

## Improving Detention Conditions in the EU- *Aranyosi's* Contribution

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### I. Introduction

In a globalising world, and increasing cross-border crime, it has proven imperative for the EU to engage in enhanced judicial cooperation in criminal justice matters.<sup>2</sup> This has undeniably caused an increase in prosecutorial efficiency, but at the expense of individual rights. The main principle governing EU cooperation in criminal justice matters, as proposed at the 1999 Tampere European Council, is mutual recognition.<sup>3</sup> Premised on mutual trust,<sup>4</sup> mutual recognition requires Member States to fully recognise judicial decisions taken across the EU.<sup>5</sup> This cooperation takes place within the so-called Area of Freedom, Security and Justice (AFSJ), the EU's version of a judicial space launched in 1999 with the entry into force of the Treaty of Amsterdam. Mutual trust in turn is grounded on the presumption that fundamental rights are respected equally throughout the EU. However, it has by now been convincingly shown that presumption is flawed, *i.e.* lacks an empirical basis: the provision of fundamental rights differs significantly across the EU and falls short of minimum standards.<sup>6</sup>

While in the first mutual recognition instruments, potential fundamental rights violations in the requesting state were not explicitly listed as a valid refusal ground, most notably in the European Arrest Warrant (EAW),<sup>7</sup> currently the tide is changing and such a refusal ground is becoming more accepted. A good example of this has been the inclusion of such a refusal ground in the European Investigation Order (EIO),<sup>8</sup> as has also been observed by De Capitani and Peers:

'To qualify as "rebuttable" in a legislative text the presumption of compliance by another Member State with EU law and fundamental rights is an important progress in an European Union which since the Tampere programme has considered mutual recognition to be the cornerstone of the judicial cooperation in criminal matters and which until now has usually

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<sup>2</sup> See e.g. A. Klip, *European Criminal Law: An Integrative Approach* (Antwerp, 2016, 3<sup>rd</sup> ed.); S. Peers, *EU Justice and Home Affairs Law. Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford, 2016a, 4<sup>th</sup> ed.); V. Mitsilegas, *EU Criminal Law* (Oxford, 2009).

<sup>3</sup> See C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford, 2013).

<sup>4</sup> On mutual trust in EU criminal law see e.g. A. Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character', 9(1) *European Journal of Legal Studies* (2016), 211-249, <<http://www.ejls.eu/22/232UK.htm>>; G. de Kerchove and A. Weyembergh (eds.), *Mutual Trust in the European Criminal Area* (Brussels, 2005).

<sup>5</sup> See e.g. Peers S., 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?', 41(1) *Common Market Law Review* (2004), 5-36.

<sup>6</sup> See e.g. G. Vernimmen-van Tiggelen, L. Surano and A. Weyembergh (eds.), *The Future of Mutual Recognition in Criminal Matters in the European Union* (Brussels, 2009).

<sup>7</sup> Council Framework Decision 2002/584/JHA, (2002) OJ L190/1; from a large body of literature see e.g. L. Klimek, *European Arrest Warrant* (Dordrecht, 2014).

<sup>8</sup> Directive 2014/41/EU, (2014) OJ L130/1.

made only generic reference to protection of fundamental rights in mutual recognition instrument.<sup>9</sup>

More broadly, the EU has come to recognise that fundamental rights deficiencies present a serious barrier to further development of an effective body EU criminal law, and, more importantly, constitute a significant breach of the EU's very identity as an organisation built on respect for fundamental rights.<sup>10</sup> Such development had already long been called for in academic literature.<sup>11</sup> The best example of such progress has been the Roadmap on Criminal Procedural Rights,<sup>12</sup> a legislative program to strengthen the rights of suspected and accused persons, and a strong push to reverse the negative impact of mutual recognition on individual rights.<sup>13</sup> Moreover, the elevated status of the EU Charter of Fundamental Rights under the Lisbon Treaty (Article 6 TEU) has significantly contributed to improving fundamental rights in criminal justice.<sup>14</sup>

