKK mentions as a disadvantage of the JICN that permission always goes 'via The Hague' and therefore it takes more time to process the request.

### *Assessment*

According to the Council, a prison that meets the standards and has an adequate infrastructure will have the need to rely on an ORD less often, because then the prison will be able to meet, for example, its capacity or safety needs itself. In several reports on the prisons in question, the Council established that the detention capacity on its own territory does not meet or only partially meets the (inter)national standards set. The Council is of the opinion, that work should be done within the shortest possible time to improve the detention capacity. The recommendations made by the Council in that respect, remain as valid as ever.

From the figures (see section 3.5) it is evident that the majority of ORD1 requests is addressed to Curaçao (11) and the Caribbean part of the Netherlands (6). On the other hand, the figures show that the Caribbean part of the Netherlands (13) and Sint Maarten (6) make the most requests. The Council has the impression that in accordance with ORD1, the countries are making every effort to make detention capacity available to each other, whenever possible. In doing so, the place of residence of the detainee is taken into account as much as possible.

### 3.6.6 Grounds provision and grounds for rejection

Upon request, the countries provide temporary detention capacity to each other based on one or more of the four grounds prescribed. These grounds are: insufficient detention capacity; upholding order or safety; protection of public order or national security; and prevention or detection of criminal offences. The Minister of Justice of the requested country only denies the request on the basis of one or more of the five prescribed grounds for rejection. These grounds for rejection are: insufficient capacity; incompatibility of order or safety; protection of public order or national security; in the interest of preventing or detecting criminal offences; and the fact that there is a place closer to the place of residence of the detainee.

#### *Findings*

There is an ORD1 checklist on the basis of which, among other things, the grounds are checked by the PPG in Curaçao and the PPG in Aruba. In its response, the DJI notes that they do not work with such a checklist. The interviews reveal that the Caribbean islands/ countries mainly make requests for ORD1 on the grounds of 'lack of capacity' and 'maintaining order or safety in the institution'. The other grounds are not mentioned as such as reasons for transfer.

According to information from the PPG in Curaçao, in the period from 2014 onwards, a total of 22 ORD1 requests were granted, two requests were denied, and two extensions were requested. The figures received from the PPG in Aruba show that occasionally a request is made to Aruba. Interviewees report that most requests for transfer to the Caribbean part of the Kingdom are granted. A request is only denied if the requested capacity is not available or, if there is a threat (JICN).

#### *Assessment*

The countries follow the prescribed grounds (for rejection) in the case of requests to provide temporary detention capacity. The Council remarks that the figures obtained support the view that most requests are granted. The Council welcomes the fact that the PPGs make use of a checklist to verify the grounds for the request. Similarly, any possible rejection can also be verified based on this checklist.

### 3.6.7 Return of detainee

As soon as the need for housing in another country no longer exists, the detainee returns to the country where the order for pretrial detention is issued or the custodial sentence is imposed.

#### *Findings*

If the need for transfer no longer exists, the return of the detainee usually takes place around the end date of the temporary transfer.

In its response, the PPG in Aruba adds that in Aruba the periods are monitored by the Head of the Execution Department (HAEX) whether or not in collaboration with the prosecutor in charge of the execution. The HAEX also monitors the extension of the ORD period. In addition, the policy department takes care of the return procedure. As far as the other Caribbean islands/ countries are concerned, the prosecutor in charge of the execution notifies the departments involved of the conditional release and detention end date and also ensures the timely repatriation of the detainee. In section 3.6.4, it was already pointed out that, in certain cases, the return around the conditional release date is difficult for detainees coming from Curaçao. This is because the decision on whether or not to grant the release by the CCvR usually takes place merely one week before the effective date of the possible conditional release. As a result, it is logistically not always possible to arrange the return in a timely manner. In the other countries, the preceding issue is not relevant.

There is no (automated) system to monitor the return period of the detainee. As stated before, such a system is considered desirable. Monitoring the period is done manually in an Excel file by the PPG's policy officer.

#### *Assessment*

The Council is under the impression that, as soon as the need for housing in another country ceases to exist, in most cases the detainee returns in due time. If the detainee does not return in time, the consequence is that the conditional release for the detainees from Curaçao cannot be executed in time. According to the Council, the timing of the decision on whether or not to grant conditional release is too tight in case it concerns a temporarily transferred detainee. Furthermore, a flight movement is always required for the return, with the Public Prosecutor's Office being dependent on flight schedules. In the Council's opinion, the decision should therefore be taken earlier. The CCvR must be informed in due time about the temporary transfer. The Council is of the opinion that the organisations involved should consult with each other periodically to reach workable solutions.

The Council notes that the role of the Aruban prosecutor in charge of the execution in the return of a detainee is not entirely in accordance with what is included in the Manual of both PPGs. For completeness, the role of the HAEX could be included in the Manual.

For the Council's consideration of an (automated) system, reference is made to section 2.9.

#### *Recommendation*

- Notify the CCvR in a timely manner that a detainee who may be eligible for conditional release is residing abroad, so that the decision on whether or not to grant conditional release can be taken in time and the detainee's return travel can be arranged in a timely fashion.

### **3.6.8 Reimbursement of costs**

The countries reimburse each other for the costs arising from the application of this arrangement.
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#### *Findings*

It is evident from a number of interviews, that the organisations in the countries work on the principle of reciprocity when it comes to the reimbursement of costs. This implies that if the correctional institutions of two countries involved temporarily transfer a detainee back and forth, they do not charge each other any costs for the temporary transfer. This was also noted by the interim evaluation committee. In this respect, the SDKK indicates that it pays, for example, for the dental expenses of temporarily transferred detainees, because according to the SDKK – despite a provision on this matter – there is no clarity about which country should pay for the medical costs in practice.

#### *Assessment*

The Council is pleased to know that the provisions about the reimbursement of costs in practice do not create obstacles for the temporary transfer of detainees. Despite having agreed to this, in practice the countries do not charge each other in the context of the temporary transfer. According to the Council, the principle of reciprocity is in line with Article 36 of the Kingdom Charter, which stipulates that the countries shall provide each other with aid and assistance. In section 2.11, the Council referred to the financial situation of the countries and indicated that a more realistic solution should be found for the reimbursement of costs. The recommendation on the reimbursement of costs, as included in section 2.11, is fully applicable here.

### 3.6.9 Written agreements

Written agreements are made about interim reporting on the behaviour and condition of the detainee. This is to promote that the countries fully collaborate with each other to be able to ensure the exercise of legal responsibilities towards the detainee.

#### *Findings*

After the transfer, the correctional institution of the requesting country often no longer inquires about the behaviour and condition of a detainee, according to interviewees of the JICN and the prison in Pointe Blanche. The other way around, it turns out that almost the same thing happens. The requested country often does not inform the requesting country about the behaviour and condition of a detainee. According to these interviewees, interim reporting and reports on the behaviour and condition of the detainee are usually not written, nor provided or only received at the request of the requested country's correctional institution. In its response, the KIA states that they will provide interim reporting and reports.

The JICN works with new standard working methods and is therefore ahead of the other correctional institutions. The JICN also claims that despite the short lines of communication, obtaining timely information from the SDKK and the KIA is difficult. Occasionally, the SDKK social worker calls to inquire about detainees transferred under ORD1 and ORD2. In its response, the KIA claims that in accordance with requests, it dispatches all information, such as reports, the sentence and threat analyses, (in a timely manner).

Furthermore, there is no uniformity in documenting information within the correctional institutions. According to interviewees, the provision of a (complete) file upon transfer and upon return of a detainee also needs improvement. Interviewees gave as an example the failure to prepare or to send along behavioural reports. However, the JICN claims that it sends a complete file. The case managers of the JICN actively inquire about the detainees transferred by them. A solution is also sought in a uniform way of working (together). In its response, the KIA proposes that the various institutions could, for example, develop a format together.

In the Manual, the prosecutor in charge of the execution is designated to notify the departments involved of the date of EM, conditional release and end of detention, as well as the timely repatriation of the detainee. It is the correctional institutions that make the calculations. In its response, the PPG in Curaçao points to a major difficulty in this respect. In the event a detainee is transferred temporarily, the institution does not make any calculations for the transferred detainee, as a result of which no calculation can then be issued to the requested country.

#### *Assessment*

The mutual expectations about providing information and living up to agreements are not aligned. This is despite the fact that this is stipulated in the ORD, because written agreements must be made in writing about interim reports (Article 3, paragraph 4). The Council is of the opinion that this stipulation should be applied on a consistent basis, which will benefit the information needed (as well as, sharing information with the CCvR, for example) and the responsibility of all involved. The Council considers the exchange of information about the temporary detention period of a detainee in another correctional institution essential. According to the Council, proper documenting of information by the correctional institutions is indispensable for this purpose. For example, this could be achieved by creating a format for this, as is suggested by the KIA.

Under section 3.6.7, it is stated that the CCvR in Curaçao should decide on the granting of conditional release to a detainee. In its decisions, the CCvR also takes into account the behaviour of the detainee. Consequently, the Council is of the opinion that it is essential that

not only the correctional institutions, but also the CCvR has information about the behaviour of the detainee during his detention period in another correctional institution. Even for the calculation of the penalty, the prosecutor in charge of the execution should provide information about the calculation to the receiving country as well as to the detainee. The Council is of the opinion that it should not matter whether a detainee is residing elsewhere. The country where the sentence was rendered is always responsible for this calculation. Since in the countries, the correctional institutions are making the calculations, the Council is of the opinion, that they should continue to do so in case the detainee is temporarily transferred. The Council holds the view that the preceding should be documented in the interest of being able to timely inform the persons involved and to repatriate the detainee in a timely manner.

### *Recommendations*

- In accordance with the provision in the ORD:
  - Always make concrete and written agreements about interim reporting on the behaviour and the condition of the detainee;
  - Comply with the agreements made (plan, do, check, act).
- Agree on the minimum requirements that the documentation of information within the various correctional institutions should comply with.
- Determine that the correctional institution of the requesting country always makes the calculation of the punishment.

### **3.6.10 Resocialisation**

In the interest of a good resocialisation, the detainee will, in any case, return within a reasonable period of time before the end of the execution of the sentence.

### *Findings*

In ORD1, specific attention is paid to the resocialisation of the detainee. In the event that the end of the sentence is in sight, the vast majority of the detainees return in due time, which is no later than six months prior to the end of the execution of the prison sentence. It was already indicated before, that the prosecutor in charge of the execution is in charge of this.

### *Assessment*

With regard to the time of return in connection with the resocialisation, the Council did not encounter any obstacles, with the exception of the time of the advice given by the CCvR.

### **3.6.11 Procedure**

Er is een procedure waarin onder meer de verantwoordelijken zijn benoemd, de benodigde documentatie is uiteengezet en de wijze van monitoring is bepaald.

### *Findings*

In the context of a possible request for temporary transfer on the basis of ORD1, the prison directors and/or the Public Prosecutor's Office (case public prosecutor or prosecutor in charge of the execution ) are involved. The countries follow the procedure as described in the Manual. The PPG in Aruba and the KIA are still unclear about the process to be followed. In its response, the PPG in Aruba indicates that in September 2021, at the request of the KIA, the Public Prosecutor's Office prepared a draft document about the different ORD arrangements, which also includes ORD1.

The PPGs are primarily responsible for advising and executing the ORD(s). The PPG policy officer, the system monitoring and securing coordinator, the HAEX (Aruba) and the prosecutor in charge of the execution all play a pivotal role in the procedure. Especially, the PPG policy officer is mentioned as the focal point where all information is collected and where monitoring takes place. All interviewees point to the good mutual contacts.

It is clear to all parties involved who is responsible for each part of the procedure.

Standard letters are used for (extension) requests. The PPG in Aruba provided examples of this. Based on the interviews, no serious problems emerged about the composition of files. Furthermore, interviewees indicated that the countries in the Caribbean part of the Kingdom usually respond within the set time frame.

Interviewees indicated that the problem lies more in the area of the administrative procedure to be followed. Particularly, they point out that the procedure is very bureaucratic, which according to them, is unnecessary. It is stated that a new threat product must be provided with each request for extension of the allocation period. In that case, the DJI will require an up-to-date threat product. This means that the countries' intelligence agencies must collect new information. In practice, this appears to be a difficult task because of the ongoing capacity problems and because it usually appears that the threat situation concerning a detainee remained unchanged. According to the PPG in Curaçao, the DJI asks many additional questions when a threat product does not contain any new information. This happens while the outcome is that the situation remains unchanged, according to the PPG in Curaçao in its response. In practice, this results in delays in the procedure. Incidentally, this is particularly the case with ORD2 extensions (see further 4.6.9).

#### Assessment

The Council notes that there is a procedure which, among others, identifies those in charge, outlines the required documentation and establishes the method of monitoring. The PPG in Curaçao provided the Council with a number of examples of documents taken from files. However, the Council reiterates that it was not able to conduct a file review in order to be able to determine, among other things, the use of the prescribed documentation by all parties involved. At any rate, according to the Council, the use of standard letters will enhance the uniformity of the procedure, wherever possible.

The Council is under the impression that those involved know how to get in touch with each other. The perceived bottleneck related to the procedure have to do with its cumbersome nature. The Council notes that it is of utmost importance that the procedure must be able to be completed expeditiously, certainly in the case of safety aspects for which ORD1 is used, but all the more so when using ORD2. The Council concludes from the feedback received that currently, there is not always a case of urgency. Consequently, the Council is of the opinion that the procedure, in particular with regard to providing a threat information product in the case of extension requests, should be simplified. According to the Council, one of the ways this can be achieved, is by shortening the duration of the procedure. This can be done by making agreements about the decision-making procedure (see also section 4.6.9) and its duration. For example, concerning the threat information product, standard forms and standard texts can be used to justify the extension requests. It can also be agreed that if there is no response within the time-limit set, the request will be granted. The recommendation made by the Council in section 2.7 about simplifying the procedure fully applies here.

#### 3.6.12 Periodic consultations

The Public Prosecutor's Offices of the countries, under the rotating presidency of the Solicitor General of Aruba and the Solicitor General of Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba, periodically meet on the implementation of this mutual arrangement. The directors of the detention facilities of the countries are involved in these meetings.

### Findings

Periodic consultations as stipulated under ORD1 do not take place. The opinions differ on the need, possible frequency and its added value, which is reiterated by the PPG in Aruba in its response. Instead of that, there would be a greater need for clear agreements. Virtually all stakeholders indicate that they know how to get in touch with each other for consultation, if necessary. They are also willing to attend periodic meetings, if so desired.

In addition, prison directors' meetings are held and from the JVO a detention task force<sup>50</sup> was established in which the ORDs can also be a topic of discussion, according to interviewees. The KIA also expressed the wish that at least once a year, meetings between the detainee administrations of the different countries should be held to promote cooperation.

### Assessment

The stipulated periodic meetings between the PGs and the prison directors are not held. However, the Council recognises an added value of the meetings, because the parties involved are able to keep each other informed on various topics related to the ORDs on a regular basis. Since there are clear difficulties, it is evident that regular meetings are an appropriate way to make agreements at the strategic level to solve difficulties at the executive level. The Council therefore urges the parties involved to comply with the agreement on periodic meetings.

### Recommendation

- Comply with the agreement on periodic meetings.

### 3.6.13 Transport of detainees

The transport of the detainee to the other country should take place in compliance with the applicable rules for the transport of detainees and their safety during the transport.

