Same Tools used Differently:

The Preventive Potential of the European Arrest Warrant against Inhuman Treatment

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Keywords: European Arrest Warrant; Inhuman and Degrading Treatment

Abstract

Eradicating torture and inhuman or degrading treatment or punishment entails not just their prohibition, but also their prevention. Within the Council of Europe close synergies between its institutions are both notable and increasing. The European Union has been something of an outsider in this regard. With focus on the European Arrest Warrant scheme ("EAW"), this article argues for increased synergy between the EU, ECHR and European Committee for the Prevention of Torture towards preventing inhuman treatment. It demonstrates how the CJEU has moderated its previous approach to accommodate non-compliance with Article 4 of the Charter (torture and ill-treatment) as a ground to refuse an extradition request. The article argues that the progress made already can be developed further, and demonstrates how the EAW may be mobilised as a preventive tool to improve inhuman and degrading detention conditions in the prisons and remand centres of EU Member States.

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I Introduction

The fight to eradicate torture and inhuman or degrading treatment or punishment entails not just their prohibition, but also their prevention. Within the Council of Europe ("COE") this has long been understood and close synergies between its institutions, - particularly the European Court of Human Rights and the European Committee for the Prevention of Torture ("CPT"), - are both notable and increasing.[1] To maximise protection all available relevant mechanisms should be made use of in a coherent fashion and there is a need for improved synergy between the European Union ("EU") and COE in this relation which is not yet convincingly present. Indeed, prevention from the triple perspective of CPT, ECHR and EU is equally absent from the literature, a point which the present contribution begins to address. The EU also has a responsibility and commitment to combatting torture and ill-treatment which it prohibits under Article 4 of its Charter of Fundamental Rights ("CFR"). Moreover, within the EU territory, the EU itself is a mostly untapped resource in respect of prevention, whereas the impact of its contribution could be significant. The present article addresses these points specifically in the context of the European Arrest Warrant scheme ("EAW"). It argues for a shift in approach to extradition requests which would go beyond consideration of the detention conditions of the individual(s) they name. It demonstrates instead how the EAW could be mobilised to improve the detention conditions in prisons and on remand across the board in EU countries.[2]

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[1] On synergies between the European Court of Human Rights and the CPT in particular: C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018). Other synergies include for example CPT and GRECO joint statement: https://www.coe.int/en/web/cpt/-/heads-of-council-of-europe-anti-torture-and-anti-corruption-bodies-call-on-member-states-to-take-decisive-action-against-torture-and-corruption; and the European Commissioner for Human Rights which regularly takes up Article 3 ECHR issues raised by both the European Court of Human Rights and the CPT: https://www.coe.int/en/web/commissioner

[2] It is notable important parallels exist between the EU's handling of extradition under the EAW, and its approach to asylum claims. For reasons of space the present discussion is limited to the EAW context, but I am grateful especially to my anonymous reviewer for their helpful insight.

The EAW has long been the subject of criticism for its failure to accommodate fundamental rights[3] as a reason for one EU Member State to refuse extradition of a criminal or suspected criminal to another EU Member State. Since *Aranyosi and Căldăraru*[4] in 2016 the CJEU has adapted its approach. Its *Dorobantu*[5] decision in 2019 marked both a strengthened rights-based position in respect of non-refoulement under Article 4 CFR,[6] and a more wholesale acceptance of standards set by a European Court of Human Rights decision than ever before seen.[7] Although their wider implications are beyond the scope of this article, these are progressive steps for CFR rights generally. This article calls for continued momentum improving Article 4 protection and to this end it argues that the EU should look to embed prevention into its approach. The EAW provides a significant opportunity for the EU to do this, and a way forward is suggested that would at once be supported by and help to build greater cohesion and synergy between the EU and COE in the fight against torture and ill-treatment. The proposed approach would, in addition, improve mutual trust between EU states as they extradite under the EAW. Mutual trust is a central EU principle by which EU Member States accept all others are fully compliant with EU law. Although the principle is

[3] Most of the critical literature refers to 'fundamental rights' rather than 'human rights', since fundamental rights feature in the CFR's title. For an examination of the difference, see S. Greer, J. Gerrards and R. Slowe, *Human Rights in the Council of Europe and the European Union* (Cambridge: CUP 2018). For present purposes the terms are approached as interchangeable.

[4] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15) Grand Chamber 5 April 2016.

[5] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019.

[6] See Section V below.

[7] Ágoston Mohay, 'Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order', EU Law Analysis Blog: http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html [Accessed 13 October 2020].

being undermined by the EU's rule of law crisis,[8] indisputably it underpins the workability of the EAW. Accordingly, and although not the key objective for which the present argument is advanced, any improvement of mutual trust is of tremendous value, for reasons of effectiveness and efficiency, to the EU.