A prime example of a fundamental rights problem within the EU criminal law space are poor detention (or prison) conditions, often overcrowding. Such problems have become particularly pressing in times of economic austerity. The EU has made some effort to address these, but so far insufficient.<sup>15</sup> This has presented a serious human rights issue in the EU's AFSJ, in which Member States are required to recognise and execute judicial decisions without much room for questions on the basis of mutual recognition (and mutual trust). Insufficient prison conditions have presented a major barrier to a successful implementation of mutual recognition, in particular in the context of the EAW, as judicial authorities have been increasingly reluctant to extradite individuals to jurisdictions with such problems. The presumption of mutual trust, the foundation of mutual recognition, requires Member States to operate under the assumption that all jurisdictions within the EU are human rights compliant, and the Court of Justice of the European Union (CJEU) has long interpreted this presumption strictly, not allowing refusal grounds outside those listed in the EAW.<sup>16</sup> However, the first signs of a change came in *N.S.* in the context of the Common European

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<sup>9</sup> E. De Capitani and S. Peers, 'The European Investigation Order: A New Approach to Mutual Recognition in Criminal Matters', *EU Law Analysis* (2014), <<http://eulawanalysis.blogspot.be/2014/05/the-european-investigation-order-new.html>>.

<sup>10</sup> See Articles 2 and 6 TEU.

<sup>11</sup> See e.g. S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study- the European Arrest Warrant', 10(2) *European Law Journal* (2004), 200-217.

<sup>12</sup> Resolution of the Council of 30 November 2009, (2009) OJ C295/1; see also T. Spronken and D. de Vocht, 'EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step"', 37(2) *North Carolina Journal of International Law and Commercial Regulation* (2011), 436-488.

<sup>13</sup> See e.g. V. Mitsilegas, 'Legislating for Human Rights After Lisbon: The Transformative Effect of EU Measures on the Rights of the Individual in Criminal Procedure', in M. Fletcher, E. Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice* (London, 2017), 201-214.

<sup>14</sup> S. de Vries, U. Bernitz and S. Weatherhill (eds.), *The EU Charter of Fundamental Rights as a Binding Instrument* (Oxford, 2015); C. Franklin, 'The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon', 15(2) *Tilburg Law Review* (2010), 137-162.

<sup>15</sup> See D. Sayers, 'The EU's Common Rules on Detention: How Serious are Member States About Protecting Fundamental Rights?', *EU Law Analysis* (2014), <<http://eulawanalysis.blogspot.nl/2014/02/the-eus-common-rules-on-detention-how.html>>.

<sup>16</sup> See e.g. T. Ostrowski, 'The CJEU as a Defender of Mutual Trust', 6(2) *New Journal of European Criminal Law* (2015), 166-178.

Asylum System, a field of the AFSJ also governed by mutual recognition and mutual trust.<sup>17</sup> In this important judgment, the Court ‘made clear ... that ‘non-rebuttable trust’ is not allowed when this would jeopardize the protection of the fundamental rights of the individual’.<sup>18</sup> Post *N.S.*, one of the most anticipated questions in EU criminal law became whether it can be extended to the criminal law context, particularly in relation to prison conditions.

In April 2016, in *Aranyosi and Căldăraru*,<sup>19</sup> the moment finally came that the Court transferred that ruling to the criminal law sphere, and has allowed Member States to defer execution of a request for extradition if detention conditions in the requesting Member State are contrary to fundamental rights, in particular Article 4 of the EU Charter prohibiting inhuman or degrading treatment or punishment. This paper seeks to analyse that judgment and whether it can contribute to better prison conditions. But before our attention will turn to that case, first a few words about the problem that detention conditions pose in the EU context.

## II. Poor Detention Conditions and Prison Overcrowding

The urgency of ‘deficiencies in some prisons within the EU’ was highlighted by the 2011 Commission Green Paper devoted to detention conditions.<sup>20</sup> The idea of ‘strengthening mutual trust’ in this context is that a successful and effective cooperation on the basis of mutual recognition is undermined as human rights issues arise when sending a person to a Member State with substandard prison conditions.