### Findings

The actual transport under ORD1 takes place in the following manner. As far as Bonaire is concerned, the KMar is in charge of the actual transport from Bonaire to another country. The members of the tactics team (AT) of Curaçao and the AT of Sint Maarten are in charge of the execution of the actual transport of detainees to another country. For transports from Sint Maarten and Curaçao from and to the European Netherlands, the KMar is sometimes called upon. In Aruba, detainees are divided into three categories. Based on this classification, it is determined who will be deployed to escort the detainees during transport. This is generally the Special Support Team (BOT K9 unit) of the KIA. The number of escorts to be deployed varies depending on the safety situation. In principle, the KPC deploys two members of the tactics team. If this is required by safety situation, the KPC will expand the team with a member of the AT. The KMar uses three escorts as standard. Depending on the circumstances, a fourth escort may be added who has a specific specialization, for example in case of a medical escort.

A difficulty regarding the deployment of the AT Curaçao is that the formal line is not used for permission for and coordination about the deployment of this team, since the prosecutor in charge of the execution contacts the team leader directly. Just sending an e-mail to those involved is suggested as a solution. Generally, the KPSM deploys three members. The deployment of BOT-members of the KIA usually consists of two members. The AT in Aruba can transport a detainee abroad. This happens if additional safety measures are necessary.

<sup>50</sup> The detention task force is charged with advising the JVO about the possibilities of a TBS- and/or PIJ provision in the Caribbean part of the Kingdom. In view of the needed expertise, a working group is currently being established.

The staff of the JICN or of the KPCN accompanies the transports of detainees from the JICN to another country in the Caribbean part of the Kingdom.

KMar personnel routinely accompanies the transports of detainees from Bonaire to the European part of the Netherlands. This also applies to any transports from the European part of the Netherlands to Bonaire. According to several interviewees from the Caribbean part of the Kingdom, the KMar is sometimes called upon for transports between the European part of the Netherlands and the Caribbean part of the Kingdom. The DJI and the PPG in Curaçao in their response point out that in case a country would like to call on the KMar, an application for military assistance can be submitted.

During the transport by air, the escorts do not carry weapons.

For the remaining findings regarding the use of restraining devices such as handcuffs, the working method and provisions regarding safety, reference is made in section 2.10.

### *Assessment*

The research did not reveal to the Council any obstacles regarding the actual transport of the detainees involved. Insofar as the Council was able to establish, that transport is carried out with due observance of the applicable rules for the transport of detainees and for their safety during transport. The recommendation on the description of the transport procedure, as included in section 2.10, applies here in full.

## Chapter 4 ORD2

### 4.1 The arrangement and explanatory note

ORD2 contains seven articles, the first five articles of which concern provisions on the temporary provision of detention capacity and the last two articles have to do with the evaluation and enforcement.

The explanatory note indicates that ORD2 outlines the circumstances under which a temporary transfer from one of the Caribbean parts of the Kingdom to the European part of the Netherlands is possible. Article 1 concerns the provision of detention capacity (paragraph 1) and what is meant by detention capacity (paragraph 2).

ORD2 is exclusively applicable in case of compelling reasons of safety or medical complications (Article 2, paragraph 1) and transfers to the European part of the Netherlands only takes place if ORD1 cannot be applied (paragraph 2). Furthermore, the ORD makes mention of reimbursement of costs (paragraph 3) and extending of cooperation and making of written agreements (paragraph 4). The explanatory note indicates that the added value of ORD2 consists of, on the one hand, the expansion of the grounds compared to ORD 1, and on the other hand, a fallback option to the European part of the Netherlands under certain conditions. Medical complications relate to situations in which a detainee is in need of medical or psychiatric assistance that is not available in his own country, including possibly transferring him to a closed care institution in (the European part of) the Netherlands. Furthermore, it further elucidates, among other things, what is meant by urgent safety reasons and who is responsible for the (specification of the) costs.

Article 3 describes the procedure regarding the request for provision of detention capacity (paragraph 1), what information is at least necessary to assess the request (paragraph 2) and the decision-making period (within 14 days) (paragraph 3). There are - as with ORD1 - six limitative grounds for rejection, including that the requested capacity is not available (paragraph 4). In addition, the article contains rules for the return of the detainee and the time period of notification (paragraph 5). As is stated in the explanatory note, in case of medical complications, psychiatric complications must also be explicitly considered. It is also indicated what at least should be evident from the required documentation and that a request must be rejected in writing and with reasons.

Article 4 specifies the return period of the detainee (paragraph 1), who is responsible for notifying him that the need for transfer no longer exists (paragraph 2) and that, if necessary, the period may be extended each time by six months (paragraph 3). The time period for the written request for extension as well as the decision and notification thereof are also stated (paragraph 4). In the explanatory note, it is stated that, in principle, the detainee will return after six months or sooner after transfer, and well before his sentence is ended.

Article 5 stipulates that the transfer of a detainee on the basis of ORD2 has the effect of transferring responsibility for the execution of the detention of the person concerned to the requested country (paragraph 1). The transfer is organised by the requesting country (paragraph 2).

## 4.2 Information Sheet

The information sheet on ORD2 contains the same topics as the information sheet on ORD1.

## 4.3 Manual Description Assistance Procedures

The (extension) procedure for ORD2 described in the Manual is the same as that for ORD1 (see section I.3). However, with the understanding that assessing the request is also based on the ORD2 checklist. Besides, it is stated in the manual that the detainee cannot derive any (direct) rights from ORD2. In case the temporarily transferred detainee is returned or in case of an extension under ORD2, the DJI must be informed if the detainee is temporarily transferred to the European part of the Netherlands.

## 4.4 Interim Evaluation

As far as ORD2 is concerned – just as with ORD1 – the committee’s recommendation on adapting the texts of the ORDs is relevant. In its update, the committee indicates that the components listed below still need to be reviewed and implemented. These are:

- a. the extension of the (initial) transfer period;
- b. the (possible) merging of ORD1 and ORD2;
- c. the inclusion of a provision in ORD2 (and ORD1) which expressly states that legislation on conditional release of the sentencing country remains applicable in the event of a transfer;
- d. textual adaptation of ORD2 (and ORD1) where it refers to transfers from country to country;
- e. adaptation of Article 5 of ORD2 because it makes mention of transfer, while according to the committee transportation is meant.

## 4.5 Making use of ORD2

### Office Solicitor General in Curaçao

Based on its registration, the PPG in Curaçao gave an approximation of the number of decisions per year, per ORD and per country movement<sup>51</sup>. In the registration, a distinction is made between Aruba, Curaçao, Sint Maarten, the Caribbean and the European part of the Netherlands. Based on ORD2, a total of 102 requests were granted in the period from 2014 up to and including 2021 (through November 15).

### *ORD2 medical reasons*

A total of 26 ORD2 requests for medical reasons were granted, 17 of which to Curaçao, 8 to the Netherlands and 1 to Aruba. By far the most requests were made by the Caribbean part of the Netherlands to another country (18), followed by Sint Maarten (4) and Curaçao (4). There were three extensions and four rejections respectively.<sup>52</sup> Three requests and two extensions were made by the Caribbean part of the Netherlands to the European part of the Netherlands (both the Netherlands). According to the PPG in Curaçao, the grounds for rejection of medical requests concern: the detainee was not in detention at the time of the request, medical assistance could be provided in the requesting country itself or the remaining detention period was too short.

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<sup>51</sup> Some of the requests are not processed in 1 year, so it can happen that the initial request is made in year X, and a decision on that request is taken in the following year, but the request for extension is also initiated.

<sup>52</sup> With regard to the rejections, this concerns a combination of both negative advice issued by the office of the PG as well as requests, rejection of initial requests or rejection of extensions.

### **ORD 2 safety reasons**

A total of 76 ORD2 requests for safety reasons were granted, 50 of which were made to the Netherlands (38 for transfer to the European part and 12 to the Caribbean part), 13 to Curaçao and 13 to Aruba. The requests were made by Curaçao (35), by Sint Maarten (19), the Caribbean part of the Netherlands (18), Aruba (2) and the European part of the Netherlands (2). There were 135 extensions and 9 rejections respectively. Nine requests were made to the European part of the Netherlands by the Caribbean part of the Netherlands and 31 extensions were granted to the Caribbean part of the Netherlands (both the Netherlands). This was because of renovations or due to safety reasons, according to the PPG in Curaçao in its response. The European part of the Netherlands made one request to the Caribbean part of the Netherlands.

The reasons for rejecting requests for safety reasons are not kept separately. These reasons range from connections with high-risk detainees in the Netherlands and the lack of a threat product (not prepared or not prepared in time) to the fact that no urgent safety reason can be established and the requested country does not wish to accommodate particular detainees (sex offenders).

### **Office Solicitor General Aruba**

Based on the Excel registration of the KIA, the PPG in Aruba provided insight into the requests under ORD2. In the context of a transfer per detainee, the KIA registers, among other things, the person making the request, the detention location, the ORD applied and the number of extensions. This concerns a total of 102 requests.

### **Transfer from Aruba**

The PPG in Aruba indicates that from 2014 through 2021, a total of 21 requests<sup>53</sup> were granted for temporary transfer under ORD2, ten of which to Curaçao (one of which was subsequently transferred to the European part of the Netherlands), seven to the European part of the Netherlands, three to the Caribbean part of the Netherlands and one to Sint Maarten. According to the Office of the PG in Aruba, in all cases, the decision period of fourteen days was exceeded. For four detainees, an extension request was made several times (a total of 17). In all cases, the average length of stay was longer than six months, namely, between one and five years.

### **Transfer to Aruba**

Furthermore, seventeen<sup>54</sup> requests were granted on the basis of ORD2 for transfer to Aruba, seven of which were from the Caribbean part of the Netherlands, six from Curaçao and four from Sint Maarten. Here too, according to the PPG in Aruba, the decision period was exceeded. The average length of stay in Aruba was between one month and almost four years. Sixteen extensions were requested, but according to the overview provided, none were granted. In its response, the PPG of Aruba provides an elucidation of the discrepancy in the registration. This discrepancy has to do with the fact that granted requests for extension are not registered by the KIA. The KIA claims that it does not receive any feedback from the PPG in Aruba when a request for extension is granted, which is the reason why this cannot be registered. The PPG in Aruba indicates that from now on, the PPG will inform the KIA about this.

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<sup>53</sup> The numbers of the requests kept by the PPG in Aruba do not exactly match those of the KIA, but the differences are minimal.

<sup>54</sup> The numbers of the requests kept by the PPG in Aruba do not exactly match those of the KIA, but the differences are minimal.

## DJI

DJI indicates that in October 2021, based on ORD2, a total of 34 detainees were temporarily housed in the European part of the Netherlands.

### 4.6 ORD2 in practice

In the following description of the manner in which ORD2 is executed in practice and its assessment, the Council follows the design of the assessment framework for this research.

#### 4.6.1 Concept definition and applicability of ORD2

The concepts used are sufficiently clear to the parties involved and are interpreted in the same way. There is no ambiguity about which ORD should be applied for which case.

#### Findings

Just like ORD1, ORD2 generally also meets the need. Here too, the interviewees make no mention of concepts that are unclear. As far as ORD2 is concerned, there is no ambiguity about the cases in which it can be applied.

#### Assessment

With respect to the concept definition and applicability of ORD2, there are no obstacles.

#### 4.6.2 Maximum duration of transfer

The maximum duration set for the temporary transfer is realistic in view of the grounds mentioned in the ORD and the circumstances on the basis of which a temporary transfer is needed, can be resolved within the stipulated period.

#### Findings

Particularly in the case of transfers for safety reasons, interviewees are in favour of adjusting the initial transfer period and the extension period from six to twelve months. They argue that the (often gang-related) safety issues and situations are such that there is no short-term solution in the requesting country. This is partly due to the quality of the correctional institutions (see also 3.6.5). Due to the *gangs*-problem, transfer to the European part of the Netherlands is often the only option. The adjustment of the time period would relieve the required administrative extension procedure. The DJI is aware that a longer time period could possibly be used and the DJI notes that it is thinking along on a case-by-case basis. In its response, the PPG in Curaçao indicates that it has not yet happened that the DJI agreed to maintain a longer time period.

Furthermore, in practice there are detainees who actually cannot return to the country of their conviction at all, for safety concerns. According to the PPG in Curaçao in its response, that is precisely why such cases do not fall under ORD2. For example, this is the case with detainees who made incriminating statements and who are wanted for liquidation or revenge, according to the PPG in Curaçao. Another example is a number of convicts of whom it is known that they will have to stay in the European part of the Netherlands for a long time for safety and security reasons. In that respect, there is a request from the PPG in Curaçao to the DJI for a final decision on placement for a number of detainees, because now the extension procedure must be followed every six months. The request has not yet been addressed. An interviewee points out that more consideration should be given to the local context and its related possibilities. A possible solution is to adapt ORD2 to enable such cases to be placed or extended for a (much) longer period of time or even permanently. It has been suggested that, for other cases, due to safety reasons, it would be better to

release certain detainees at the end of their sentence in the country of transfer. Currently, this is not possible under ORD2, according to an interviewee. The person concerned is of the opinion that Article 40 of the Kingdom Charter may be able to provide a solution for these cases.

### *Assessment*

Based on the figures provided, the Council concludes that at least one extension is almost always requested in the context of safety and that in most cases, this is granted. This means that the reason for temporary transfer still existed and that the extension period was followed in all these cases.

For ORD2, the Council sees relief in the proposal of the interviewees and of the interim evaluation committee to extend the initial period and the extension period from six to twelve months. According to the Council, extending the initial time-period for requests in the context of safety will only provide a real relief if the extension period is also changed from six to twelve months. This is because otherwise it will actually only lead to one less extension procedure. Moreover, the Council is of the opinion that, in addition to adjusting the time periods, simplification of the extension procedure is also desirable. According to the Council, simplifying that procedure will also lead to less administrative burden. Already in section 2.7, the Council gave suggestions for the simplification referred to and made a recommendation in that regard. In this respect, the Council notes, however, that naturally, the premise for the detainee to return as soon as the need for temporary transfer ceases, will remain.

The circumstances which necessitate temporary transfer for safety and security reasons are also related to the quality of the prisons and often cannot be resolved within the specified time-frame. The Council already made recommendations in several reports to improve the quality of correctional institutions.<sup>55</sup> These recommendations are fully applicable.

Furthermore, in the context of safety-related requests, the current provisions do not provide a long-term solution for cases with a longer or more permanent character, despite the fact that there is a need for a solution for this. Seeing that this is an obstacle, the Council is of the opinion, that the countries should make additional agreements for such cases. The Council holds the view, that the countries can, for example, agree and establish that for cases of a more long-term or permanent character, a different procedure can be followed than that the one which applies to the current ORDs. Longer (extension) periods can be maintained, for example. The specific example mentioned about the request for permanent placement of convicted persons is, in the opinion of the Council, also a matter within one country as discussed in section 2.6, as such the request has to be dealt with accordingly. Article 8b, paragraph 2 of the Dutch Criminal Code even offers the public prosecutor's office in the Netherlands the possibility to take over the criminal prosecution of the BES Public Prosecutor's office. The preceding gives as an example that in the Dutch constitutional system, there are many possibilities for 'internal' cooperation between the public prosecutor's offices involved. The recommendation on how to deal with the temporary transfers between the Caribbean and the European part of the Netherlands, as included in chapter 2.6, is fully applicable here.