In what follows, 'ill-treatment' refers to all inhuman and degrading treatment or punishment prohibited by Article 4 CFR and Article 3 ECHR. The CFR sets out the 'meaning and scope' of Article 4 is 'the same as [that] laid down by' Article 3 ECHR.[9] Accordingly, the prohibition of torture and ill-treatment under these frameworks is, unless otherwise stated, referred to herein as Article 4. After a brief note on prevention, Section III introduces the historic and continuing tension between EAW and the non-refoulement principle under Article 4. Section IV outlines the CJEU's restrictive approach in the case law prior to *Aranyosi*. Section V discusses the CJEU's Article 4 case law, indicating the positive shift brought by the *Aranyosi*, *M.L.* and *Dorobantu* decisions, whilst also highlighting aspects of continued difficulty. Section VI argues for a more strongly preventive EU approach to protection from ill-treatment and indicates the powerful role in this regard which the EU can fulfil. Section VII proposes how the EU might approach this role. Section VIII concludes.

II A Note on Prevention

[8] See for example: M. Smith, "Staring into the Abys: a crisis of the rule of law in the EU" (2019) 25 *European Law Journal* 561; F. G. Nicola, "Another view from the Cathedral: what does the rule of law crisis tell us about democratizing the EU?" (2018) 25(2) *Maastricht Journal of European and Comparative Law* 133.

[9] Article 52(3) EU Charter of Fundamental Rights, confirmed inter alia by the CJEU in *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016.

The preventive approach advocated in this article gives a broad meaning to the term 'prevention' consistent with the understanding and approaches of the CPT and the UN Subcommittee for the Prevention of Torture. Non-refoulement, which is discussed throughout, is itself a preventive measure, but its focus is narrowly on the risk to an individual in a particular set of circumstances. Combatting torture and ill-treatment includes non-refoulement as one essential aspect of prevention. However it requires prevention also in a broader sense meaning, with the aim of protecting the greatest possible number of people, concern with states themselves and evaluating and addressing the systems and structures within them. Prevention of torture and ill-treatment in this sense requires, in all states globally,[10] a constant striving to improve the conditions and treatment of people in places of detention. Hence this level of prevention is not only concerned with the prohibition of torture and ill-treatment as a human right attaching to a single individual. Rather it is concerned with *all* the individuals within the system, which necessitates a refocussing of attention to standards and conditions across the board.

III EAW and Non-refoulement: the problem in overview

The EAW is a mechanism by which an EU Member State that wants a suspect in connection with certain serious crimes (the 'issuing state') may issue a request to another EU Member state (the 'executing state') for that person's arrest and extradition. It was introduced and is governed by the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of 13 June 2002[11] and its amending 2009 Council Framework Decision[12] (referred to collectively herein as "FD-EAW"). Based on the

[10] C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018) whose overview of the CPT's findings in every COE Member State makes this point clear.

[11] 2002/584/JHA.

[12] 2009/299/JHA of 26 February 2009.

EU principles of 'mutual trust' ("MT") and 'mutual recognition' ("MR") it has enabled a more streamlined and efficient process than the surrender of a person system it replaced. In that regard it has been welcomed and is 'generally considered a success story'.[13] However, the EAW has been consistently the subject of criticism for its failure to fully accommodate rights.[14]

With laudable intentions of deeper cooperation and frictionless borders, and in a drive not to allow 'safe havens' for criminals to exist within the EU territory, MR was introduced to European criminal law '[b]orrowing [mainly] from concepts that had worked well in the creation of the single market and combining them with elements from some Council of Europe conventions.'[15] A detailed discussion of the related but distinct principles of MT and MR is beyond the scope of this article,[16] but a simple explanation assists this work. Of the

[13] C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: OUP 2013), 234. In particular this view was reached by the Commission in 2007: Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, 2.

[14] Discussed below. This was indeed the subject of challenge brought to the Belgian Court of Arbitration relating Belgium's implementation of FD-EAW, which gave rise subsequently to CJEU preliminary ruling *Advocaten voor de Wereld VZW* (Case C-303/ 05) 3 May 2007. See also, for example: S. Alegre and M. Leaf, *European arrest warrant: a solution ahead of its time*, (London: Justice 2003); Justice, *European Arrest Warrants: ensuring an effective defence*, (London: Justice 2012); V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019); N. M. Schallmoser, "The European Arrest Warrant and Fundamental Rights" (2014) 22 *European Journal of Crime, Criminal Law and Criminal Justice* 135.