Insufficient prison conditions often constitute of overcrowding, but also of violence, poor healthcare and lack of facilities. The European Court of Human Rights (ECtHR) has highlighted in numerous cases the deficiencies in European prisons, which may give rise to violations of the prohibition of torture and inhuman and degrading treatment, as guaranteed by Article 3 European Convention on Human Rights (ECHR).<sup>21</sup> Moreover, the European Committee for the Prevention of Torture (CPT) has issued numerous reports highlighting concerns with detention centres and police facilities in Greece, Hungary, Romania, Bulgaria, Slovakia and other EU Member States.<sup>22</sup> A recent CPT report has found ‘intolerable prison conditions’ in Belgium during a strike by prison staff.<sup>23</sup>

As a result, national courts have repeatedly refused surrender requests for EAW’s for reasons of unacceptable prison conditions. The English High Court of Justice for example refused extradition because of a systemic failure in Italy’s prison system,<sup>24</sup> and the Irish Supreme

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<sup>17</sup> Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, 21 December 2011; see e.g. V. Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’, 2(2) *Comparative Migration Studies* (2014), 181-202.

<sup>18</sup> E. Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’, 9(1) *Utrecht Law Review* (2013), 135-147.

<sup>19</sup> Joined Cases C-404/15 and C659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016.

<sup>20</sup> COM (2011) 327 final, at 11.

<sup>21</sup> See e.g. ECtHR 8 January 2013, *Torreggiani and others v. Italy*, No. 43517/09; ECtHR 16 July 2009, *Sulejmanovic v. Italy*, No. 22635/03; ECtHR 22 October 2010, *Orchowski v Poland*, No. 17885/04; ECtHR 20 January 2009, *Slawomir Musial v. Poland*, No. 28300/06; ECtHR 14 September 2010, *Affaire Florea v. Romania*, No. 37186/03; ECtHR 8 November 2012, *ZH v. Hungary*, No. 28973/11; and ECtHR 19 April 2001, *Peers v. Greece*, No. 28524/95.

<sup>22</sup> The official reports of the CPT can be found on their website <<http://www.cpt.coe.int/en/>>.

<sup>23</sup> See <<http://www.coe.int/en/web/cpt/-/intolerable-detention-conditions-in-certain-belgian-prisons-during-may-2016-strikes-says-council-of-europe-s-anti-torture-committee>>.

<sup>24</sup> See *Hayle Abdi Badre v Court of Florence* (2014) EWHC 614.

Court refused surrender to Poland also because of unacceptable prison conditions.<sup>25</sup> A Court in the Netherlands even suspended all extraditions to Hungary because of poor prison conditions pending preliminary questions raised by a German Court on the issue.<sup>26</sup>

The Commission has in one of its implementation reports on the EAW also acknowledged that the EAW ‘does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person’s fundamental rights arising from unacceptable detention conditions’.<sup>27</sup> This is rather inconsistent with the Commission’s earlier rigid stance towards human rights related grounds for refusal,<sup>28</sup> but it ‘indicates a change of strategy’ in favour of a more ‘expansive interpretation of grounds for refusal’,<sup>29</sup> and is a welcome development in light of the need for more emphasis on individual rights in EU criminal law cooperation. The Commission’s strong language furthermore underlines how pressing the issue is, it does not only threaten violating fundamental human rights, it also threatens the functioning of the EAW and the viability of interstate cooperation on the basis of mutual recognition. Moreover, in 2014, the Commission published a report strongly condemning the poor implementation of the EU’s ‘common rules’ on detention conditions:<sup>30</sup> at best eighteen of twenty-eight Member States have implemented any of the measures.<sup>31</sup>

It is by now well-documented that there are systemic deficiencies in a number of European prisons,<sup>32</sup> and large differences appear between Member States. For example, in 2015 the prison population in Belgium exceeded capacity by 27%, in Hungary by 29% and Italy by 6%, while in other countries prisons run below capacity, like in Denmark, the Netherlands and Germany.<sup>33</sup> Alternative non-detention measures have been proposed and taken by the EU, but these do not always lead to a decrease in prison populations.<sup>34</sup> This demonstrates the difficulties in addressing the issue from the EU level. Detention issues will ultimately have to be addressed at national level, either by improving conditions and/or capacity, for which

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<sup>25</sup> *MJELR v Rettinger* [2010] IESC 45 (23 July 2010).