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<sup>55</sup> For reports on the prisons in St. Maarten and Curaçao, see [www.raadrechtshandhaving.com](http://www.raadrechtshandhaving.com) and for the prison in Aruba (KIA), see the report and inspection letters at [www.inspectie-ienv.nl](http://www.inspectie-ienv.nl).

### Recommendations

- For ORD2, extend both the initial and the extension period from six to twelve months.
- In the context of requests related to safety and security, make additional agreements for cases with a foreseeable longer or more permanent character.

#### 4.6.3 Legal framework

When transferring detainees, the countries involved shall observe the generally applicable human rights, the applicable *European prison rules* and *standard minimum rules* on the transport of detainees and the applicable national laws and regulations in the context of the transport of detainees. In the event the mutual arrangement on the provision of detention capacity is not applicable or is inadequate, other treaty or legal provisions will be applied in order to still achieve the purpose of temporary transfer.

#### Findings

Statements made in section 3.6.3 also applies to ORD2. As is the case with ORD1, ORD2 does not contain any provision either on legal remedies for detainees, in the event they do not agree with the temporary transfer or return transfer. In addition to the rulings mentioned there, there are two relevant rulings that specifically address ORD2. In 2017, the preliminary injunction judge of the Hague District Court declared that a plaintiff's claim in summary proceedings for a measure of order to suspend his return to be inadmissible, because a different judicial procedure was appropriate in which the plaintiff may achieve a result comparable to summary proceedings.<sup>56</sup> This is related to the criminal summary proceedings, which possibility was also suggested by several interviewees. In another case from 2021, a criminal summary procedure was successfully initiated by a detainee in the context of his transfer.<sup>57</sup> The Court of Appeal prohibited the public prosecutor's office from transferring the petitioner to Curaçao until the time of the next review as referred to in Article 4, paragraph 3 of the ORD2 (concerning whether or not to extend the transfer).

#### Assessment

What is stated in the assessment in section 3.6.3 is also applicable with regard to ORD2.

#### 4.6.4 (Provision of) Information

Relevant information on the detainee in the context of the provision of detention capacity shall be made available to the requested country. Suspects and convicted persons are informed about ORD2 and about its application and (any) resulting rights and obligations.

#### Findings

Statements made in section 3.6.4 about the GRIP, the threat information products, the (provision) of information, the ORD database, the probation service and information to detainees also apply to ORD2.

The threat information products within the context of ORD2 are being used, among other things, for the assessment of a possible temporary transfer, a transfer to another detention facility in the European part of the Netherlands (or other countries) or for possible visitors of detainees in the European part of the Netherlands. The DJI points out that together the parties involved should continue to look critically at the correct execution of the ORD procedures, including threat analyses. Sometimes a detainee is transferred to the European part of the Netherlands for acute safety reasons without all the necessary information being available beforehand. It is important to make this available as soon as possible after the

<sup>56</sup> [ECLI:NL:RBDHA:2017:9296, District Court of The Hague, C/09/531370 / KG SAT 17/527 \(rechtspraak.nl\)](#)

<sup>57</sup> [ECLI:NL:OGHACMB:2021:168, Joint Court of Justice of Aruba, Curaçao, Sint Maarten and Bonaire, Sint Eustatius and Saba, HAR 83/2021 \(rechtspraak.nl\)](#)

transfer for a safe placement. Furthermore, according to the DJI, it is necessary that in the case of a request for an extension, close attention should be paid to the timely delivery of a current threat assessment. Should the security and safety risks no longer exist, the detainee in question must return to the country where he was sentenced. This is the reason why up-to-date information is necessary. The explanatory note to ORD2 refers to 'reports from intelligence and investigation agencies and detention facilities'. As is indicated, the products are compiled by the info-units of the police forces. Both the JICN and the KIA have assigned specific individuals who can also compile this for their detainees. Moreover, a document was prepared for the prison management containing questions that at least must be answered in an information product for ORD2. In the case of new detainees, the investigation team will answer the questions, stated the PPG in Curaçao in its response.

#### Assessment

Statements made in the assessment in section 3.6.4 are also applicable to ORD2; for the sake of brevity, the Council refers to the aforementioned section.

#### 4.6.5 Provision and accommodation in the European part of the Netherlands

The countries shall provide detention capacity to each other in the manner stipulated in ORD2. Transfer to the European part of the Netherlands will only take place if ORD1 cannot be applied.

#### Findings

Statements made in section 3.6.5 on the provision of detention capacity and the possibilities in the context of safety of detainees are also valid for ORD2. It was indicated before, that the issue with *gangs* involves limitations. Compared to the Caribbean part of the Kingdom, the European part of the Netherlands has many more possibilities for placement and spreading and has higher levels of security in the correctional institutions.

Also, within the context of ORD2, detainees are temporarily transferred, if possible, on the basis of reciprocity ('swapping detainees'). For example, two detainees were transferred to the FOBA of the SDKK based on ORD2 and two detainees from SDKK were transferred to the Pointe Blanche penitentiary facility in Sint Maarten. In the case of flight-risk detainees, the correctional institutions in the European part of the Netherlands are considered.

If possible, options are first sought in the Caribbean part of the Kingdom, before appealing to the European part of the Netherlands. The European Netherlands is mostly perceived as willing, but according to a number of interviewees, it is more reluctant compared to the other (islands) countries of the Kingdom. This is particularly the case, when it comes to granting requests under ORD2 for medical reasons, because according to interviewees, certain requests in this context are denied. This brings about frustrations, since oftentimes a solution must be found for an acute problem, for which locally there are no possibilities.

The DJI claims that requests for transfer to the European part of the Netherlands are seldom rejected. The PPG in Curaçao states in its response, that it does not recognize this picture as far as medical requests are concerned. The DJI points out that it regularly receives ORD2 requests on medical grounds, however, often these are open questions. Before such a request can be granted, information must be provided and concrete agreements must be made (for example, who will pay for the treatment and the social rehabilitation period). In its response, the PPG in Curaçao additionally states that in these cases there is collegial coordination and consequently, it should not be treated as a formal request as yet. Moreover, the DJI indicates that ORD2 on medical grounds relates to somatic (being physical) conditions and not to mental disorders. Conversely, several interviewees point to the explanatory note to ORD2, which states that in the case of medical complications, psychiatric complications must be explicitly taken into account.

Should a TBS or a PIJ measure be imposed, there will be a need for transfer from the Caribbean part of the Kingdom to the Netherlands, because locally, the countries have no facilities for this. Several interviewees report that the European Netherlands does not grant requests for this based on ORD2 (on medical grounds), but according to them, the aforementioned explanatory note about psychiatric complications also refers to these situations. In the event that the imposed measures (including TBS and PIJ measures) do not fall under ORD2, the view is that ORD2 should be expanded to include them. If that is not possible, there is a desire to compile a similar mutual arrangement for these cases.

The DJI indicates that the requests in the context of measures are not covered by ORD2. As an example, the PPG in Curaçao provided the Council with a ministerial decision dated 23 September 2019 from the Minister for Legal Protection. In that decision, the request for transfer based on ORD2 'medical reasons' was rejected on the grounds that the TBS imposed is a measure and therefore does not fall within the scope of this arrangement. According to the DJI, the requests are mostly rejected because of the nature of these types of measures and treatments, which, according to interviewees, cannot be executed in the European part of the Netherlands.

The DJI claims to have understanding for the situation and that it is willing to think along. In a few very special cases – based on Article 40 of the Charter – custom-made solutions were provided. This was, for example, in the case of a juvenile prisoner taken over by the European part of the Netherlands within the context of a PIJ measure. The PPG in Curaçao adds in its reply that in this respect, the policy document "Scenario implementation TBR youth from CAS islands to the Netherlands" was used.

In conclusion, several interviewees would like to see opportunities for TBS and PIJ measures in ORD2, on account of the current lack of facilities for them.

The DJI indicates in its response, that it does not recognize itself at all in a number of findings.

### *Assessment*

The Council notes that the countries provide detention capacity to each other in accordance with ORD2. The figures show that most requests for transfer are made to the European part of the Netherlands and Curaçao (see 4.5). By far, the vast majority of requests are granted. If one compares the number of requests to the European part of the Netherlands and to the (islands) countries in the region, most requests are made in the region.

The Council notes that not all parties have the same understanding of 'presence of medical complications'. The Council remarks that the DJI's position that medical complications must be understood to mean only somatic complications is not correct. The explanatory note to ORD2 leaves no room for interpretation as far as this point is concerned. The Council is of the opinion that the DJI should deal with this accordingly.

In addition, the Council establishes that ORD2 does not refer to measures, since it mentions 'persons who have been legally deprived of their liberty based on an order for pre-trial detention or received a sentence involving deprivation of liberty'. As a result, TBS or PIJ measures are excluded from ORD2. However, Article 40 of the Kingdom Charter continues to provide the basis for a possible transfer in such case. Article 1:84 of the Criminal Code stipulates that, persons placed in Government custody can be cared for elsewhere in the Kingdom. This does not alter the fact that, the lack of such facilities in the region is a serious obstacle, which can even be argued to affect human rights. That is why – despite the complexity of the problem – it cannot be simply stated that this type of treatments, due to its nature, is not suitable to be executed in the European part of the Netherlands. All the more so, because in the Caribbean part of the Kingdom, the TBS measure is included in the

Criminal Code and, where appropriate, is also imposed in practice by the criminal courts, despite the lack of facilities in these countries.

The Council is aware that the JVO is investigating the possibilities of a joint TBS and/or PIJ facility in the Caribbean part of the Kingdom and expresses the expectation that the countries will find a solution. In view of Articles 3 and 5 of the ECHR and the opinion of the European Court of Human Rights on aid and assistance between the Kingdom parts, the Council is of the opinion that a solution is needed. The European Court sometimes even considers transfer as a duty, namely when the sentence imposed cannot be enforced in an acceptable manner in the part of the Kingdom where the convicted person resides and the convicted person himself requests a transfer.<sup>58</sup>

### *Recommendations*

- In the case of a request on medical grounds, apply the term medical complications in accordance with the explanatory note.
- Find a workable solution as soon as possible for the countries regarding TBS and PIJ measures.

#### **4.6.6 Grounds for provision and grounds for rejection**

The ORD2 applies exclusively on the basis of the two aforementioned grounds. These are the presence of medical complications; and urgent safety reasons. The Minister of Justice of the requested country shall only reject the request on the basis of one or more of the six grounds for rejection prescribed. These are: insufficient capacity; lack of necessary information; incompatibility with order or safety; protection of public order or national security; importance of the prevention or detection of criminal offences; and the fact that there is a space closer to the place of residence of the detainee.

### *Findings*

There is an ORD2 checklist which is amongst others used to verify the grounds. It is evident from the interviews that the countries in the Caribbean part of the Kingdom make ORD2 requests particularly on the basis of 'urgent safety reasons'. In addition, requests are made on the grounds of 'presence of medical complications', but this does not happen often, according to the interviewees. They indicate that most requests for transfer in the region are honoured. A request is only turned down if the requested capacity is not available or if there is a threat (JICN). On occasion, the JICN temporarily transferred a number of detainees to the European part of the Netherlands due to its own capacity shortage. More often than not, requests based on ORD2 are turned down by the DJI, according to several interviewees.

Interviewees indicate that both the reasons given for the initial request as well as those given in the context of extension constitute an obstacle. A number of interviewees indicate that it may occur that there is a serious safety issue, but that there is not enough information to substantiate this. In such cases, the request is often rejected, despite the acute need. It is also possible that the information used for the previously prepared threat assessment is still current and is re-used for the extension request, but that this is not sufficient for the DJI. The DJI would like to have a new justification, which cannot be provided because the same threat still exists. Moreover, it happens that the required information – partially based on experiences with other requests – is provided, but then other – sometimes inconceivable – information is demanded by the DJI. This not only causes (more) delay, but in the end, also leads to rejections.

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<sup>58</sup> See Reijntjes, *Het interregionale strafrecht van het Koninkrijk der Nederlanden*, page 74, ISBN No. 9789462901216.

In that respect, the PPG in Curaçao alleges that constantly new requirements are being set that do not always correspond with the stipulated grounds for rejection. Such as a rejection on account of the fact that a detainee is not able to speak the Dutch language. It is reported that it is common that statements by medical specialists of the requesting country are disregarded by a specialist of the requested country without providing proper justification. The PPG further adds that the specialist of the requested country does not have sufficient insight in the local context, including in the disciplines that may or may not be available locally. For example, the specialist would then state, that the treatment can take place in the requesting country itself, despite the fact that the requesting country actually indicates that such treatment is not available there. In the specific case mentioned as an example, the ORD2 request for psychiatric treatment was extensively justified by the requesting country. But the advice given by the specialist of the requesting country was considered to be insufficiently substantiated by the requested country. The request was rejected by the Netherlands. The Ministerial Decision relating to this case of 12 May 2021 was made available to the Council. As a result of this case, the DJI and the Public Prosecution Office in Sint Maarten agreed to consult with each other prior to a request, so that, among other things, the local context can be elucidated.

Generally speaking, interviewees from several countries in the Caribbean part of the Kingdom also remarked, that more consideration should be given to the local context, since this often is related to serious matters in the area of safety and health, which these countries do not take lightly.

More clarity is needed on what is covered or not by medical complications and who makes the overriding decision. Equally, more clarity is needed on which medical opinion from which country will be the guiding factor. In addition, there is a need for a rejection of a medical request by a specialist to be substantiated and for agreements to be made if the detention should end prior to a medical treatment.

### *Assessment*

The requests are submitted based on one of the two possibilities. The most common ground for a request is in the context of safety. The Council notes that the requests are not only rejected by the DJI on the basis of one or more of the six rejection grounds prescribed, but also on other grounds, such as, for example, not mastering the Dutch language or barring certain detainees. Since the rejection grounds are exhaustive, requests should not be allowed to be rejected on other grounds. The Council itself could not ascertain to what extent the requests or their rejection are substantiated. Furthermore, based on file review, the Council could not ascertain either whether, how often and in what cases requests are granted or denied. Based on the figures provided and some examples of documents, it can be stated that a rejection by the DJI occurred at least once. Justification of decisions should always be the basic principle. In this respect, the Council also highlights the added value of better and more detailed automated registration of ORD cases.

It is evident to the Council, that there is much ambiguity about the assessment of medical requests. It is therefore obvious, that the countries make further arrangements on this matter, so that all requests are basically assessed in the same manner. As indicated before, the Council can imagine for example, that the countries would agree that, in principle, the premise will be the medical opinion of the requesting country.

### *Recommendations*

- Only reject requests based on the exhaustively stipulated grounds for rejection.
- Make sure that decisions are always substantiated.
- Within the context of medical requests, make further arrangements on the assessment of these requests.

#### 4.6.7 Reimbursement of costs

The Countries shall reimburse each other for the costs arising from the application of this arrangement.

##### *Findings*

As with the application of ORD1, no reimbursement of costs takes place regarding ORD2. What is reflected in the findings in section 3.6.8 also applies to ORD2.

Sint Maarten is paying for the detainees who were transferred to the European Netherlands after the hurricanes based on administrative agreements. If applicable, Sint Maarten receives reminders for payment from the DJI. The SDKK indicates that the Netherlands pays the costs for the accommodation of the group placed in the SDKK as a result of the hurricanes. Initially, the invoicing procedure was not clear, which resulted in this being set in motion only a year later. However, the funds paid have ended up in general resources item of the Country of Curaçao. As a result, these specific funds were not directly available to the SDKK and consequently, they could not be used for the benefit of the group of detainees referred to. A separate request from the SDKK to the Ministry of Finance of Curaçao was submitted for this purpose.