[15] C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: OUP 2013), 166. For a good overview of FD-EAW's origins see: M. Mackarel, "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant" (2007) 15(1) *European Journal of Crime, Criminal Law and Criminal Justice* 37.

[16] For particularly authoritative accounts see: C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: OUP 2013) and V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019).

two, only MR is referred to in FD-EAW and as Mitsilegas explains, it is a vehicle by which 'automaticity in inter-state cooperation' can be achieved. Avoiding the need to harmonise the criminal law in each respective state, it means a national decision by one Member state (the issuing state) will be enforced beyond its borders in another Member state (the executing state) 'without many questions being asked' and 'extremely limited ... grounds to refuse the request for cooperation.'[17] This is possible only because it is based on the principle of MT: 'a high level of mutual trust' between states in the system 'premised upon the acceptance that membership of the European Union means that all EU Member states are fully compliant with fundamental rights norms.'[18] The fact this is simply not true and that indeed, not all states have this level of trust in each other[19] is central to the problem under discussion in this article. Nevertheless, as a vehicle for efficiency and cooperation, MR requires an 'uncritical acceptance of presumed mutual trust between – and in – the legal systems of EU Member States.'[20] In practice this means EU Member States should be willing to accept all other EU Member States are compliant with EU law, including the CFR.

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[17] V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 125.

[18] V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 126.

[19] Asif Efrat, "Assessing mutual trust among EU members: evidence from the European Arrest Warrant" (2019) 26(5) Journal of European Public Policy 656; V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019) which highlights the continued EU monitoring of Romania and Bulgaria. C. Bicknell, "Council of Europe and the European System" in M. Evans and J. Modvig (eds) Research Handbook on Torture (Northampton: Edward Elgar Forthcoming December 2020).

[20] V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 124.

Regarding Article 4 there were two specific problems with this before *Aranyosi*. Firstly, FD-EAW provides a list of grounds for which an EAW request may be refused, but the list does not include fundamental rights grounds. Although FD-EAW sets out in Article 1(3) that it 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union',[21] this had not been proven true by the case law. Instead, the CJEU declared the list 'exhaustive',[22] allowing no further grounds for non-execution of an EAW request. At the same time MR is enshrined in FD-EAW,[23] and has been interpreted to require all EU Member states to assume and recognise all other EU Member states as compliant with the CFR. Hence the second problem, because MT is based on a fallacy. Relevant to the present discussion, it is well known and documented that in reality, the general detention conditions of prison and remand centres in certain EU states fall a long way short of compliance with Article 3 ECHR and by extension Article 4 CFR.[24]

Before the joint cases of *Aranyosi and Caldararu* were decided an executing state would potentially have faced a difficult situation since the Article 4 prohibition includes the non-

[21] FD-EAW, Article 1(3).

[22] *Curtea de Apel Constanța v. Ciprian Vasile Radu* (C-396/11) Grand Chamber 29 January 2013, para 36; based on the CJEU's previous judgments in *Artur Leymann and Aleksei Pustovarov* (C-388/08) 1 December 2008, para 51: and *Gaetano Mantello* (C-261/09) Grand Chamber 16 November 2010, para 37.

[23] Preamble, Article 1(2) and 1(3).

[24] For example: C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018); C. Bicknell, "Council of Europe and the European System" in M. Evans and J. Modvig (eds) Research Handbook on Torture (Northampton: Edward Elgar Forthcoming December 2020); S. Alegre and M. Leaf, *European arrest warrant: a solution ahead of its time*, (London: Justice 2003); and numerous European Court of Human Rights decisions and CPT reports. Of particular note, pilot judgments including *Varga and others v Hungary* (2015) 61 E.H.R.R. 30 which partly gave rise to the preliminary ruling request in *Aranyosi*.

refoulement duty not to extradite, deport or otherwise return any person within its jurisdiction if there is a real risk of torture or other ill-treatment in the receiving state. Non-refoulement necessarily means an assessment of that risk should be made, and if the risk is found to exist, extradition cannot happen. Hence, at least in theory, the EAW presented the executing state with a choice between accepting an issuing state believed to pose an Article 4 risk did not pose such a risk, thereby meeting the MR expectation, *or* staying true to its non-refoulement obligations under not only the CFR, but also the ECHR[25] and any other relevant international law to which it is party.[26]

In *Aranyosi* the CJEU introduced a two-stage process by which the executing state can escape this bind and satisfy requirements of both MR and non-refoulement under the EU law framework. It is the central argument of this article that, building on the progressive first steps of *Aranyosi*, *M.L.* and *Dorobantu*, the FD-EAW offers a significant opportunity for the EU to embed prevention into its approach to Article 4 thereby going beyond the lowest common denominator approach which seems presently to apply, to drive up the standard of conditions and treatment in criminal justice detention settings across the EU. To advance these points it is necessary first to explain and examine the relevant CJEU case law.