<sup>26</sup> See <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Schending-mensenrechten-in-Hongaarse-gevangnissen.aspx>>.

<sup>27</sup> COM (2011) 175 final (‘third evaluation report’), at 7.

<sup>28</sup> COM (2005) 63 final (‘first evaluation report’).

<sup>29</sup> V. Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’, 31(1) *Yearbook of European Law* (2012), 319-372, at 326.

<sup>30</sup> These ‘common rules’ are formed by the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions, and on supervision measures as an alternative to provisional detention.

<sup>31</sup> COM (2014) 57 final; see also Fair Trials, <<https://www.fairtrials.org/failure-of-eu-member-states-to-implement-common-rules-on-detention/>>.

<sup>32</sup> See also the study ‘Prison Overcrowding and Alternatives to Detention’, carried out by the University of Ferrara *et al.*, <<http://www.prisonovercrowding.eu/en/about-the-project>>; and the Council of Europe’s Annual Penal Statistics, also known as the ‘SPACE programme’, that collects data on imprisonment and penal institutions throughout the Council of Europe, <<http://wp.unil.ch/space/>>.

<sup>33</sup> For the 2015 statistics see SPACE I 2015, <[http://wp.unil.ch/space/files/2017/03/SPACE-I-2015\\_Executive-Summary\\_E\\_1703014.pdf](http://wp.unil.ch/space/files/2017/03/SPACE-I-2015_Executive-Summary_E_1703014.pdf)>.

<sup>34</sup> A. Martufi, ‘Prison Overcrowding and Alternatives to Detention: A State of Art’, *University of Ferrara Working Paper* (2015), at 2, <<http://www.prisonovercrowding.eu/doc/Adriano%20Martufi%20-%20Prison%20overcrowding%20and%20alternatives%20to%20detention.%20A%20state%20of%20art.%20Working%20paper.pdf>>.

funds are needed that are often unavailable, or by bringing down the prison population, *e.g.* by decriminalising certain forms of behaviour, suspending sentences and longer probationary periods. However much these are national issues, guidance and direction from the EU could prove beneficial by bundling (financial) power and knowledge.

Several Member States have made such improvements, for example Italy went from 48% overcapacity in 2013 to 6% in 2015, and Cyprus even went from 40% overcapacity in 2012, to 3% below capacity in 2014. But it is clear that more is needed. Poor prison conditions and overcrowding are at the core of problems that ‘compromise the mutual trust necessary to underpin judicial cooperation in Europe’.<sup>35</sup> Inconsistent and unfair detention conditions undermine mutual trust, ‘and the EU needs to address this’ in order to enhance mutual trust and fairness in EU criminal justice cooperation.<sup>36</sup>

### **III. *Aranyosi and Căldăraru*- A Landmark Ruling for Fundamental Rights and Mutual Trust**

As briefly mentioned above, following the judgment in *N.S.*, a case on interstate cooperation in the field of asylum law in which the Court held that the transfer of asylum seekers is precluded if there are systematic deficiencies in reception conditions, *i.e.* humiliating and degrading detention conditions,<sup>37</sup> the question as to whether it should apply to the other AFSJ fields, like the EAW, came up shortly after. Peers unequivocally found that ‘logically, the judgment should apply by analogy to other areas of Justice and Home Affairs law’,<sup>38</sup> and Mitsilegas stated that *N.S.* ‘signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law.’<sup>39</sup> On a similar note, Bay Larsen noted in relation to a ECtHR case on civil law cooperation regarding child custody in which the trust presumption was also rebutted,<sup>40</sup> that ‘[t]here seems to be no particular reason why such a jurisprudence should be limited to mutual recognition in one specific part of the [AFSJ] ... and should not affect mutual recognition in another part of that area (such as penal law co-operation)’.<sup>41</sup> But, in the EAW cases directly following on *N.S.*, most notably in *Radu* and *Melloni*,<sup>42</sup> the primacy of the effectiveness of mutual recognition and the limited options for refusal remained the primary considerations for the Court, and it took several years before the Court applied *N.S.* to the penal area.