##### *Assessment*

The remark made by the Council about the reimbursement of costs for ORD1 under 'assessment' in section 3.6.8 also applies to the reimbursement of costs for ORD2. For the sake of brevity, the Council is referring to that. Already in section 2.11, the Council referred to the countries' poor financial situation and the accumulation of a potential debt to the Netherlands in connection with the reimbursement of costs. As already indicated, the Council is of the opinion that a more realistic solution should be sought. The recommendation on the reimbursement of costs, as included in section 2.11, is fully applicable here.

#### 4.6.8 Written agreements

Written agreements are made about interim reporting on the behaviour and condition of the detainee. This is to promote that the countries fully collaborate with each other to be able to ensure the exercise of the legal responsibilities towards the detainee.

##### *Findings*

The findings on interim reporting, recording of information and the files as mentioned in section 3.6.9 are also applicable to ORD2. The JICN claims that obtaining information in a timely manner constitutes a serious problem. From the European part of the Netherlands, the JICN does not receive any behavioural reports or notification on transfers or relocations within the European Netherlands. The social workers of the Pointe Blanche prison in Sint Maarten claim that they are only involved in preparing reports on conditional release for short-term prisoners who are temporarily staying in the Netherlands. The SDKK social worker occasionally calls to inquire about detainees who have been transferred under ORD1 and ORD2. The PPG in Curaçao reports that in June 2021, it was agreed with the DJI that in future, annual behavioral reports will be sent.

Furthermore, the findings as mentioned in section 3.6.9 on legal responsibilities also apply to ORD2. As indicated earlier, for ORD2 it specifically applies, that in practice the countries only take into account the date of conditional release and not leaves of absence such as those with EM (Electronic Monitoring), because the detainees are not legible for EM (electronic monitoring) on account of safety considerations. It is desirable to provide more clarity about this to the detainee. This matter was also raised by the interim evaluation committee, where it was suggested to clarify this textually.

### Assessment

What was stated about the interim reporting in the assessment in section 3.6.9 also applies to ORD2. According to the Council, it is sufficiently clear to the countries involved what the legal responsibilities include. However, the Council holds the view, that detainees should be better informed about leaves of absence in connection with temporary transfer under ORD2. According to the Council, for example, adjusting the Manual and/or the already existing information sheet could help in this respect. The recommendations regarding the written agreements on the interim reporting and recording of information, as included in section 3.6.9, are fully applicable here.

### Recommendation

- Give more clarity to the detainees about possibilities regarding leave of absence.

### 4.6.9 Procedure

There is a procedure which, among others, identifies those in charge, outlines the required documentation and establishes the method of monitoring.
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### Findings

The procedure described in section 3.6.11 and the problem regarding the procedure, characterised as bureaucratic also apply to ORD2.

It may occur that a request is made on the basis of ORD2, but placement – without justification – is granted on the basis of ORD1. In such cases, in view of the expected need for extension, a request is sometimes made for conversion to ORD2. Moreover, it may happen that a detainee transferred based on ORD2, requests an ORD3 transfer (see chapter 5 for the findings on ORD3). According to the PPG in Curaçao in its response, in that case, this is not a conversion, but a new request.

According to interviewees, the (advice on the) decision-making process by the DJI takes too long. In the Caribbean part of the Kingdom, the countries usually respond, as indicated, within the set deadlines. According to the PPG in Curaçao, however, the deadlines are far exceeded by the DJI. To illustrate this, the PPG in Curaçao submitted a number of ministerial decisions of the Minister for Legal Protection to the Council. For example, in a decision dated 12 May 2021, the request for transfer, dated 26 November 2020, is denied after more than five months. In another case, in which a request for a transfer on medical grounds (TBS) was requested by a letter dated 14 January 2019, after several reminders the request was rejected by ministerial decision of 23 September 2019 after approximately eight months. According to aforementioned PPG, there are no consequences attached to this type of exceedance, which is truly desirable within the context of progress. As a possible solution to this issue, it is suggested to automatically grant the request in the absence of a response. During the monthly meetings between the policy workers of the PPG in Curaçao, Sint Maarten and of the BES islands and the DJI, the cases with delays of time-periods are discussed, but this does not always result in a decision being taken at short notice. In the case of requests based on medical physical reasons, the PPG in Curaçao has the impression that processing such requests takes longer than prescribed or necessary. Similarly, it is indicated that there is a need for clear(er) frameworks to limit the scope of discretion of the reviewers of the requests. Grounds are used or requirements are set that were not prescribed. For example, then questions are asked about whether the detainee does in fact master the Dutch language as a condition to be able to have the medical treatment carried out in the (European) Netherlands. This occurs, despite the fact that this is not a requirement in the arrangement. Furthermore, it strikes the interviewees that there is a difference in granting and rejecting predominantly equal cases. For example, a request under ORD2 on medical grounds was denied by email after almost a year, because the person involved was not detained based on the definition of detention capacity, but was

under house arrest, whereas in the case of another (possible) request that involved suspension of detention, the DJI cooperated. Of both cases, the PPG in Curaçao provided documents to the Council for illustrative purposes.

In its response, the DJI indicates that it does not fully recognize itself in a number of findings.

### *Assessment*

What has been stated in section 3.6.11 about the assessment of the procedure, also applies to ORD2.

The Council remarks that, given the nature of the arrangement, it is essential that decisions are taken in a timely manner. In the examples cited, it took more than five months to a year between the request and the decision. According to the Council, time-limits agreed upon do not have a non-committal character and should be adhered to. Especially considering the fact that safety aspects are oftentimes involved, and for this reason diligence is called for. The view of the European Court of Human Rights is that countries should assist each other in this<sup>59</sup>. The Council therefore assumes that all stakeholders will strive to meet the time-limits agreed upon. Should it remain a persistent bottleneck, the Council is of the opinion that new agreements should be made. However, in doing so, the reasons for the delays should be taken into account. The Council is of the opinion that the proposal to attach the consequence that the request will be tacitly granted in the absence of a response is worth considering. The Council encourages the countries to make agreements about this. The recommendation on the simplification of the procedure contained in section 3.6.11 applies in full here.

Although the Council was not able to conduct a file review in order to be able to verify certain information itself, the Council notes that in any case the appearance of arbitrariness must be avoided when assessing requests. In a previous section, the Council already pointed out that a proper justification must be the premise. This is also applicable in this context.

### *Recommendation*

- Take a decision within the prescribed time-period.

#### **4.6.10 Return of detainee**

As soon as the need for accommodation in another country no longer exists, the detainee returns to the country where the pre-trial detention order was issued or the custodial sentence was imposed.

### *Findings*

Most requests are made within the context of safety. Interviewees indicated that the safety issues of the detainees placed in the European Netherlands are such that they will not be resolved at short notice. In such cases, it is foreseeable that an extension must be requested. Therefore, the temporary placement usually lasts six months or longer. In view of the possibility of multiple extensions, ORD2 is focussed on.

It is the prosecutor in charge of the execution who ensures the timely repatriation of the detainee. The obstacle referred to in section 3.6.7 concerning the provisional release date and timely return also applies to ORD2. It also occurs that a detainee temporarily stays in the European part of the Netherlands under ORD2 and commits a criminal offence there. It may also turn out that, once there, a detainee still has one or more outstanding Dutch criminal sentences, that have yet to be executed. In the latter case, the detainee will not

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<sup>59</sup> Reijntjes The interregional criminal law of the Kingdom of the Netherlands, page 74, ISBN no. 9789462901216.

return after the end of the period specified in the ORD. This is due to the execution of the sentence(s) imposed in the Netherlands.

If the need for relocation ceases to exist, the return is mostly around the end date of the temporary transfer. The PPG in Curaçao indicates that the DJI strictly adheres to the rules with regard to the return period. One interviewee claims that the DJI assesses the time-limits in a more procedural manner and would like to see a more substantive assessment taking into account various aspects. The DJI indicates that if the safety risks no longer exist, the detainee must return. This is also a reasons why up-to-date information is necessary. However, that is not always available or cannot be provided.

The Solicitor General of Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba, after having been alerted by the Netherlands, wrote a letter to the Minister of Justice of Curaçao requesting that attention should be paid to the importance of improving the conditions in the SDKK and to the importance of proper registration.<sup>60</sup> This is in connection with being able to comply with the agreements made in ORD2 about (timely) repatriation of detainees placed in the European Netherlands on the one hand and on the other hand, on account of the ability to prepare substantiated extension requests.

Many interviewees also point to the special group of detainees who were transferred to Curaçao and the European Netherlands as a result of the hurricanes in 2017. Although the basis for this is Article 40 of the Kingdom Charter and the ORD2 agreements are (partially) adhered to, this group is mainly referred to as having been transferred based on additional administrative agreements. For those detainees, who are still elsewhere, an extension request is made every six months. Other agreements are also made about the extension period. This concerns three detainees from Sint Maarten, two of whom reside in the SDKK and one in the European part of the Netherlands. For these detainees, it is considered that the country of Sint Maarten can reasonably be expected to be able to provide its own adequate detention facility within a period of five years. Furthermore, it is taken into consideration that the threat level of these detainees will not decrease substantially during that period, as a result of which it was requested to extend the temporary stay in Curaçao until 1 November 2023.<sup>61</sup> For the group residing in the European Netherlands on the basis of administrative agreements, the file holder of the prison system of the Ministry of Justice of Sint Maarten is the one who prepares the extension requests and monitors the time periods.

### Assessment

The Council already stated previously, to have the impression that as soon as the need for accommodation in another country in the Caribbean part of the Kingdom is terminated, in most cases, the detainees return in a timely manner. The preceding also seems to be predominantly the case in the event of a transfer to the European part of the Netherlands. Prior to this, the Council already highlighted the importance of adhering to agreements for the functioning of the ORD. According to the Council, the fact that outstanding sentences in the Netherlands have to be executed there, is unavoidable at times. After all, there is a basis for this and sentences have to be enforced. As such, this does not lead to postponing nor cancelling the execution of the sentence nor should any additional costs need to be incurred, because the detainee would first have to be brought back to the requesting country and then returned to the Netherlands again. The Council assumes, however, that detainees are generally also informed about this possible procedure.

The initial request for transfer must be as complete as possible and must be accompanied by the required threat product. As far as the assessment of the possibility of the detainee's return is concerned, additional information is indispensable. Not only must this information

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<sup>60</sup> Letter PG (Solicitor General) dated March 19, 2018

<sup>61</sup> Letter PG (Solicitor General) dated October 2, 2018

be up-to-date, but the new information must be actively provided by the requesting country. This is the only way to best assess the situation regarding the return of the detainee.

#### *Recommendation*

- Ensure that the detainee returns as soon as the need for transfer is removed.

#### **4.6.11 Transfer**

The (actual) transfer is organised by the requesting country.

#### *Findings*

Unlike ORD1, ORD2 contains a specific provision on the organisation of the transfer of a detainee.

On an operational level, the countries maintain contact with each other, share information and make concrete agreements about the transfer to the requested country (for example, the time of departure and arrival) and about the transport to be carried out. The contacts are made in a timely manner to schedule the transfer. Interviewees do not report any bottlenecks about communication at operational level. Those involved know how to find each other.

The procedure to be followed is included in the Manual. In practice, the prosecutor in charge of the execution coordinates the transport of detainees to and from the requested country. In this respect, the prosecutor in charge of the execution takes care of the applications for the official trip and arranges the tickets through the Ministry of Justice in a timely manner. The prosecutor in charge of the execution also collects all relevant (containment) documents that the escorts have to bring along for the transport. In Curaçao and Sint Maarten, the members of the AT are charged with assessing the risks that could possibly arise during transport. In response, the PPG in Aruba reports that the procedure followed in Aruba is somewhat different than the one mentioned above. There, it is primarily the KIA that arranges the transport of the detainee to and from the requested country, but in collaboration with the prosecutor in charge of the execution. The KIA has direct contact with employees of the Ministry of Justice for arranging of the trip and accommodation expenses of the escorts. The KIA is also in contact with the authorities of the requested country and the KIA personnel does the risk assessment for during the transport, together with the Public Prosecutor's Office. If the KMar takes on the transport escort, it will perform the risk analysis related to the transport.

The Public Prosecutor's Office in Curaçao wrote a document entitled: "*Transport of detainees from Curaçao to abroad and from abroad to Curaçao*" incorporating the way in which the transport of detainees should take place. This document describes the method of an application for a transport, the procedures at Schiphol and the desired behaviour of the transport staff. The document states, among other things, that the Public Prosecutor in charge of the execution, should coordinate the transport of detainees and that the escorts should assess the risks and threats before carrying out the transport. As is already indicated in section 2.10, no such documents on the transport policy are written for the countries of Aruba and Sint Maarten.

The actual transport takes place in the same way as in the case of ORD1. For that reason, reference is made to sections 2.10 and 3.6.13 for the findings on this matter.

### *Assessment*

The (actual) transfer is organised by the requesting country. For the assessment of the subject of transport, the Council refers to sections 2.10 and 3.6.13.

## Chapter 5 ORD3

### 5.1 The arrangement and explanatory note

Unlike ORD1 and ORD2, both of which offer the possibility of *temporarily* transferring detainees to another country, ORD3 is aimed at *a complete and final transfer* of enforcement of criminal sentences. This ORD is put in place with a view to resocialisation of the person concerned. In this respect, the heading of this ORD states the following:

*'Whereas the optimal resocialisation of detainees is served by detention in the country in which these detainees have the strongest ties with the local community and that in some cases this requires that the enforcement of criminal sentences be transferred to another country within the Kingdom.'*

The arrangement applies to all countries within the Kingdom, and as far as the Netherlands is concerned, to both the Caribbean part as well as the European part.

Unlike in the case of ORD1 and ORD2, the convicted person must take the initiative himself for transfer to another country. The second paragraph of Article 2 of ORD3 states that the convicted person can submit an application for transfer to the Minister of Justice of the country where he resides by means of a petition, to be submitted to the PG or to a department designated by the Minister of Justice for that purpose in the country where the sentence is currently being enforced.

Grounds for denying a transfer request include:

- the remaining period of detention is less than six months at the time the request is submitted;
- the resocialisation interest put forward by the person concerned cannot reasonably be served by the requested transfer;
- criminal justice interests;
- the public interest.

Specifically for the Netherlands, it is determined that the person concerned must be able to demonstrate main residence in the Netherlands for a period of three years or longer.

Both the Minister of Justice of the requesting country and – in the event of a positive decision by that Minister – the Minister of Justice of the requested country must agree to the request in order to proceed with the transfer of the sentence.

The explanatory note to ORD3 addresses, among others, the target group:

*'The target group that can make a claim on this cooperation arrangement, consists of persons who are detained in a country within the Kingdom of the Netherlands other than where they have their main residence and whose resocialisation is not served by the current place of detention. Main residence is said to exist when a person resides in a country for a period of at least 3 consecutive years. It has long been recognised that, when enforcing a sentence in the country of conviction, the possibilities of resocialisation are limited for persons who do not live in that country. Transferring the enforcement of the sentence to the country where the convicted person has his main residence makes resocialisation possible and consequently provides important benefits.'*

Under the heading '*Resocialisation interest and demonstrable main residence*' the following statement can be found:

*'In the consideration of the resocialisation interest, there is some discretionary power of the corresponding Solicitors General or the department designated for that purpose by the Minister of Justice, for the purpose of establishing mutual policy agreements and/or guidelines in order to promote uniformity of decision-making process with regard to petitions.'*

Furthermore, under this heading the following is stated:

*'Under g, reference is made to grounds derived from the public interest. This may include, for example, the safety interests of the convicted person and/or the rest of the detention population, but also the social interests of the requesting and the requested countries. In view of the relatively open standards, a rejection on grounds of public interest may have to be substantiated more extensively than a rejection based on the first three grounds.'*

Appendix 1 of this report contains the text of ORD3 as well as its explanatory note, as is published in the Government Gazette 2014, no. 17853, dated 1 July 2014.