IV The CJEU's Approach: Before *Aranyosi*

Since the CFR became legally binding with the entry into force of the Treaty of Lisbon, the tension between EAW and fundamental rights has been tested several times before the CJEU,

[25] All EU Member States are also States Party to the ECHR.

[26] For example 1966 International Covenant on Civil and Political Rights, Article 7: see in particular Human Rights Committee, General comment No. 20, fourty-fourth session (1992), para 9; and 1984 UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

albeit not initially in respect of Article 4. The CJEU's approach before *Aranyosi* was marked by three key features: a rigid approach to FD-EAW's non-execution criteria; a seemingly reversed order of priorities which placed MR above fundamental rights; and an acceptance of minimum level of protection. *Radu*, the first notable case, concerned procedural rights and was widely criticised for missing an opportunity to confirm the protected status of fundamental rights within the FD-EAW, even in spite of the Advocate General's very strong argument that it should. Instead the CJEU fixed its focus very narrowly, indeed, reframed the questions referred to it, and in so doing avoided addressing fully the relationship between fundamental rights and EAW.[27] In fact, *Radu* was not just unhelpful, its insistence that FD-EAW's list of reasons for non-execution of requests is exhaustive almost certainly worsened the situation. It was not the first time the CJEU had stated the point,[28] but crucially it was the first time in a case directly concerning the EAW/fundamental rights relationship since the Treaty of Lisbon which made the CFR binding.

Radu also paved the ground for *Melloni,* another procedural rights case and itself the subject of extensive criticism.[29] The damage of *Melloni* was two-fold: the CJEU repeated the exhaustive nature of FD-EAW's grounds for non-execution, thereby excluding failure to comply with fundamental rights as a ground; and controversially, it gave primacy to MR under the FD-EAW (which is secondary EU law enacted under the third pillar) over fundamental rights as they are protected by the national constitutions of Member States. If a

[27] R. Raffaelli, "C-396/11 – *Radu*: Judgment of the Court of Justice of the European Union, 29 January 2013, Radu", in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019); J.R. Spencer, 'Extradition, the European Arrest Warrant and Human Rights' (2013) 72(2) CLJ 250-253

[28] *Artur Leymann and Aleksei Pustovarov* (C-388/08) 1 December 2008, para 51: and *Gaetano Mantello* (C-261/09) Grand Chamber 16 November 2010, para 37.

[29] *Stefano Melloni v Ministerio Fiscal* (Case C-399/11) Grand Chamber 26 February 2013.

national constitution, as Spain's in the immediate case, protected rights to a higher standard than that provided for by the CFR, the CJEU made clear that the executing state could not insist on its own standard being met: the surrender had to take place and could not be made conditional. Equally notably, although the Spanish court raised the highly relevant argument of dignity, which is protected under Article 1 CFR, this was ignored by the CJEU. Hence, rather than tap into the request for a preliminary ruling as an opportunity to drive standards up, as it was surely a powerful means by which the CJEU could have done so, *Melloni* represented a trade-off and a settling along a minimum baseline. The more progressive approach of conditionality would have meant interpreting Article 53 CFR in a way which would, according to the CJEU, 'undermine the principle of the primacy of EU law'.[30]

In addition to *Radu* and *Melloni* two further contextual points provide the backdrop against which *Aranyosi* was decided and help inform our understanding of MR's priority place. First, FD-EAW was introduced in 2002, shortly post-9/11 and long before CFR had binding status. In those circumstances it has been widely observed that prosecuting and punishing criminals, including terrorists, and not allowing impunity was at the forefront of the legislators' minds at the time of its adoption.[31] Second, is the matter of the EU's accession to the ECHR that was blocked by the CJEU in Opinion 2/13,[32] which also includes two paragraphs setting out

[30] *Stefano Melloni v Ministerio Fiscal* (Case C-399/11) Grand Chamber 26 February 2013, para 58.

[31] For good contextual analysis see Jan Wouters and Frederik Naert, "On Arrest Warrants, Terrorist Offences and Extradition Deals: an appraisal of the EU's main Criminal Law measures against terrorism after '11 September'" (2004) 41 *Common Market Law Review* 909; also M. Mackarel, "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant" (2007) 15(1) *European Journal of Crime, Criminal Law and Criminal Justice* 37.