In the ‘eagerly awaited decision’<sup>43</sup> *Aranyosi and Căldăraru*,<sup>44</sup> the Court ruled that the execution of a EAW must be deferred (‘postponed’) if there is a real risk of inhuman or

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<sup>35</sup> *Ibid.*

<sup>36</sup> Sayers (2014).

<sup>37</sup> See *e.g.* M. Den Heijer, ‘Case Note *N.S.* and *M.E.*’, 49(5) *Common Market Law Review* (2012), 1735-1753.

<sup>38</sup> His comment was in response to the Advocate General’s Opinion, which the Court followed. See S. Peers, ‘Court of Justice: The NS and ME Opinions - The Death of “Mutual Trust”?’, *Statewatch Analysis*, <<http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf>>.

<sup>39</sup> Mitsilegas (2012), at 358.

<sup>40</sup> ECtHR 12 July 2011, *Šneerson and Kampanella v Italy*, No. 14737/09.

<sup>41</sup> L. Bay Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’, in Cardonnel P., Rosas A. and Wahl N. (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing, Oxford, 2012), 139-152, at 152.

<sup>42</sup> Case C-396/11, *Ciprian Vasile Radu*, 29 January 2013; Case C-399/11, *Stefano Melloni*, 26 February 2013.

<sup>43</sup> R. Niblock, ‘Mutual Recognition, Mutual Trust? Detention Conditions and Deferring an EAW’, 7(2) *New Journal of European Criminal Law* (2016), 250-251, at 250.

<sup>44</sup> Joined Cases C404/15 and C659/15 PPU, *Aranyosi and Căldăraru*, 5 April 2016.

degrading treatment because of detention conditions in the requesting Member State.<sup>45</sup> The Court stayed short of a general refusal ground, but favouring human rights over the efficient operation of mutual recognition for the first time is a watershed moment in the Court's jurisprudence on criminal justice matters. It cannot have come as a surprise that the first such case has been in relation to prison conditions.

As to the facts and legal background of the case,<sup>46</sup> Germany received two requests for surrender: regarding Aranyosi (a Hungarian national residing in Germany), two EAW's had been issued for prosecution purposes by Hungary for two counts of burglary; regarding Căldăraru (a Romanian national whose case was joined), a EAW had been issued seeking the execution of a prison sentence of one year and eight months for driving without a licence. Both men were found and apprehended in Germany and did not consent to their surrender. The ECtHR had found earlier that both Hungary and Romania had been in violation of Article 3 ECHR (prohibition of torture and inhumane or degrading treatment) because of prison overcrowding.<sup>47</sup> The Higher Regional Court of Bremen therefore referred two preliminary questions to the Court in Luxembourg.<sup>48</sup> The first question inquired whether Article 1(3) EAW- stating that the EAW shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU- could be interpreted as requiring refusal of the execution of a EAW in case there is convincing evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular Article 4 of the EU Charter, or that in such cases the executing authority must make the surrender conditional upon assurances that detention conditions are sufficiently safeguarded. The second question inquires whether Articles 5 and 6(1) EAW are to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?

Advocate General Bot in his opinion rejected such an interpretation of Article 1(3) EAW as it would be contrary to the EAW scheme and its exhaustive list of refusal grounds.<sup>49</sup> He explained his position by referring to the importance of mutual recognition and mutual trust, and that allowing refusal on fundamental rights grounds would substantially undermine mutual trust between Member States.<sup>50</sup>

The Court however departed from the Advocate General and ruled in favour of human rights.<sup>51</sup> The Grand Chamber, as per usual, first reiterated the fundamental importance of the

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<sup>45</sup> For analysis see also E. Bribosia and A. Weyembergh, 'Arrêt «Aranyosi et Caldăraru»: imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale', 6 *Journal de droit européen* (2016), 25-27; S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant', 24(2/3) *European Journal of Crime, Criminal Law and Criminal Justice* (2016), 197-219.