In some aspects, ORD3 can be compared to the Transfer of Enforcement of Criminal Sentences Act (WOTS) and the Act on Mutual Recognition and Enforcement of Custody and Conditional Sanctions (WETS), which regulate, among others, the transfer of foreign criminal sentences by the Netherlands and vice versa. Those Acts also aim at promoting the re-entry into society of offenders.

Briefly put, in the European part of the Netherlands, the WETS applies to the transfer of sentences within the European Union and the WOTS applies beyond that. The WETS contains five general principles for the transfer of sentences<sup>62</sup> and the WOTS contains seven.<sup>63</sup> The WOTS and the WETS provide for legal remedies for the convict in question. For example, he can file a notice of objection before the court that imposed the custodial sentence at the highest instance, if he objects to the intention of the Minister of JenV to transfer the enforcement of that sentence<sup>64</sup> to a foreign State.

And the WETS offers convicts the opportunity to file a notice of objection before the Arnhem-Leeuwarden Court of Appeal in certain situations.<sup>65</sup>

One of those conditions under the WOTS and the WETS is ties to the Netherlands. The information sheet WOTS published for the benefit of detainees by the DJI, states the following about that:

#### *"Ties to the Netherlands*

*You must have sufficient 'ties' to the Netherlands. That means: you are a Dutch citizen; you live and work or study in the Netherlands and you have family here. IOS<sup>66</sup> checks this. For example, by checking whether you have a Dutch passport and whether you are registered in the municipal basic administration (GBA). IOS may also request information about your partner, children or parents in the GBA. If it is not clear whether you have sufficient ties to the Netherlands, IOS will send you a letter with a questionnaire for you to complete. Or, IOS may ask the probation service to investigate whether you have ties to the Netherlands. This investigation will take about six weeks. This only happens if you are known to the Office for*

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<sup>62</sup> These are the following topics: the foreign sentence is continued, only the country where the person is confined can make the request, criminal sentence transfer is not mandatory, the Dutch conditional release arrangement applies and the return guarantee. <https://www.dji.nl/justitiabelen/documenten/publicaties/2013/05/06/wets-infoblad-voor-gevangenen-uit-eu-land-in-nederland>

<sup>63</sup> These are the following topics: ties to NL, Guideline: still sufficient punishment, court case is ready, prison sentence also punishable in NL, both countries agree and submit a request themselves.

<https://www.dji.nl/documenten/publicaties/2013/05/06/wots-informatieblad-voor-nederlandse-gevangenen-in-het-buitenland>

<sup>64</sup> Article 52 WOTS.

<sup>65</sup> Article 2:27 WETS.

<sup>66</sup> IOS: International Transfer of Criminal Judgments. IOS is the department of the DJI (Ministry of JenV) that handles WOTS and WETS cases.

*Dutch Prisoners abroad of the Dutch Probation Service and if you do not object to the investigation."*

## 5.2 Information sheet

Within the Kingdom, an information sheet on ORD3 is prepared for prisoners stating that it is possible to apply for a transfer to a penitentiary institution in another country of the Kingdom. According to the information sheet, this is only possible if it increases the chances of the person concerned for a good return to society. Furthermore, it is pointed out that it is then the intention, that the person concerned serves the rest of his prison sentence in the country to which he wishes to go and that he will also be released in that country. It is mentioned in the information sheet that the detainee or his lawyer may submit a request to the PG or to the department designated by the Minister of Justice of the country where the sentence was imposed, and that the Minister of Justice of the requested country takes the final decision. At the end of the information sheet, it is stated that the person concerned can contact the director of the institution in which he is locked up for more information.

## 5.3 Manual Description Assistance Procedure

In the aforementioned Manual mention is made, among others, that if a convict is detained in Curaçao, Sint Maarten or Aruba, he should send the application to the PG concerned. If the prisoner in question is detained in the European or Caribbean part of the Netherlands, he should send the petition to the Individual Affairs Division (DIZ) of the DJI. The application must be assessed in light of the requirements of ORD3. These requirements are listed in a checklist included in the Manual.

The actual assessment of the request is done at least on two occasions, the first time by a policy officer of the PPG, then by the Minister of Justice of the sentencing country and, after his consent, by the Minister of Justice of the requested country or a department designated for that purpose. Based on an advice from the PPG or the DIZ, the Minister of Justice takes a decision. If the request is denied, this minister will inform the detainee in question (and his lawyer).

If the request is approved, the Minister concerned will inform his counterpart from the country to which the transfer is requested (the requested country) as well as the detainee concerned. Subsequently, the Minister of Justice of the requested country takes a decision after receiving the file from the minister of the sentencing country or the DIZ. If the DIZ or the PPG already prepared an advice from the sentencing country, the receiving country may use and supplement that advice for the second assessment.

The Minister of Justice of the requested country must inform his counterpart of the requesting country of his decision. In the Manual it is stated that the detainee concerned, possibly through his lawyer, will be informed by the Minister of Justice of the requested country of his decision.

If the application is granted, the transfer of the enforcement of the criminal judgment can take place.

Furthermore, in the Manual is also stated that the prosecutor charged with the execution of judgements in the court of first instance of the requesting country determines when the transport will take place and ascertains who will escort the detainee during the transport. This Public Prosecutor must ensure that the detention center of the requesting country provides the necessary information.

The Public Prosecutor's Office involved is responsible for the escort of the detainee from one detention facility to the other. As far as the European Netherlands is concerned, the DIZ fulfils this role.

In the aforementioned checklist of ORD3, the following footnote to the assessment on the resocialisation interest is included:

*'Reintegration into Dutch society is meaningless if there is no substantial relationship with the Netherlands. In determining whether ties exist, consideration is given to, among others,*

*where the person in question actually lives and for how long, where he works, where the social ties lie (such as relatives, family, friends), etc. The period spent temporarily in a detention facility in the Netherlands does not count.'*

#### 5.4 Interim evaluation

Specifically with regard to ORD3, the Interim Evaluation Committee made the following suggestions in its report of 15 December 2017:

- indicate in the checklist accompanying the Manual Description Procedure in which cases the advice of the probation service is or may be requested;
- adapt ORD3 in terms of the deadline for submission of the request in connection with the minimum period of six months needed to promote reintegration;
- include in the Manual and the information sheets for each country, to which authority a request can be submitted;
- clarify in the Manual which authority processes a request in case the detainee in question is (temporarily) transferred to another country for safety reasons at the time of the request;
- regulate that a detainee is not placed at a disadvantage by the transfer of enforcement of the judgement, but neither given a benefit in terms of detention time;
- clarify the text in the explanatory note to ORD3 regarding the requirement of three consecutive years of residence in the European Netherlands with information about the necessary ties to the European Netherlands;
- avoid that the same PG should issue an advice twice on the same case by stipulating that the first advice is reused for transfers between the Caribbean Netherlands and the European Netherlands or between Curaçao and Sint Maarten.

#### 5.5 Making use of ORD3

##### *Office of the Solicitor General in Curaçao*

The PPG in Curaçao provided the Council with an overview of all ORD3 cases since 2014. This shows that this office of the Solicitor General was involved 28 times in the transfer of an offender to a correctional facility in another country based on ORD3. 16 of these cases involved transfers to the European part of the Netherlands and 11 cases involved transfers to Curaçao. On one occasion, an offender was transferred to both Aruba and Bonaire. The PPG in Curaçao was not involved in the latter case because it concerned someone who was detained in the European part of the Netherlands. His application was processed by the DJI.

During this period, there were no ORD3 transfers to Sint Maarten. In addition, this overview shows that the PPG in Curaçao was involved in a rejected ORD3 request by an offender 40 times. Additional information from this PPG shows that in about 30 of these cases, the requesting country decided that the request was not admissible, and in the remaining cases it was the requested country.

The most common ground used for rejection by the requesting countries is failure to comply with formal requirements and, to a lesser extent, the public interest.

The most frequently used argument of the requested country, in practice the Netherlands, is the lack of sufficient ties with the Netherlands.

##### *Office of the Solicitor General in Aruba*

The PPG in Aruba reported that since 2014, an ORD3 request was made 5 times by a detainee of the KIA, namely 3 times in 2019 and twice in 2020. One of these requests was submitted on medical grounds; that request was not processed because ORD3 does not provide for it. The other four requests were decided within 60 days by the Minister of Justice of Aruba. Of those 4 requests, 2 were granted. In the 2 cases in which the request was rejected, it was done on grounds of public interest.

In addition, the PPG in Aruba reported that, so far, ORD3 was invoked once by an offender who was detained in another country and who had requested to be transferred to Aruba. This had to do with an Aruban woman who had been convicted in the European part of the Netherlands and was imprisoned there. This request was granted and the person in question spent the last 16 of 21 months in total in the KIA.

### *The DJI*

The DJI makes mention of a limited number of ORD3 cases, it concerns 'only a few' ORD3 requests to the Netherlands per year. According to the DJI, the number of detainees residing in the European part of the Netherlands based on ORD3 is not directly visible *'because they are included in the system through permanent transfer.'* This means that the place of residence of the detainees are no longer kept separately.

## 5.6 ORD3 in practice

In the following description and assessment of the way in which ORD3 is implemented in practice, the Council follows the design of the assessment framework for this study.

### 5.6.1 Concept definition

It is important that the organisations that carry out this ORD interpret the concepts from the mutual arrangement in the same manner.

### *Findings*

The PPG in Curaçao pointed out that requests should be submitted to the sentencing country and not to the country of residence. According to this PPG, if the detainee concerned is temporarily residing in another country based on ORD1 or ORD2, he should submit his ORD3 request to the Minister of Justice of the country of conviction. That is also what happens in practice. In this respect, the PPG suggested an adjustment to the second paragraph of Article 2. In fact, that paragraph of the article states that the request should be submitted to the Minister of Justice of the country where the sentence is currently being enforced.

During the research carried out by the Council, the interviewees made no further mention of concepts in the text of ORD3 that are not clear.

The ground for rejection 'grounds derived from public interest' (Article 3, paragraph 2, under g) is not elucidated in written policy. In practice, when assessing this provision, aspects such as the nature, the severity and the context of the offense committed, are taken into account. In this context, the PPG in Curaçao also mentioned the safety interest of the person concerned and that of the detention population as well as the interests of the victim such as compensation.

When assessing ORD3 requests, the length of the sentence still to be served is sometimes included in the assessment of the resocialisation interest referred to under subsection e. (*'the application will be rejected if the resocialisation interest raised by the applicant cannot reasonably be served by the requested transfer of enforcement'*). The reasoning is that in the case of a long prison sentence, resocialisation is only addressed during the latter part of the detention. When such is the case for the application of ORD3, is not clear from the text of the arrangement nor from its explanatory note. This aspect is not elaborated upon in policy. In this respect, a director of a probation organization remarked that resocialisation does not begin at the end of a sentence, but right at the beginning.

By way of illustration, below are passages from two letters from the Minister of Justice of Curaçao rejecting ORD3 requests from two SDKK prisoners with long-term sentences.

*'Besides the social unrest, is the fact that the larger part of the prison sentence imposed on you is not yet served, as a result of which your criminal sentence cannot yet be transferred. During the enforcement of the prison sentence, it is quite possible that the resocialisation interest will increase in severity and should eventually prevail – when the return to society of the convicted person is foreseeable.'*

*'Compared to the severity of the crime, the social unrest and the relatively short portion of the prison sentence that you have already served, I consider the resocialisation interest to be insufficiently weighty at this point in time to allow the request to be granted.'*

In a general sense, several interviewees noted that they feel that the Netherlands is reluctant to honour ORD3 requests.

### Assessment

Contrary to what is laid down in the second paragraph of Article 2 of ORD3, in practice an ORD3 request must be submitted to the authorities of the sentencing country, and not to the country of residence. Given the responsibility of the sentencing country, this is also logical. On this point, the aforementioned provision is not entirely correct and it would be reasonable to adjust it.

The grounds for rejection 'public interest' and 'resocialisation interest' are so broad that the outcome of the assessment of an ORD3 request is uncertain, without prior elaboration of those grounds in a policy document. A negative outcome of such an assessment by the requested country may be interpreted as that country's reluctance to cooperate with the transfer, even in cases where the requested country has valid arguments not to grant the request. The Council considers it important that the countries reach an agreement on the aspects that play a role in assessing these grounds for rejection and that they subsequently further develop them.

### Recommendations

- Make it clear in the second paragraph of Article 2 of ORD3, that an application must be submitted to the Minister of Justice of the sentencing country.
- Further develop the grounds for rejection 'public interest' and 'resocialisation interest'.

### 5.6.2 Legal framework

The ORD must comply with international and national regulations, such as the International Covenant on Civil and Political Rights (ICCPR), the ECHR (Articles 3, 5 and 8), the Charter for the Kingdom of the Netherlands and the custodial institutions acts and national ordinances of the countries.

### Findings

In various treaties, attention is focussed on the resocialisation of detainees. As is stated in Article 10, paragraph 3, first clause of the ICCPR:

*'The penitentiary system shall comprise a treatment of prisoners of which the essential aim shall be their reformation and social rehabilitation.'*<sup>67</sup>

Similarly, the Custodial Institutions Acts and the National Ordinances of the countries, namely the National Ordinance Penitentiary System Principles, the BES Penitentiary System

<sup>67</sup> The authentic text of this provision of the Treaty reads as Follows: *'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'*

Principles Act as well as the Acts on Custodial Institutions in force in the European part of the Netherlands, make mention of the preparation of the return to society of the detainee in question as one of the principles in the execution of custodial sentences imposed.

ORD3 contains the specific condition of at least three years of main residence in the Netherlands, if an offender makes a request to be transferred to the Netherlands on the basis of ORD3 (Article 3, paragraph 2, under h). In the explanatory note, under the heading 'Target group', it is stated that one can speak of main residence when a person resides in a country for a period of at least three consecutive years.

The proposal of the evaluation committee of December 2017 to elucidate the explanatory note on this point did not yet result in an adjustment of that explanatory note.

With regard to the condition of three years of main residence, the DJI initially noted that it applies exclusively to the European Netherlands. In response to the Council's question as to whether the text of ORD3 needs to be adjusted on this point, the DJI stated, however, that the current text is correct and that therefore, the condition concerned applies to both the Caribbean as well as the European part of the Netherlands.

By the reaction of its response, it is clear that the PPG in Curaçao assumes that this condition only applies to transfers to the European part of the Netherlands.

The PPG in Curaçao noted that for several years now, the DJI has unilaterally given a different interpretation to the requirement of 'three years of main residence in the Netherlands' ('the individual concerned must have lived in the European part of the Netherlands for the last three years continuously prior to detention'), with the result that this criterion is met less often. The Netherlands maintains this criterion as a rigid requirement, according to this PPG.