[32] Opinion 2/13 of the Court (Full Court) on EU Accession to the ECHR, 18 December 2014. Whether forever or just for the time being depends on one's interpretation and/or optimism. Under Article 6(2) TEU, the EU is obliged to accede to the ECHR.

the CJEU's approach to MT. Regrettably, the minimum level of protection approach and the CJEU's strange order of priorities was once again confirmed by the Opinion. According to the CJEU, MT is of 'fundamental importance' in EU law because it enables the creation and maintenance of 'an area without internal borders'.[33] Hence all Member states, when implementing EU law,[34] 'may, under EU law, be required to presume that fundamental rights have been observed by the other Member States' with two main consequences. Member States cannot demand that another Member State meet a higher level of rights protection than is provided by EU law. Additionally, 'save in exceptional cases' Member States are not permitted to check whether another Member State 'has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[35]

Mitsilegas is especially critical of this 'extreme view of presumed mutual trust' which leads to 'automatic mutual recognition.'[36] According to him the principle has been deified and the CJEU has misaligned its priorities. As he puts it, the CJEU

> 'endorses a system whereby the protection of fundamental rights must be subsumed by the abstract requirements of upholding mutual trust, instead of endorsing a model

[33] Opinion 2/13 of the Court (Full Court) on EU Accession to the ECHR, 18 December 2014, para 191.

[34] The CFR binds EU Member States only when they are implementing EU law; CFR, Article 51.

[35] Opinion 2/13 of the Court (Full Court) on EU Accession to the ECHR, 18 December 2014, para 192. The Opinion is discussed in detail by V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 140-142.

[36] V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 141.

> of a Union whereby cooperation on the basis of mutual trust must be underpinned by the effective protection of fundamental rights.'[37]

Against this context the CJEU in *Aranyosi* had to consider potential conflict between FD-EAW and the non-refoulement duty under Article 4. As indicated above, the context was characterised by three key features. Firstly, there was an especially rigid approach to grounds for non-execution of an EAW request, regarding the list as exhaustive and excluding fundamental rights as a ground. Secondly, MR, as an aspect of FD-EAW, enjoyed a priority status, including primacy above the constitutions of EU Member States. Thirdly, and relatedly, the prioritisation of MR brought with it a willingness to be satisfied with a minimum level of rights protection. These have continued relevance to the CJEU's position on the relationship between FD-EAW and Article 4. By its judgment in *Aranyosi*, the CJEU necessarily altered its approach but, as will be demonstrated in the following Section, it did so fully only in respect of the first of these features. MR's arguable primacy has, in the context of Article 4, necessarily been weakened though it remains quite central. The CJEU's satisfaction with a minimum level of protection is still apparent, and particularly stark when viewed through a preventive lens. It is to this case law that we now turn.

V The CJEU's Approach: *Aranyosi* and Beyond

Aranyosi, and subsequently *M.L.*[38] and *Dorobantu*, concerned directly a (potential) conflict between FD-EAW and Article 4. The case law is expanded upon below, but an outline

[37] V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019), 141.

[38] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18), 25 July 2018.

undoubtedly helps. In *Aranyosi* the CJEU nuanced its approach to non-execution criteria and created a two-stage process of assessment by which the executing state may satisfy requirements of both MR and non-refoulement under EU law. This has quite rightly been welcomed,[39] and provides far greater accommodation of fundamental rights within the FD-EAW than previously. Indeed, the *Aranyosi* decision unblocked what had become a dangerous status quo and building on this, rights accommodation has since been extended further to the Article 47(2) CFR right to a fair trial.[40] Given the absolute nature of Article 4 however, it is difficult to see that the CJEU could have done anything but moderate its approach. Whilst the shift in *Aranyosi* is quite clearly progressive, the narrowness of the review and the source of evidence deemed relevant mean the CJEU has nevertheless settled for a minimum level of protection that would satisfy Article 4. This is all the more striking when prevention is given emphasis. *M.L.* and *Dorobantu* reaffirmed the two-stage process and reflect not only the CJEU's continuing satisfaction with a minimum level of protection, but also the prominence still accorded, curiously and unhelpfully in this context, to MR. In particular, the CJEU's reasoning lends itself to an inappropriate balancing exercise between the risk of ill-treatment and MR. By contrast, *Dorobantu*'s wholesale adoption of standards from the European Court of Human Rights jurisprudence is a cause for great hope in respect of deepening synergies between the two systems.

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[39] F. Korenica and D. Doli, "No more Unconditional 'Mutual Trust' Between the Member States: An analysis of the Landmark Decision of the ECJ in Aranyosi and Căldăraru" (2016) 5 *European Human Rights Law Review* 542; M. Rogan, "What Constitutes evidence of poor prison conditions after *Aranyosi* and *Căldăraru*? Examining the role of inspection and monitoring bodies in European arrest warrant decision making" (2019) 10(3) *New Journal of European Criminal Law* 209; Steve Peers, "Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?" EU Law Analysis Blog: http://eulawanalysis.blogspot.com/2016/11/human-rights-and-european-arrest.html [Accessed 13 October 2020].