<sup>46</sup> For more detail see *Aranyosi and Căldăraru*, paras. 28-63.

<sup>47</sup> See e.g. ECtHR 10 June 2014, *Vociu v Romania*, No. 22015/10; and ECtHR 10 June 2015, *Varga and Others v Hungary*, Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.

<sup>48</sup> *Aranyosi and Căldăraru*, paras. 46 and 63; on preliminary rulings see Article 267 TFEU.

<sup>49</sup> Opinion of Advocate General Bot in Joined Cases C404/15 and C659/15, *Aranyosi and Căldăraru*, delivered on 3 March 2016, paras. 78-93; for an analysis of the Opinion see Gáspár-Szilágyi (2016), at 201-206.

<sup>50</sup> *Ibid.*, paras. 106-122.

<sup>51</sup> It is noteworthy that the positions of the Advocate General and the Court are exactly the opposite from *Radu*, where Advocate General Sharpston opined in favour of a human rights refusal ground, and the Court did not follow.

principles of mutual recognition and mutual trust for building an area without internal borders and submitted that ‘mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter’ is the foundation of mutual recognition.<sup>52</sup> As a consequence, refusal of a request for a EAW can only be based on the grounds set out in Articles 3 and 4 EAW.<sup>53</sup> The Court further referred to Opinion 2/13 in which it had held that limitations to the principles of mutual recognition and mutual trust can only be made ‘in exceptional circumstances’, and to Article 1(3) EAW stating that the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights.<sup>54</sup> It proceeds to set out that it follows from these findings that if the ‘judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State’, in particular referring to Article 4 EU Charter, ‘that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant’.<sup>55</sup> The Court develops a two-tier test to this end. Firstly, it is required that ‘the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State’ and that any deficiencies found ‘may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention’.<sup>56</sup> The Court furthermore underlines that Article 3 ECHR and relevant case law impose a positive obligation ‘to ensure that any prisoner is detained in conditions which guarantee respect for human dignity’.<sup>57</sup> But, if an executing judicial authority establishes a risk on the basis of general detention conditions, this in itself is not sufficient to refuse execution of the EAW.<sup>58</sup> This leads to the second step, namely the executing authority has to make ‘a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State’.<sup>59</sup> In order to diligently make this assessment, the executing authority must request, as a matter of urgency and in accordance with Article 15(2) EAW, all additional information necessary to establish the conditions in which the person will be detained. The executing authority is allowed to set a deadline for the receipt of the information.<sup>60</sup> If then, the executing authority is convinced of the existence of a real risk of inhuman or degrading treatment, the execution of the warrant must be *postponed*, but not abandoned.<sup>61</sup> A further decision that has to be made then by the executing authority is whether the person wanted will remain in detention (in accordance with Article 6 EU Charter and the principle of

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<sup>52</sup> *Aranyosi and Căldăraru*, paras. 77-78.

<sup>53</sup> *Ibid.*, paras. 80-81.

<sup>54</sup> *Ibid.*, paras. 82-83.

<sup>55</sup> *Ibid.*, para. 88.

<sup>56</sup> *Ibid.*, para. 89.

<sup>57</sup> *Ibid.*, paras. 89-90.

<sup>58</sup> *Aranyosi and Căldăraru*, para. 91.

<sup>59</sup> *Ibid.*, paras. 92-94.

<sup>60</sup> *Ibid.*, paras. 95-97.