In the context of this evaluation, the PPG submitted a number of ministerial decisions as examples. In one instance, it concerned a man sentenced to 36 months imprisonment in Sint Maarten, who was placed in a penitentiary facility in the European Netherlands on the basis of ORD2 as of August 2021. His request to be able to remain in the (European) Netherlands on the basis of ORD3 was granted by the Minister for Legal Protection of the Netherlands in October 2021, despite the fact that, according to the PPG in Curaçao, the person concerned had not previously lived in the European Netherlands for any extended period of time.

### *Assessment*

As is also stated in the explanatory note to ORD3 (see Annex 1), the promotion of resocialisation of offenders is the primary motive behind this mutual arrangement. It goes without saying that for a successful resocialisation, ties to the country concerned is essential. The duration of a previous (main) residence in that country of the offender concerned can certainly play a role here.

Applying the criterion of at least three years' main residence, which, according to Article 3 of ORD3, only applies to transfer to the Netherlands, is according to the Council, however, difficult to reconcile with the principle that detention must primarily be aimed at 'reformation and social rehabilitation', as stipulated in the aforementioned provision of the ICCPR. When deciding on ORD3 applications, other aspects should also be taken into account. According to the Council, the manner in which the criterion referred to is currently applied, is not necessarily in the interest of a proper return to society of the offender concerned. In this respect, the Council also refers to the WOTS and the WETS, neither of which contains such a provision on main residence. Also, those Acts are partly aimed at increasing the chances of resocialisation after detention.

It is difficult for the Council to explain that this criterion of at least three years of main residence within the context of the execution of ORD3 only applies to transfers to the Netherlands.

Lastly, the Council observes that the text of this ORD would be incorrect on this point, if the

condition would apply exclusively to transfers to the European part of the Netherlands. After all, in the arrangement reference is made to the Netherlands, which also includes the Caribbean part of the Netherlands. The Council noticed that this condition is interpreted in different ways.

### *Recommendation*

- Reconsider the criterion of 'three years' main residence in the Netherlands' as well as the manner in which this criterion is applied.

### 5.6.3 (Provision of) Information

It is important that offenders who could possibly rely on ORD3 are well informed about the possibilities offered by the mutual arrangement. In addition, it is important that the countries involved provide each other with the relevant information when an ORD3 case arises.

### *Findings*

#### a. Information to detainees

The interviews revealed that in none of the correctional institutions in the Caribbean part of the Kingdom, detainees are systematically and proactively informed about the possibility that ORD3 can offer. However, following a recommendation from the interim evaluation committee, an 'Information sheet for prisoners within the Kingdom' on ORD3 has been prepared. Information from the side of the institutions shows that this information sheet is not included in the house rules nor is it deposited in the library nor in any other place that is accessible to all detainees.

Several lawyers reported that detainees are often not aware of the existence of ORD3. And because usually offenders no longer have a lawyer after the judgement becomes final, it depends on the staff of the institution whether the person in question is informed about this mutual arrangement.

Case managers and social workers at institutions in the Caribbean part of the Kingdom are aware of the contents of the ORDs. They reported that upon request, they inform detainees about the criteria for transfer on the basis of ORD3. This is not done routinely nor proactively.

In its reactions, the KIA reported that information about the ORDs will be made available in the library of that institution and that during the intake interviews with 'new' detainees, attention will be paid to the ORDs.

The probation organisations, including the Dutch Probation Service (RN), sometimes receive questions from detainees or family members about ORD3. For example, in the past two years, the RN Foreign Exchange desk was involved in 5 cases with an ORD3 case. In those cases, the Dutch Probation Service (RN) played a referral and informative role. In general, RN claims that at times, information about transfer options under ORD3 is sought too late. In one case, the sentence remaining at the time the transfer was requested, turned out to be less than 6 months. For that reason, the request was not considered for approval. Other probation organisations also fulfill a referral role in ORD3 cases sometimes.

The proposal of the interim evaluation committee of December 2017 to include in the checklist to the Handbook when the probation service is or can be asked for advice did not result in any adjustment of that checklist (see further 5.6.5). Transfer of enforcement to another country may affect, for example, the date on which conditional release takes effect because the calculation of that date is not the same in every country.

The DJI indicated that with an incoming ORD3 request, a calculation is always made of the conditional release date after transfer. That date may fall on a later time than if the person in question were not transferred. In this respect, the DJI forwards the calculated date to the PPG concerned, according to the DJI. The DJI assumes that the PPG communicates that

date to the detainee in question so that the latter can decide for himself whether he would like to proceed with his request.

The PPG in Curaçao confirmed that detainees are well informed beforehand about the consequences of changing the detention regime, such as possible differences in the conditional release date.

b. Information to requested country

Since the Council was not able to conduct a file review, it relies on the information provided by the organisations involved.

As for the Netherlands, the Minister of Justice designated the DJI as the organisational unit that processes the ORD3 cases. Within the DJI, the Individual Affairs Division (DIZ) is charged with this task.

Requests for placement in the European part of the Netherlands are received by the DJI via the PPG in Curaçao or the PPG in Aruba. The DJI has monthly meetings with the PPG in Curaçao. With the PPG in Aruba – from which far fewer requests are received – there is occasional contact. The DJI only receives a few ORD3 cases per year. According to the DJI, this may be due to the investigation conducted by the PPGs for the purpose of advising on the decision for the 'requesting' country. It is possible, that requests are already stranded by then, according to PPG in Curaçao, because of formal requirements, and consequently do not end up at the DJI. Usually, ORD3 requests that reach the DJI are granted. Regarding ORD3 cases, the DJI does not experience any challenges with respect to missing or inadequate information on the part of the requesting country.

Neither the PPG in Curaçao nor the PPG in Aruba made any mention of the absence of relevant information with incoming ORD3 requests. The PPG in Curaçao noted that the DJI regularly asks for additional information.

### *Assessment*

a. Information to detainees

ORD3 offers detainees the opportunity to request a transfer to an institution in another country for the purpose of their resocialization. However, in order to make use of this possibility, the detainees concerned must be aware of this. The findings show that they are not actively informed about this. The KIA already announced that it is going to improve the provision of information to detainees.

Because the application of ORD3 involves a complete transfer of powers and responsibilities, there may be disadvantages to the transfer for the person concerned, such as a later conditional release date. It is important that the detainee concerned is made aware of such consequences before a final decision on the transfer is made. It is therefore up to the correctional institutions to inform detainees who may be eligible for transfer under ORD3 in a standard and active manner.

Based on the information provided by the DJI and by the PPG in Curaçao, the Council assumes that this aspect is properly regulated in practice in the meantime and that the detainees in question are informed in a timely fashion of the consequences of a transfer, for example, the v.i. date.

b. Information to requested country

Apart from the observation of the PPG in Curaçao that the DJI regularly requests for additional information, the organisations involved that receive ORD3 requests from another country made no comments about incompleteness of those requests. The Council therefore assumes that no difficulties present themselves during the exchange of available information. Below, the Council will expound separately on the information collected specifically on the aspect of resocialisation.

### *Recommendations*

- Ensure that the information sheet on ORD3 is easily accessible to detainees.
- Ensure that the correctional institutions proactively inform detainees who may be eligible for the application of ORD3 about the possibility of submitting a request for it.

#### 5.6.4 Objective

The Countries involved should be willing to cooperate with the implementation of ORD3 in order to make the enforcement of the sentence as conducive as possible for the return to society of those involved.

#### Findings

ORD3 concerns the transfer of the enforcement of unconditional prison sentences. This ORD does not contain any provisions on the transfer of measures. In the meantime, about 30 detainees were transferred to another country within the Kingdom based on this ORD. The Manual contains a detailed description of the procedural course of actions in the case of ORD3 procedures. The explanatory note to ORD3 further elaborates on some substantive aspects of ORD3. As noted above under 5.6.1, several aspects need further elaboration in policy documents. It is evident from the research, that there are no such policy documents. This implies that the countries have a lot of space to make decisions at their own discretion.

The PPG in Curaçao called the adoption of a compensation measure a challenge with regard to ORD3 cases. According to the office of this Solicitor General, many ORD3 cases involve the fact that a compensation measure is imposed on the person in question and that its enforcement does not take place after the transfer of that person. Any advance payment does not cover the entire damage in all cases. However, according to this PPG, the fact that enforcement of this measure did not take place prior to the transfer is not a valid reason to deny an ORD3 request. The PPG in Curaçao is of the opinion that by adopting the enforcement of the judgment, the enforcement of the compensation measure is also adopted.

In its response, the PPG in Aruba expressed that it agrees that this is a challenge.

#### Assessment

From the discussions held by the Council and based on the figures provided, it appears that the countries are cooperating with implementing ORD3. However, due to a restrictive interpretation of certain criteria, the impression may be created that a country has reservations.

The challenge mentioned by the PPG in Curaçao and acknowledged by the PPG in Aruba regarding the enforcement of a compensation measure deserves further attention. According to the Council, it cannot be the intention that victims miss out on compensation as a result of the permanent transfer to another country of the convict concerned. At the same time, the mere fact that the convict concerned still has to pay damages as such cannot constitute grounds for rejecting an ORD3 request. It is up to the countries to find a solution that does justice to the interests of both victims and convicts. The Council is of the opinion that the view of the PPG in Curaçao is in line with Article 40 of the Kingdom Charter.

#### Recommendation

- Ensure that the compensation measure is enforced, subject to Article 40 of the Kingdom Charter.

### 5.6.5 Resocialisation

ORD3 aims at improving the resocialisation possibilities of detainees. When assessing an ORD3 request, the authorities involved must therefore pay special attention to the resocialisation interest and the resocialisation possibilities of the detainee who is relying on this mutual arrangement.

#### *Findings*

The Council received several documents from the PPG in Curaçao and the SDKK correctional institution in Curaçao, but the Council was not able to conduct a file review. As a result, it was unable to establish which documents were prepared in the context of ORD3 requests. In any case, it became evident from the discussions that the Council held with employees of all organisations involved, that the probation organisations are not involved in advising and decision-making on ORD3 requests, despite the fact that the arrangement makes mention of that possibility. Neither the PPG concerned nor the DJI get in touch with a probation organisation before assessing a request.

Nor is there any evidence, that case managers or social workers of the detention facility in the country where the detainee concerned is residing are requested to compile a report or an advice on the resocialisation interest or possibilities of resocialisation of the person concerned in the context of an ORD3 request. Employees of the JICN reported that they always attach an advice about the ORD3 request to the application. To what extent this advice specifically addresses the resocialisation interest and chances of resocialisation of the person concerned is unknown to the Council.

The PPG in Curaçao claimed that it never received a report from the SDKK.

#### *Assessment*

The Council considers it important that, when assessing ORD3 requests, sufficient attention is always paid to the specific resocialisation interest and the chances of resocialisation of the person concerned. This is an important consideration because every case is different and customization is therefore necessary. The Council is of the opinion that the current work method does not sufficiently guarantee that these specific aspects receive enough attention in each case. According to the Council, probation organisations could play an important role in this respect, because of their expertise in the field of resocialisation and reintegration.

#### *Recommendation*

- Document in which cases with ORD3 requests, information is collected from the relevant correctional institution and from the probation service with a view to assessing the resocialisation interest and the chances of resocialization of the person concerned.

### 5.6.6 Application convicted person

Detainees who are not able to draft an application themselves should be able to get help to do so.

#### *Findings*

ORD3 assumes that the detainee himself submits the application for transfer. The explanatory note also mentions the possibility that the lawyer of the person concerned does that.

Several lawyers with whom the Council spoke, pointed out that detainees by no means always have the skills to draft an application themselves. They also noted that an irrevocably sentenced person usually does not have a lawyer (anymore) and that it is not regulated that lawyers receive compensation for this type of work. The PPG in Aruba indicated that this is indeed a challenge.

Social workers at two detention facilities (JICN and SDKK) reported that they assist detainees with drafting an ORD3 application, if they so desire.

### *Assessment*

The Council considers it important that detainees who may be eligible for transfer to another country based on ORD3, always receive adequate assistance when making a request to do so. In the current situation, this assistance is often provided upon request, but in the Council's opinion this is not guaranteed enough.

### *Recommendation*

- Provide a provision for adequate assistance to detainees who may be eligible for transfer on the basis of ORD3.

### **5.6.7 Procedure requesting country**

In order for the application procedure in the requesting country to run smoothly, it is important that the organisations involved are equipped accordingly and that the files contain the necessary documents.

### *Findings*

As noted earlier, with regard to Curaçao, Aruba, Sint Maarten and the BES islands, the offices of the Solicitors General play a central role in processing ORD3 requests. If detainees from those countries make an ORD3 request, the Public Prosecutor's Office (prosecutor in charge of the execution) in the country in question forwards the request to the relevant PPG. Sometimes the request comes directly to the PPG. The PPG gives advice to the relevant Minister of Justice and monitors the progress. ORD3 requests from detainees from the Netherlands are handled by the DJI. In practice, the DJI leaves the initial assessment up to the PG of the sentencing country and afterwards the DJI makes its assessment as a service of the requested country, according to the PPG in Curaçao. The work methods of the two Public Prosecutor's offices are described in detail in the Manual. At both Public Prosecutor's Offices policy officers are employed, who deal specifically with ORD cases.

Following the proposal of the interim evaluation committee of December 2017, the Manual was amended in such a way that an advice from the PG can be reused in appropriate cases. This prevents the PG from having to issue advice twice in the same case.

The DJI uses a similar procedure for cases in which a detainee in the Netherlands requests the application of ORD3. Some DIZ policy officers/advisors are specifically charged with this task (assessing and advising on ORD3 requests, monitoring of deadlines).

During the interviews, the Council received predominantly positive comments about the way in which the employees of both the Public Prosecutor's Offices and the DJI handle ORD cases.

Because the Council was unable to conduct a file review and only received a number of sample documents, it was unable to verify whether the ORD files contained the necessary documents.

It is the understanding of the Council that the Ministers of Justice of the country where the offender in question is located, generally succeed in taking a decision on the admissibility of the request within the 60-day period laid down in ORD3.

### *Assessment*

In general, the Council did not encounter any problems with the procedure in the requesting countries. The PPG in Curaçao, the PPG in Aruba and the DJI in The Hague have qualified staff specifically dealing with ORD cases. From the discussions the Council held with chain partners, it became evident that there is satisfaction with the way in which they carry out these tasks.

The Council is unable to comment on the completeness of the files, because a file review was not possible.

The decision period of 60 days is generally met.

To the extent that there are substantive bottlenecks, such as the application of the condition of three years of main residence, the Council addresses them in the relevant section of this chapter.

#### 5.6.8 Approval and rejection of application (applicant country)

If the Minister of Justice of the sentencing country is of the opinion that the request cannot be approved based on one or more of the grounds for rejection of ORD3, he must inform the person in question in writing and with reasons. The decision should be subject to judicial review.

#### *Findings*

The Council received some ORD3 decisions from the Minister of Justice of the country where the person concerned was sentenced and where the sentence was enforced at that moment. It concerned two cases in which the Minister had rejected the request. In both cases, the decision was provided with a detailed substantiation with reference to the relevant provisions of ORD3.

Neither ORD3 nor its explanatory note make mention of a legal remedy against the decision on an ORD3 request. Practically, all interviewees called this a challenge. When asked about possible options for the person concerned to challenge such a decision, several interviewees mentioned a criminal summary procedure. Because these concern decisions by the Minister, the possibility of an administrative legal remedy was also suggested. In addition, it was noted that the detainee in question can resubmit an application a year after a rejection.