[40] *Minister for Justice and Equality v LM* (C-216/18) Grand Chamber 25 July 2018.

MT and MR must have some limit under the FD-EAW if EU Member States are to satisfy their non-refoulement obligation under Article 4. This is a consequence of the unfortunate reality that EU states are not all consistently compliant with their fundamental rights obligations.[41] Specifically in the context, detention conditions in prisons and on remand have been found, not infrequently, and sometimes even in the same type of institution across a country without exception,[42] to amount to inhuman or degrading treatment by the European Court of Human Rights and the CPT.[43] The three relevant preliminary rulings (*Aranyosi* and *Căldăraru* being considered together) all originated from the Higher Regional Court of Bremen and hinged directly on this problem. Whilst in *Aranyosi* the CJEU's Grand Chamber provided the starting point, it still left some questions unanswered. Accordingly, the Bremen Court sought further preliminary rulings in *M.L.* and *Dorobantu* which were returned respectively by the CJEU's First Chamber and Grand Chamber.

The EAW requests in *Aranyosi* and *M.L.* had been issued by Hungary which had in 2015 been the subject of an European Court of Human Rights pilot decision, *Varga v Hungary,*[44] due to its overcrowded prison conditions. Prior to *Varga* this had led to several violation

[41] This was highlighted from the outset, for example S. Alegre and M. Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—The European Arrest Warrant" (2004) 10 ELJ 200. Notably also, the observation was made before further eastward expansion to include Croatia, Romania and Bulgaria the latter two of which remain under EU supervision for compliance: V. Mitsilegas, "Mutual Recognition and Mutual Trust in Europe's Area of Criminal Justice: The Centrality of Fundamental Rights" in V. Mitsilegas, A. di Martino and L. Mancano (eds) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (London: Bloomsbury 2019).

[42] For example Bulgarian detention facilities run by its Investigation Services, see inter alia *Navushtanov v Bulgaria* (App. No.57847/00), judgment of 24 May 2007.

[43] The CPT is a non-judicial body and never strictly makes a finding of inhuman or degrading treatment, rather it indicates conditions or treatment that 'could be considered as amounting to' inhuman treatment or etc. Examples in EU Member States' prisons highlighted by the CPT include: Belgium; Bulgaria; Croatia; Greece; Ireland; Latvia; Lithuania and Romania.

[44] *Varga and others v Hungary* (2015) 61 E.H.R.R. 30.

findings of inhuman and degrading treatment under Article 3 ECHR, as in *Varga* itself with at that time 'approximately 450 prima facie meritorious applications' outstanding against Hungary citing inadequate detention conditions as their primary complaint.[45] This is a typical use of the pilot judgment procedure which the European Court of Human Rights may use when it has a high number of pending applications in its caseload that appear rooted in a common systemic issue within the respondent state. The *Căldăraru* and *Dorobantu* EAW requests were issued by the Romanian judicial authorities which, although not subject to the European Court of Human Rights's pilot judgment procedure, the European Court of Human Rights had on numerous occasions found in violation of Article 3 ECHR due to inhuman prison conditions including too small cell size and overcrowding: findings supported also by the CPT's report of its visit to Romania in 2014. For the executing judicial authority there were clear and documented systemic failings in the issuing states, particularly Hungary. Necessarily it sought clarity from the CJEU as regards its position as the executing judicial authority in such circumstances, and the expectations on it under FD-EAW.

The CJEU in *Aranyosi* summarised the questions under consideration, with the key question for present purposes bound up with the import in the Article 4 context of Article 1(3) FD-EAW: that the 'Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.[46] The question as the CJEU framed it was whether Article 1(3)

> 'must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in

[45] *Varga and others v Hungary* (2015) 61 E.H.R.R. 30, para 98.

[46] This provision was central to the Advocate General's Opinion in *Radu* but was nevertheless side-lined in the cases before *Aranyosi*.

particular with Article 4 of the Charter, the executing judicial authority may or must refuse to execute a European arrest warrant'.[47]

The precise answer given is in fact contradictory. Nevertheless, the CJEU gave guidance in the decision as to how the risk of ill-treatment in the issuing state should be approached. Acknowledging the absolute nature of Article 4 the CJEU is clear that where the executing judicial authority has 'evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State' it is 'bound to assess the existence of that risk' when called on to decide the surrender of a person under the EAW.'[48] Ascertaining the risk is to be approached in two-stages which summarised, are: first, the risk in the general prison population must be established and if present; second, the specific risk to the individual must be assessed.