<sup>61</sup> *Ibid.*, para. 98; furthermore: ‘where the executing authority decides on such a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) of the Framework Decision, giving the reasons for the delay’, para. 99.

proportionality).<sup>62</sup> In case the requested information does not warrant the conclusion that a real risk exists that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State, it must adopt, within the timeframe as set out in the EAW, its decision on execution of the request.<sup>63</sup>

#### **IV. *Aranyosi and Căldăraru*- A Step in the Right Direction, and an Incentive for More?**

The Court has thus for the first time allowed deferral of a EAW on fundamental rights grounds, and thereby also for the first time favoured safeguarding individual rights over the effectiveness of mutual recognition and mutual trust in the criminal law sphere. It is hard to underestimate the significance of this judgment for the future development of the AFSJ. It has nevertheless raised a number of issues.<sup>64</sup>

The first issue relates to the exact effect of postponement. The Court has carefully avoided to create a new refusal ground and opted for mandatory postponement (or deferral) instead, but has done so on rather ambiguous terms. Following a postponement, execution of the warrant ‘cannot be abandoned’.<sup>65</sup> At the same time, the last paragraph of the judgment states that ‘[i]f the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end’.<sup>66</sup> It is hard to see how systemic deficiencies in detention conditions will be improved overnight, hence it is not likely that this can be remedied within the time limits set out by the EAW.<sup>67</sup> The postponement might therefore ‘easily amount to a *de facto* ground of refusal to surrender the requested person’.<sup>68</sup>

One could get the impression that the Court has intentionally inserted a degree of ambiguity into its decision. As creating trust is a process, the Court might want to see first whether Member States can resolve such issues with minimum guidance by the Court, and in the process establish better relations and trust.

A second issue is whether this newly created ground for postponement applies only in relation to detention conditions, or do other human rights infringements also warrant postponement? The right at stake here (Article 3 ECHR and Article 4 EU Charter) is absolute and ‘is closely linked to respect for human dignity’.<sup>69</sup> Like in previous cases (*e.g. Radu*), the Court has shown a preference for answering the questions referred to it narrowly. The Court explicitly refers to the right not to be subjected to inhuman or degrading treatment, and not to any other rights. It is therefore likely that for now the ground for postponement only applies in relation to that specific right. Future cases will have to show whether this will be extended to other fundamental rights, most notably to rights that do not have an absolute character, such as for example the right to a fair trial. And what about the pressing issue of excessive pre-trial detention? There are still many more fundamental rights related issues in the EAW

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<sup>62</sup> *Ibid.*, paras. 100-102.

<sup>63</sup> *Ibid.*, para. 103.

<sup>64</sup> See also *Bribosia and Weyembergh* (2016), at 27.

<sup>65</sup> *Aranyosi and Căldăraru*, para. 98.

<sup>66</sup> *Ibid.*, para. 104.

<sup>67</sup> 10 days in case the requested person consents, 60 days (with a possible 30 day extension) in other cases, Article 17 EAW.

<sup>68</sup> *Gáspár-Szilágyi* (2016), at 216.

<sup>69</sup> *Aranyosi and Căldăraru*, para. 85.

context, but the recent series of ‘rulings suggest a significant change of direction ... and may have opened up the door to addressing others.’<sup>70</sup>

A further issue raised by the case relates to evidentiary requirements. As set out in the above, the existence of systemic or general deficiencies with respect to detention conditions is not a sufficient ground for deferral, in addition there must be substantial grounds to believe that the individual concerned will be exposed to a real risk of inhuman or degrading treatment. But how to assess what is going on in another Member State’s prisons? This issue is so pressing that the German court has referred the case back once more to the CJEU for further clarification. The answer by the Court in the so-called *Aranyosi-II* is therefore eagerly awaited.