#### *Assessment*

The Council received some rejections of ORD3 requests from the Minister of Justice of the country where the detainee concerned was sentenced and was residing. These decisions were extensively substantiated and the rejections were based on grounds for rejection under ORD3. The Council assumes that, as a rule, the decisions are sufficiently substantiated. The Council has no indications that this would not be the case.

Essentially, the ORDs are nothing more than agreements between the countries within the Kingdom. These are not generally binding rules from which detainees can derive rights directly. This also applies to ORD3. In this respect, the Council refers to its comments on this matter in section 2.4. Nevertheless, it is precisely this ORD that explicitly offers convicted persons the possibility to request a transfer to another country for the purpose of resocialisation. The decision that such a request cannot be admitted, may have far-reaching consequences for the future of the person concerned. For this reason alone, the Council is of the opinion that it is up to the countries to provide this arrangement with a legal basis and to establish a specific provision for the review of such decisions. In this respect, the Council refers to sections 2.4 and 2.5, and in particular to the recommendations contained therein.

#### 5.6.9 Procedure requested country

In order for the application procedure in the requested country to run smoothly, it is important that the organisations involved are equipped accordingly and that the files contain the necessary documents.

#### *Findings*

ORD3 requests which are received from another country are handled by the relevant PPG or by the DJI. In these cases, the PPG or the DJI in question issues advice to the relevant Minister of Justice. The DJI also has the task of determining in which correctional institution in the

European part of the Netherlands a detainee will be placed if transfer to that institution is at issue. As noted above, the policy officers/advisors are employed at the PG's and the DJI, who specifically deal with these tasks. The Council received predominantly positive signals from chain partners about the manner in which the policy officers and advisors referred to carry out their ORD tasks.

As indicated earlier, the Council did not conduct a file review and was therefore unable to obtain a picture of the completeness of the ORD files.

During the interviews, it was noted that in general, the procedure is going well. However, the PPG in Curaçao reported that at times it takes a long time before the DJI decides on an ORD3 request, in cases where the European part of the Netherlands is the requested country. ORD3 does not contain a time limit within which the requested country must decide on a request.

By way of illustration, the PPG in Curaçao sent the Council several ministerial decisions taken by the Minister for Legal Protection of the Netherlands. In one of those cases, the request was denied because it concerned a TBS case. The minister referred to took a decision 7 months after the Minister of Justice of Curaçao presented the case to him. In another case, the Minister for Legal Protection rejected the request, because the person concerned did not meet the condition of three years' main residence. In that case, it took said minister 5 months to reach a decision. In a case in which the minister referred to approved the ORD3 request, it took him 7 months to reach that decision. This PPG has monthly meetings with the DJI; during those meetings, the current cases of each country are discussed.

#### *Assessment*

On the whole, the Council did not encounter any problems with the procedure as such in the requested countries. The offices of both Solicitors General and the DJI are equipped in terms of personnel to handle ORD cases.

The Council is unable to comment on the completeness of the ORD files, because a file review was not possible.

The study revealed that the procedure in the Netherlands, as a requested country, sometimes takes a long time. Unlike for the 'requesting country', ORD3 does not contain a decision time-limit for the requested country. In view of the progress of the procedure, the Council is of the opinion, that it would be good to include a decision time limit in the mutual arrangement for the requested country as well.

#### *Recommendation*

- Include in ORD3 a time-limit within which the requested country must decide on an ORD3 request.

#### **5.6.10 Approval and rejection of request (requested country)**

If the Minister of Justice of the requested country decides that the request cannot be granted on one or more of the grounds for rejection of ORD3, he must notify the Minister of Justice of the requesting country and the detainee in question in writing, giving reasons. Such a decision should be subject to judicial review.
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#### *Findings*

In a general sense, the PPG in Curaçao noted in response to the questionnaire that the requested country does not state the reason for rejection or approval in a sufficiently substantiated and reasoned manner.

By way of example, the Council received from the PPG in Curaçao 4 decisions taken by the Netherlands on ORD3 requests. In the 2 rejections, the grounds are clearly mentioned. In one case, the Minister for Legal Protection rejected the application because it concerned a TBS measure, which does not fall under ORD3. According to said minister, in the case of the other rejection, the condition of having three years main residence in the Netherlands was not met. Both allocations contain a brief explanation. In one of these two cases, the Minister for Legal Protection granted the request because allegedly there was 'permanent residence in the Netherlands'. In the case of the other allocation, the Minister states that the person concerned was born in the Netherlands, had a main residence of longer duration in the Netherlands and has numerous ties with the Netherlands.

The PPG in Curaçao made mention of problems in the assessment of ORD3 requests by the Netherlands. In one of the aforementioned cases in which a request was granted, the Minister for Legal Protection incorrectly referred to 'permanent residence in the Netherlands', according to this PPG. According to the PPG, this was not at all the case.

The Council does not have any indication that the authorities of the requested countries do not properly inform the Ministers of Justice of the requesting countries and the detainees concerned of their decision.

With regard to the possibility of lodging an appeal against a rejection by the Minister of Justice of the requested country, the Council refers to the findings of paragraph 2.5 on the rejection of an ORD3 request by the country where the detainee is locked up (the requesting country).

#### *Assessment*

Based on the sample decisions received, the Council assumes for the time being that the requested countries will provide adequate justification for any negative decision on an ORD3 request. In doing so, the Council observes that, in the case of an allocation, a brief substantiation will suffice.

Needless to say, the Council also points out that it is not one of its tasks to express an opinion on the correctness of decisions in individual cases.

Furthermore, the Council assumes that the requested country will immediately communicate its decision on an ORD3 request to the requesting country and that the detainee concerned will also be informed in accordance with the provisions laid down in the Manual.

In that respect, the Council has not identified any challenges.

There is no specific appeal available against a negative decision of the requested country. As already noted in Chapter 2 of this report, the Council considers this to be a shortcoming. For the sake of brevity, the Council refers to its considerations in section 2.5. The related recommendation made by the Council in this report naturally also applies to negative decisions on ORD3 requests from the requested country. In this respect, it is important to realize that the detainee in question is the person most directly affected by such a decision.

#### **5.6.11 Transfer**

In case a request is granted, the requesting country will organise the transfer and, in principle, the transfer will take place within 30 days of the approval of the Minister of Justice of the requested Country. The detainee concerned is informed about the consequences of the transfer.
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#### *Findings*

Granting the request by the requested country has the effect that the requesting country is authorised to transfer enforcement. By transferring enforcement, the requested country acquires the right to enforce the unconditional prison sentence, including all relevant powers and responsibilities.

The PPG concerned informs the detainee concerned about the consequences of transfer of enforcement, for example, with regard to conditional release date (see section 5.6.3.). As far as the Council is aware, to date no use has been made of the suspension option due to lack of detention capacity, as referred to in Article 7, paragraph 3 of ORD3. The interviewees did not report any problems regarding the organisation of transfers by the requesting country.

#### *Assessment*

As was remarked above, the Council was unable to conduct a file review and was therefore unable to verify whether the transfers took place within 30 days. The Council has no indication that there was any delay following the granting of a request by the requested country or any problems with the organisation of the actual transfer.

As already noted under 5.6.3, the detainees concerned are informed by the authorities of the consequences of transfer in a timely manner.

#### **5.6.12 Transport of detainees**

The transport of the detainee to the other country should be done in compliance with the applicable rules for the transport of detainees and their safety during transport.

#### *Findings*

The transport of detainees from one island / country to another on the basis of ORD3 is not done in any other way than the transport on the basis of ORD1 and ORD2.

For the sake of brevity, the Council refers to the findings on this subject in Chapters 3 and 4. In general, ORD transports are not risky undertakings. Therefore, the transport escorts do not have to be of heavy caliber, according to the PPG in Curaçao.

During the interviews, no mention was made of any particular problems with transports in the context of transfers based on ORD3.

In the context of its response, the Public Prosecutor's Office in Aruba pointed out that in Aruba it is not the Public Prosecutor in charge of the execution, that has the lead in organizing the transport, but the correctional institution (the KIA).

#### *Assessment*

The Council did not find any problems regarding these ORD3 transports. For the sake of brevity, the Council refers to its comments about the transport in Chapter 2 (section 2.10) as well as in Chapters 3 and 4.

#### **5.6.13 Reimbursement of costs**

The countries involved are aware of the sharing of the costs associated with the application of ORD3.

#### *Findings*

It is stipulated in ORD3 that the costs of transporting the detainee concerned and of the escorting officials to the requested country (to which transfer of enforcement takes place) will be borne by the requesting country. The country to which the transfer takes place, and where the further enforcement of the prison sentence will take place, will bear the costs of that further enforcement.

The countries are aware of this cost sharing. During the interviews, no obstacles were mentioned in this regard.

#### *Assessment*

Based on what employees of the organisations involved reported about this aspect, the Council assumes that no problems arise with regard to the payment of costs in the actual application of ORD3.

## Chapter 6 ORD4

### 6.1 The arrangement and explanatory note

ORD4 regulates the cooperation between the Netherlands, Curaçao and Sint Maarten for the purpose of transporting detainees between Bonaire, Sint Eustatius and Saba. As indicated in the explanatory note to this ORD, the BES islands jointly belong to one jurisdiction. According to the explanatory note, ORD4 was agreed upon, because Sint Eustatius and Saba do not have a house of detention nor a prison and the transport of detainees between the BES islands necessarily touch base in the countries of Sint Maarten and Curaçao. The Ministers of Justice of these countries are responsible for the safety and well-being of the detainees when they are on the territory of the country concerned.

ORD4 primarily regulates the reimbursement of costs, the efforts of the Netherlands to carry out a transport in one day, the procedure and the responsibilities of the countries concerned. Under Article 2 of this mutual arrangement, the Netherlands must reimburse the costs arising from the mutual arrangement.

Article 3 stipulates that the public entities BES will strive to have the transport of a detainee take place in one day.

Article 4 describes the procedure and stipulates that the Minister of Justice of the country where the transport lands, is notified of an intended transport. The notification must be done by the OM BES, through the intervention of the PG in Curaçao, no less than five days prior to the intended transport. In addition, the explanatory note states that it is important that the countries involved have sufficient information to adequately fulfil the responsibilities arising from this mutual arrangement. The second paragraph of Article 4 stipulates that the notification must include, among others: the date of the transport, the organisation carrying out the transport and the number of escorts transporting the detainee, the containment documents, the detainee's details, and the level of security required for a possible place of detention. Furthermore, the third clause of the fourth paragraph of Article 4 stipulates that a copy with the aforementioned information must be immediately provided to the security organisations at the airports concerned, the KMar and the immigration authorities. According to article 5, first paragraph, restraining devices may be used during the transport of detainees and with a view to safety and undisturbed transport process.

### 6.2 Information sheet

No information sheet is prepared to inform detainees about ORD4.

### 6.3 Manual Description Assistance Procedure

The Manual does not contain any procedures for transporting detainees between the BES islands.

### 6.4 Interim review

In its report, the interim evaluation committee states that ORD4 is not or hardly known (see section 9.6.1 on the definition of the concept). The report also mentions that ORD4 is not applied in practice or is not applied according to the mutual arrangement. The Committee recommends maintaining ORD4 and examine to what extent adaptation of the mutual arrangement is necessary for applicability. In a memo dated 18 June 2019, the Committee describes the status regarding the implementation of its recommendations. In an appendix to this memo, the Committee mentions that the recommendation to maintain ORD4 and to

examine to what extent adaptation thereof is necessary for applicability is implemented. According to the committee, ORD4 is being used.

### 6.5 Making use of ORD4

The KPCN does not keep records of the number of transports of detainees carried out on an annual basis between the BES islands. Interviewees estimate that on an annual basis about 2 to 3 detainees are transferred from Sint Eustatius to Bonaire and 6 to 7 detainees from Saba to Bonaire.

### 6.6 ORD4 in practice

In the following description and assessment of the manner in which ORD4 is executed in practice, the Council follows the design of the assessment framework for this research.

#### 6.6.1 Concept definition

It is necessary that all the concepts used are sufficiently clear to the parties involved and are interpreted in the same way.
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#### *Findings*

During the research of the Council, the interviewees appeared to be aware of ORD4. Article 3 of ORD4 stipulates that the public entities Bonaire, Sint Eustatius and Saba, when applying this mutual arrangement, strive to have the transport of a detainee take place in one day. In practice, it appears that the public entities are not involved in the application of ORD4. The interviewees, including representatives of the aforementioned public entities themselves, do not foresee what role the public entities Bonaire, Sint Eustatius and Saba should play in this regard.

Article 4, paragraph 1, also contains a provision that is unclear, according to the interviewees of the PPG in Curaçao. The article stipulates the requirement that the OM BES - through the PG –notifies the Ministers of Justice of Curaçao and Sint Maarten, no less than five days prior to an intended transport. The interviewees of the PPG in Curaçao do not know why the period of 5 days is required and they are of the opinion that notification within this period is not feasible. The transport escorts of the KPCN indicate that the period of detention lasts ten days and that the detainee is only arraigned before the judge of instruction until about the eighth day of detention to assess the need for further detention. If the judge of instruction orders the pre-trial detention, its execution will commence on the eleventh day of detention. As of that day, the detainee must be locked up in a different regime, namely in a detention facility. It is therefore impossible to achieve the notification within a period of 5 days, according to the interviewees. The interviewees of the PPG in Curaçao are of the opinion that this time-period should be deleted from the ORD.

#### *Assessment*

The Council noted that, in practice, the public entities do not play a role in the implementation of ORD4. Neither Article 3 nor its explanatory note provides clarity about the role of the public entities. The Council is of the opinion that this aspect should be further elucidated or that this provision should be deleted. The Council considers the notification to the Minister concerned to be an important aspect since he is responsible for the safety and well-being of a detainee who is on his territory. Within this context, he bears ministerial responsibility. The Council is of the opinion that the Minister concerned should have prior knowledge of an intended transport passing through his country. The Council believes that the OM BES is able to comply with the stipulated deadline by informing the PPG in Curaçao

in advance of an intention to demand for pre-trial detention so that the Minister can be notified in time.

### *Recommendations*

- Reconsider the provision on the role of the public entities and adapt the arrangement if necessary.
- Always inform the PPG in Curaçao of an intended transport in a timely fashion.

### 6.6.2 Legal framework

Article 3 of the ECHR stipulates that no one may be subjected to inhuman or degrading treatment and punishment. According to Article 13, paragraph 1 of the Kingdom Act on the Police<sup>68</sup>, the police officer is authorised to use, among others, restraining devices in the lawful performance of his duties. According to Article 31, paragraph 1 of the BES Official Police Instructions, the officer may put handcuffs on a person who has been legally deprived of his freedom for the purpose of transport. According to the second paragraph, this measure may only be taken if the facts or circumstances reasonably require it with a view to the risk of escape, to the safety or the life of persons. According to Article 5, paragraph 2 of ORD4, the escorting officers may take all appropriate measures, including restraining devices, in order to guarantee the safety and the undisturbed transport process.

### *Findings*

The study shows that the KPCN transport escorts have special belt handcuffs. However, there is a difference in the use of the handcuffs between the transport escorts of the KPCN based in Bonaire, Sint Eustatius and Saba. It is stated that only one hand is handcuffed during the flight and that before the actual transport, a conversation is held with the detainee, warning the detainee that his other hand will be handcuffed if he misbehaves. Other interviewees state that the transport escorts assess whether the use of the handcuffs is necessary, but that the pilot must give permission if it appears that putting on the handcuffs is necessary. It is also stated that detainees are not handcuffed during the flight. No agreements have been made with the airlines about the possible use of handcuffs.