In the first stage, relying on 'information that is objective, reliable, specific and properly updated on the detention conditions' the executing judicial authority must demonstrate 'deficiencies, which may be systemic or generalised' or affect certain groups of people or institutions.[49] Supporting information at this stage may be derived from sources including international court judgments, the European Court of Human Rights, and the issuing state's

[47] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 74. The CJEU also indicated the question whether surrender could be made conditional on obtaining further information from the issuing state to satisfy the executing state of rights compliant detention conditions, and clarification of what rules governing which authority internal to the issuing state should provide such information.

[48] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 88.

[49] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 89.

courts, as well as reports and decisions from other bodies in the COE or UN.[50] Even if risk is established by this assessment it 'does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment' if they are surrendered.[51] Hence if risk is established at the first stage, the executing authority must proceed to the second stage and discover whether there are 'substantial grounds' to believe the person subject to the EAW would face a 'real risk' of inhuman or degrading treatment within the Article 4 meaning if surrendered.[52] To establish this the executing judicial authority may request 'necessary supplementary information' from the issuing state on the conditions in which the person will be detained,[53] and it may set a time limit for receiving such information.[54]

The two-stage process in effect sets the threshold quite high, but it is not out of step with the ECHR where the existence of 'real risk' to the individual is also the standard by which the non-refoulement principle is assessed.[55] A slightly strange feature of *Aranyosi* however is its stated outcome when a real risk to the individual is established. Although the CJEU was clear '[t]he consequence of the execution of such a warrant must not be that that individual suffers

[50] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 89.

[51] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 93.

[52] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 94.

[53] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 95.

[54] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 97.

[55] E.g. *Chahal v UK* (1996) 23 E.H.R.R. 413.

inhuman or degrading treatment'[56] the decision apparently yields two opposing responses. The relevance of this for present purposes is not the discrepancy itself, but the CJEU's approach to the same matter in the subsequent cases. According to *Aranyosi* at paragraph 98, if the executing state, following its second stage inquiries, 'finds that there exists for the individual who is subject of the European arrest warrant, a real risk of inhuman or degrading treatment ... the *execution of that warrant must be postponed but it cannot be abandoned*.'[57] However, according to paragraph 104, if information provided by the issuing state is not sufficient and the risk of inhuman or degrading treatment 'cannot be discounted within a reasonable time, *the executing judicial authority must decide whether the surrender procedure should be brought to an end*.'[58] Fairly obviously, the possibility of bringing the surrender procedure to an end would mean an issuing state's non-compliance with Article 4 has been introduced as a ground for non-execution of the EAW. In spite of *Radu* and *Melloni*, the subsequent case law confirms this is indeed the position. Moreover, the CJEU has been increasingly emboldened on the point, stating in *M.L.* (based on Grand Chamber decision delivered the same day in *LM*[59]) the executing judicial authority has 'the power' in these circumstances 'to bring the surrender procedure ... to an end',[60] and in *Dorobantu* that it has an 'obligation' to do so.[61]

[56] *Pál Aranyosi and Robert Căldăraru v. Generalstaatanwaltschaft Bremen,* Joined Cases (C-404/15 & C-659/15), Grand Chamber 5 April 2016, para 88.

[57] Emphasis added.

[58] Emphasis added.

[59] *Minister for Justice and Equality v LM* (C-216/18), Grand Chamber 25 July 2018, para. 44

[60] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 57

[61] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 50.

The CJEU's increasing boldness through the evolving case law is important. Its initial hesitancy, the insistence of postponement but not abandonment of the process, was perhaps legacy from the cases preceding *Aranyosi*. Yet the CJEU has now made things far more certain. It also demonstrates a positive forward momentum, showing willingness to depart from its previous position, and developing a stronger more rights-based position as it has gathered confidence through subsequent decisions. The fact this was applied beyond Article 4, to Article 47(2) right to fair trial in *LM* is a further positive step.

M.L. and *Dorobantu* provided additional clarity in the approach to be taken by executing states. The very fact there was a need to request a preliminary ruling in *M.L.* reflects positively on the preventive impact of the European Court of Human Rights's pilot judgement scheme.[62] The ruling was requested to establish the scope of assessment to be undertaken by the executing judicial authorities in light of the fact Hungary had, to the European Court of Human Rights's satisfaction, addressed shortcomings indicated in *Varga*. This included a new law creating preventive and compensatory remedies to guarantee redress for prison overcrowding and poor detention conditions.[63] In response, the CJEU indicated that even where a legal remedy is available in the issuing state allowing the legality of detention to be reviewed in light of fundamental rights, the executing judicial authorities must still 'satisfy themselves' they would not expose the person 'on account of [detention] conditions, to a real risk of inhuman or degrading treatment'.[64] However, this must not be an

[62] See C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018) where it is observed pilot judgments create an additional preventive role for the European Court of Human Rights.