As to the source of evidence, regarding the first step (showing systemic deficiencies) the CJEU mentions information by national, regional or international public authorities, but is silent on private (NGO’s) organisations. This should be seen in relation to its emphasis on ‘objective, reliable, specific and properly’ updated information. This is a different approach than that taken by the ECtHR, which for example allows reports by NGO’s on conditions in asylum centres. Regarding the second step (showing whether there is an individual risk), for which more precise information is needed, the Court still favours information by public authorities, but seems more open to other sources of information.<sup>71</sup>

It is furthermore not yet crystallised on whom the burden of proof rests. The burden seems shared between the individual concerned, the executing and the requesting authority. The requested individual must first raise the issue of deficiencies in detention conditions in the requesting state before the executing authorities. The burden then shifts to the executing authority, which must examine whether such deficiencies exist on the basis of objective information. If this condition is satisfied, it will have to request the issuing authority for further information in order to assess whether there is a ‘real risk’ for the individual concerned. At this point the burden shifts once more to the issuing authority, which has to comply with the request for information, within the time limits set. The process to establish the state of detention conditions and the specific risks is ultimately an interplay between all parties involved. For large parts, the Court has set up a system in which dialogue between judicial authorities is stimulated to come to a solution. From the viewpoint of *creating* mutual trust, rather than *forcing* it upon cooperating judicial authorities, dialogue is a preferable option.

A concern with the rather high threshold required is that because a systemic or generalised deficiency alone does not warrant a refusal, a two-tier system could come into being. As long as issuing authorities show that the individual subject to a EAW will not be detained in an overcrowded facility, general or systematic deficiencies will not have to be addressed. More practically, Member States could designate ‘good’ facilities for EAW cases, leaving the problems for the bulk of prisoners in place. This would be highly undesirable in light of safeguarding fundamental rights equally throughout the EU. Moreover, postponing a decision

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<sup>70</sup> S. Peers, ‘Human Rights and the European Arrest Warrant: Has the ECJ Turned from Poacher to Gamekeeper?’, *EU Law Analysis* (2016), <<http://eulawanalysis.blogspot.be/2016/11/human-rights-and-european-arrest.html>>.

<sup>71</sup> The executing authority must postpone the execution of a EAW if a real risk of inhuman or degrading treatment exists based on the information provided by the issuing authority or ‘any other information that may be available to the executing judicial authority’, *Aranyosi and Căldăraru*, para. 98.

does not directly improve prison conditions, creating the risk that those guilty of crimes will move to such Member States in order to enjoy impunity.

The Court has clearly been seeking for a compromise in *Aranyosi and Căldăraru*.<sup>72</sup> On the one hand by not allowing refusal on the basis of systemic deficiencies alone, as for example is sufficient before the ECtHR, and by opting for postponement and dialogue, not outright refusal, it has safeguarded the effectiveness of mutual recognition on the basis of mutual trust. On the other hand, the Court has answered to calls for fundamental rights limitations to mutual recognition and has brought its interpretation of mutual trust more in line with the reality on the ground, a more substantive principle of trust in accordance with real levels of trust, rather than a formalistic approach.<sup>73</sup> This matches broader developments within EU criminal law (see above), for example the evolving position of the Commission, as well as developments in secondary EU law, such as the EIO, which includes a fundamental rights refusal ground, as well as the Roadmap on Criminal Procedural Rights. From that perspective, the Court has codified legislative and policy developments.

The judgment moreover creates more harmony between the various AFSJ policy fields. The questions raised after *N.S.*, as to whether its reach can be stretched to other areas of the AFSJ, have been answered positively. The Court effectively held in *Aranyosi and Căldăraru* that *N.S.* indeed applies to the field of penal law. Not *mutatis mutandis*, as a number of reservations remain, but it has certainly opened the door to start a dialogue between Member States on detention conditions, with the ultimate aim to improve these. This is a step in the right direction and has placed the issue right on top of the EU criminal justice agenda.

*Aranyosi and Căldăraru* has proven a landmark ruling and a much needed reconfiguration of the interplay between the principles of mutual recognition and mutual trust.<sup>74</sup> But in addition to allowing postponement of a cooperation request, a comprehensive effort should be made to make real improvements on the ground. The EU must now use the momentum and push for a legislative agenda on detention rules.

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<sup>72</sup> See also Bribosia and Weyembergh (2016), at 27.

<sup>73</sup> See also Gáspár-Szilágyi (2016), at 211, 'the CJEU decided to reconcile the protection of fundamental rights with the principles of mutual trust and recognition.'

<sup>74</sup> See also Korenica and Doli (2016).