### *Assessment*

The Council is of the opinion that the escorts are authorised under the law to handcuff a detainee during a transport, subject to the statutory conditions. In view of the special nature of transport by air, the Council is of the opinion, that procedural arrangements should be made with the airlines on the possible use of handcuffs during the flight. The Council also holds the view, that transport procedures should be established which address the possible use of handcuffs. In the Council's view, establishing the transport procedure guarantees transparency in addition to the unambiguous use of handcuffs. Naturally, these procedures should be in accordance with current rules on the use of handcuffs (see section 2.10). Furthermore, the Council has no indications that during the transport of the detainees, actions are performed that are not in accordance with Article 3 of the ECHR.

### 6.6.3 (Provision of) Information

The detainees are informed of the rights and obligations arising from the mutual arrangement.

<sup>68</sup> Kingdom Act of 7 July 2010, regulating the establishment, organisation, authority and management of the police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba and the mutual cooperation between the police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba (Kingdom Act on the Police of Curaçao, Sint Maarten and Bonaire, Sint Eustatius and Saba).

### Findings

Detainees are not informed about the scope of this mutual arrangement and about its related rights – such as the right to family and family life (family visits) – and obligations. As mentioned before, there is no information sheet on ORD4 for detainees. Shortly before the start of the flight, the escorts hold a conversation with the detainee about his behaviour during the flight.

### Assessment

The Council is of the opinion that the detainees should be actively informed about the transport and that an information sheet should also be prepared on ORD4 in which the rights and obligations of the detainees are listed. According to the Council, the foregoing serves the same goal as the information sheets prepared for the other ORDs, namely provide clarity towards the detainees.

### Recommendation

- Prepare an information sheet for ORD4.

### 6.6.4 Applicability of ORD4

The countries involved draw up a policy about the way in which the transfer (the actual transport) of detainees takes place. This policy should be aimed at promoting transparency, uniformity and safety.

### Findings

As already mentioned, there is no policy document with procedures on the transport of detainees between the BES islands. Despite the lack of a transport policy, in practice, a fixed working method is maintained.

KPCN personnel is charged with transporting detainees between the BES islands. In the event there are serious safety risks, KPCN 'Special Assignments Group' can carry out a transport. Before the transport takes place, the Intelligence Security Bureau of the JICN analyses the risks with regard to the detainee in question. Based on this, the JICN establishes the necessary safety precautions such as the number of escorts to be deployed. The chiefs of basic police care in Sint Eustatius and Saba discuss the transport with the escorts involved and establish any safety precautions to be taken. The airline company reserves the rear seats on the aircraft for the detainee and escorts. As a rule, the KPCN deploys two (unarmed) transport escorts for each detainee during transport.

As for Sint Eustatius and Saba, in principle, KPCN employees of these islands transfer a detainee to Bonaire. The deployment of KPCN members of Sint Eustatius and Saba is a heavy burden on the tight police staffing of these islands. It takes 2 or 3 days for the deployed police officers to return to their respective stations. Therefore, it is also possible, that KPCN members based in Sint Eustatius and Saba have to call on their colleagues in Bonaire to pick up a detainee in Sint Maarten. If the detainee is picked up in Sint Maarten, the KPCN members based in Sint Eustatius or Saba bring the detainee to Sint Maarten to hand over the detainee there to their colleagues from Bonaire. In Sint Maarten, the Alpha-Team<sup>69</sup> of the KPSM awaits the escorts and the detainee and provides the necessary

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<sup>69</sup> The Alpha-team is a multidisciplinary team working at the airport of Sint Maarten. The cooperation consists of the following agencies: the KPSM, Immigration Service, the KMar and customs.

surveillance. In Curaçao, this is done by the border control and the Hato team (KPC employees). The documents concerning the confinement (transport) of the detainee are presented to the immigration authorities of the countries where the stopover is made.

In Bonaire, the employees of the JICN security department will pick up the detainee at the airport in Bonaire. Both the KMar and the JICN employees receive copies of the containment documents. It also happens that the transfer takes place at the JICN. The KMar employees stationed at the airport, bring the detainee along with the escorts to the JICN. The containment documents are then handed to the JICN.

### *Assessment*

The Council is pleased to note that the escorts follow a fixed procedure to guarantee safety. The Council is of the opinion that this procedure sufficiently guarantees safety. Nevertheless, according to the Council, the authorities concerned should document these procedures. A disadvantage of not documenting the procedures is that there is no uniformity on the manner in which the transport is carried out. An example of this is the use of handcuffs. The Council is therefore of the opinion that it makes sense to document the procedures. In this respect, the Council refers to its considerations in section 2.10 and to its recommendation on this point.

### **6.6.5 Reimbursement of costs**

Article 2 of ORD4 stipulates that the Netherlands must reimburse the costs. In this context, it is necessary to establish joint procedures on the method of financing.

### *Findings*

In practice, it appears that the OM BES pays the costs of air travel of the detainees and escorts as well as the accommodation expenses in Bonaire of the escorts from Saba or Sint Eustatius. There is no procedure for the reimbursement of these costs nor for the costs incurred in the event that a detainee has to overnight in Curaçao or in Sint Maarten.

In practice, it appears that it is not clear which organization should arrange or pay for the return travel of Statian and Saban detainees who are released in Bonaire. Opinions on this matter are divided. At times, these detainees stay in Bonaire for a few days before their return travel is arranged. In most cases, in the end, the BES Public Prosecution Office takes the initiative and provides for payment of the costs.

### *Assessment*

In the Council's opinion, the fact that a detainee is released from the JICN without a ticket or money to travel back to Sint Eustatius or Saba is unacceptable. According to the Council, the fact that the partners in the judicial chain do not know which organisation should pay for the return travel of the (former) detainee in question is remarkable. In the Council's view, clarity is needed in this matter. In any case, the authorities are obliged to properly arrange the return of the detainee to his 'home island'.

### *Recommendation*

- Document the procedure for the (reimbursement of the costs of the) outward and return travel.

### **6.6.6 Transport of detainees**

According to Article 3 of ORD4, the public entities Bonaire, Sint Eustatius and Saba must strive to have the transport of a detainee take place in one day, so that an overnight stay in

Curaçao or Sint Maarten is not necessary. In order to achieve this, an official or a department of the public entities should be in charge of planning the transport.

### *Findings*

As already mentioned in section 6.6.1, the interviewees do not see what role the public entities should have in ORD4. In practice, the public entities do not assume any task in the implementation of ORD4 neither do they receive any information about an intended transport of a detainee. Neither do interviewees consider it necessary for the public entities to be involved. Interviewees fail to see why ORD4 stipulates that the public entities are responsible to have the transport take place in one day.

It is the KPCN members who are stationed in Sint Eustatius and Saba, who plan an intended transport to Bonaire and ensure that it takes place in one day. In Bonaire, the JICN case manager involved takes care of the organization of the return travel to the Windward Islands. In special cases, a charter flight is arranged to transport a detainee directly to the island concerned. According to an interviewee, it happened once that a detainee had to overnight in Sint Maarten.

### *Assessment*

The research has shown that the KPCN makes every effort to ensure that the transport takes place in one day. In practice, this is almost always possible. The Council did not notice any obstacles in this process and is of the opinion, that the transport complies with Article 3 of ORD4. See section 6.6.1 for the assessment of the role of the public entities and the corresponding recommendation of the Council.

### **6.6.7 Notification procedure**

The relevant information on the detainee in the context of transport between Bonaire, Sint Eustatius and Saba is made available to the country of stopover.

### *Findings*

In section 6.6.1 it is already indicated that pursuant to Article 4 of ORD4, the BES Public Prosecution Office, by the intervention of the PPG in Curaçao, must notify the Minister of Justice of the country of transit of the transport no less than 5 days prior to an intended transport. In practice, it appears that the OM BES seldom informs the PPG in Curaçao about an intended transport. As a result, the justice ministers of the countries concerned are not notified of the transport. KPCN employees are of the opinion that the relevant ministers of justice should grant prior permission for the transport.

Notification and communication about an intended transport take place at the operational level. The staff of the border control at the airport of Curaçao (including the Hato team in Curaçao), the Alpha team at the airport of Sint Maarten and the KMar at the airport in Bonaire are notified in advance about the date, the arrival time and the required security level. If a detainee has to be transferred from Sint Eustatius and Saba to Bonaire, the escorts of Sint Eustatius and Saba communicate directly with the police in Sint Maarten to arrange security and possibly the overnight stay or medical assistance. The communication with the relevant officials in Curaçao goes through the KPCN unit in Bonaire.

In Bonaire, the JICN case manager is in charge of collecting the relevant documents for the transport and transfer (containment documents) of the detainee. In Sint Eustatius and Saba, the chiefs of basic police care are responsible for this. The escorts take these documents

and information with them during the trip and present them to their colleagues from Curaçao and Sint Maarten.

The escorts have the contact details of the officials of the correctional institutions in Sint Maarten and Curaçao and of the police in Curaçao in case an overnight stay or medical assistance needs to be arranged. The correctional institutions in Curaçao and the KPSM are prepared to provide containment capacity if a detainee needs to stay overnight. If a charter flight is rented, the notification to Sint Maarten and Curaçao is not necessary because these flights are operated without a stopover.

#### *Assessment*

The fact that the OM BES does not notify the PPG in Curaçao of an intended ORD4 transport, implies that the Ministers of Justice of Sint Maarten and Curaçao are not informed about this either. After all, the notifications go through the PPG in Curaçao. In the Council's view, the fact that these ministers are not notified is a shortcoming. The Council considers it important that notifications are always given, seeing that incidents can occur during the stopover, such as situations in which force has to be used. The Minister of Justice of the country in question then bears the responsibility for this. In the opinion of the Council, the notification can easily be done by sending an e-mail message to the PPG in Curaçao. The assertion by some escorts, KPCN employees, that the Ministers of Justice in question should grant prior permission on the basis of the mutual arrangement is attributed to a wrong interpretation of ORD4, according to the Council. Neither the mutual arrangement nor the explanatory note makes mention of this.

#### *Recommendation*

Make sure that the Ministers of Justice concerned are always notified through the PPG in Curaçao of any intended transport that is carried out via Sint Maarten and Curaçao.

## 7 Closing Remarks

The central question of this evaluation was whether the four ORDs fulfil the purpose for which they were established.<sup>70</sup> As a result of its evaluation, the Council can answer this question, to a large extent, in the affirmative for the majority of the ORDs. In certain areas - and particularly, in the execution of the arrangements, there is room for improvement.

The evaluation conducted by the Council has shown that the organisations involved are in general satisfied with these arrangements and that the arrangements meet a need. The Council agrees with this. The countries Aruba, Curaçao, Sint Maarten and the Caribbean part of the Netherlands each have only one correctional institution. For that reason alone, it is beneficial that arrangements were made for transfers to be possible, and under what conditions they could take place, in cases such as capacity shortages or safety issues.

And sometimes there are more medical possibilities in another country of the Kingdom than in the country where someone is in custody. ORD1 and ORD2 can provide a temporary solution in such situations, and in practice they also offer them. This is therefore consistent with the notion that the countries 'provide aid and assistance to each other'.

Especially for the purposes of rehabilitation, ORD3 provides for permanent transfer to another country of the execution of a prison sentence. Because preparing for the return in the society is an essential element of the execution of prison sentences, this is also an important arrangement.

However, the Council is of the opinion that more attention should be paid to the interests of the detainees in terms of provision of information and legal protection.

The Council concluded that the countries are cooperating well with each other when applying these three ORDs, with especially important roles for both offices of the PG and, also the DJI as far as ORD2 and ORD3 are concerned. It is good to see that the employees of these organizations are able to cooperate with each other and that the countries actually help each other, whenever this is necessary. Simplification of the procedures in a few areas will benefit the feasibility of these arrangements.

Nevertheless, the Council holds the view that in principle, these three arrangements fulfil the purpose for which they were made.

ORD4 is aimed at properly managing the transportation of detainees between Bonaire, Sint Eustatius and Saba. The transports in themselves proceed in a proper manner, but some of the operations prescribed in this ORD are disregarded in practice. The Council is advocating a better application of the operations referred to, because they are of utmost importance, in particular, giving prior notification to the Ministers of Justice of Curaçao and Sint Maarten about a transport of a detainee.

Another bottleneck is the reimbursement of costs, in particular, those of the return trip. The Council notes that, ORD4 itself is clear, but it is not being executed correctly. Hence, it cannot be said that this ORD fulfils the purpose for which it was made.

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<sup>70</sup> The Council does, however, make a note of this. Due to circumstances, the research did not extend to file research. Nor were detainees asked questions about their experiences with the ORDs

The Council noted that a number of recommendations of the interim evaluation committee have already resulted in improvements, in particular in the areas of adjustments to the Manual, provision of information, communication and cooperation. However, the evaluation of the Council clearly shows that there is still room for improvement in these areas as well.

In this report, the Council makes a total of 39 recommendations. Some of them are related to the arrangements themselves while others only deal with the execution. According to the Council, a follow-up to these recommendations will contribute to arrangements that can be better executed, on the one hand, and on the other hand, to a better actual execution. This will benefit both the countries involved as well as the detainees concerned.

## Appendix 1 Full texts of four mutual arrangements on detention and transportation

### **ORD1 and explanatory notes**

Mutual arrangement as referred to in Article 38, first paragraph of the Charter for the Kingdom of the Netherlands, regulating the cooperation between the Netherlands, Aruba, Curaçao and Sint Maarten in the area of the mutual provision of detention capacity

### **ORD2 and explanatory notes**

Mutual arrangement as referred to in Article 38, first paragraph of the Charter for the Kingdom of the Netherlands regulating the cooperation between the Netherlands, Aruba, Curaçao and Sint Maarten in the area of the mutual provision of detention capacity on medical grounds or related to urgent safety reasons

### **ORD3 and explanatory notes**

Mutual arrangement as referred to in Article 38, first paragraph of the Charter for the Kingdom of the Netherlands, regulating the cooperation between Aruba, Curaçao, Sint Maarten and the Netherlands in the area of the transfer of persons who have been legally deprived of their freedom on the basis of a sentence of imprisonment

### **ORD4 and explanatory notes**

Mutual arrangement as referred to in Article 38, first paragraph of the Charter for the Kingdom of the Netherlands regulating the cooperation between the Netherlands, Curaçao and Sint Maarten for the purpose of transporting detainees between Bonaire, Sint Eustatius and Saba

## Appendix 2 Overview organisations of which representatives were interviewed

### **The Netherlands**

Ministry of Justice and Security (Department of Correctional Institutions)  
BES Public Prosecutor's Office  
Correctional Institution Caribbean Netherlands  
Police Force Caribbean Netherlands  
Foundation Rehabilitation Caribbean Netherlands  
Public entity Bonaire  
Public entity Sint Eustatius  
Public entity Saba  
Lawyers (Bonaire)

### **Curaçao**

Ministry of Justice  
Public Prosecutor's Office/Office of the Solicitor General  
Curacao Detention and Correction Center  
Police Force Curaçao  
Curacao Probation Office  
Lawyers

### **Sint Maarten**

Ministry of Justice  
Public Prosecutor's Office  
Point Blanche prison  
Police Force Sint Maarten  
Lawyers

### **Aruba**

Public Prosecutor's Office/Office of the Solicitor General  
Correctional Institution Aruba  
Police Force Aruba  
Aruba Probation Office

## **Colophon**

Law Enforcement Council

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June 2022