[63] *Domján v Hungary* (App. No.5433/17), decision of 14 November 2017. The Court found the application inadmissible because the new law provided sufficient guarantees and a domestic remedy.

[64] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 75.

assessment of conditions generally and must be limited to a determination 'specifically and precisely' of the risk to the individual subject of the EAW.[65]

The narrowness of approach is not only limited in this way. In answer to whether the assessment of detention conditions should include all prisons where M.L. 'might be held',[66] the CJEU returned a negative that is most revelatory.

> 'An obligation on the part of the executing judicial authorities to assess the conditions of detention *in all the prisons in which the individual concerned might be detained* in the issuing Member State is *clearly excessive*. Moreover it is impossible to fulfil such an obligation within the periods prescribed in Article 17 of the Framework Decision. *Such an assessment could* in fact *substantially delay that individual's surrender and, accordingly, render the operation of the European arrest warrant system wholly ineffective*.'[67]

It would also come at the 'risk of impunity for the requested person'.[68] Hence, by a reasoning that accords significant (too much) weight to 'the mutual trust that must exist between Member States ... and taking account, in particular, of the time limits set by Article 17 of the Framework Decision' the executing authority is obliged 'solely' to assess detention conditions where it is 'actually intended' the person will be detained.[69] The conditions in any other place of detention the person might 'possibly' be held falls to the jurisdiction of the issuing state's domestic courts.[70]

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[65] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 77.

[66] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 38

[67] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 84. Emphasis added.

[68] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 85.

[69] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 87.

[70] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 87.

The finding itself, that only places in which it is intended the person will be held should be assessed, is both practical and reasonable. Since there is no way for the executing authority to second guess alternative destinations this is perhaps, though it does not say so, what the CJEU meant by additional requirements being 'excessive'. The additional justification that is given however, which emphasises MT, timeframes and, to a lesser extent, the risk of impunity, is entirely inappropriate to the context. Article 4 is an absolute prohibition and it should not be open to balancing against any other competing interest. A delay whilst the specific risk to a person is considered is not impunity, it is safeguarding, as required by Article 3 ECHR and hence also (at least if Article 52(3) CFR is to be believed) by Article 4 CFR. MT and time-limits should never be placed ahead of accurately assessing the risk to a person, however long it may take. There are undoubtedly tensions within this, not least that human rights protection is subsidiary in the EU, and the importance placed on the primacy of EU as set out in *Melloni*. Nevertheless, any qualifiers should be discounted since, as far as they exist, they dangerously call into question the EU's understanding of the prohibition of torture and inhuman and degrading treatment as absolute, and additionally undermine parity between the ECHR and EU interpretations. The *M.L.* decision however, quite starkly demonstrates that whilst the CJEU has moderated its approach to grounds for non-execution of an EAW request, MR between Member states and efficiency of process continue to be particularly revered to the extent that, on the face of it, the CJEU retains a willingness to weigh these in the balance and consequently to be satisfied with a minimum level of protection.

That minimum is demonstrated not only by limiting the institutions in the issuing state which need to be assessed: a feature which, before prevention is taken into account, seems

reasonable. It is shown also by the extent and depth of scrutiny required of the risk assessment to satisfy the CJEU of compliance with the non-refoulement obligation under Article 4. Even without embedding prevention however, it is notable the information deemed sufficient to satisfy the second stage of evaluation is exclusively from the issuing state. Whilst it would be preferable, and in most cases probably reliable, to trust the issuing judicial authority, it is well known that judicial independence in Hungary, Poland particularly, but also in Romania have in recent years been in question.[71] In addition, *M.L.* and subsequently *Dorobantu* make it clear that 'in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter diplomatic assurances 'must' be relied upon.[72] If diplomatic assurances come from the government without the endorsement of the issuing judicial authority, the *executing* judicial authority must verify before surrender that the person would not face a breach of Article 4.[73] It is difficult to see how the executing judicial authority is well placed to evaluate this or what evidence it would use, but there is at least this assurance.

A detail also still in need of clarification following *Aranyosi* was specifically what standards should be applied when assessing detention conditions in the issuing state. This was referred to the CJEU in *Dorobantu*, which decision is especially important for the light it shines on the relationship between the EU and the ECHR, including a significant opportunity for

[71] P9_TA(2020)0014, European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP))**.** In Poland's case this is the very reason for the *LM* judgment. Romania has been the subject of deep scrutiny in this regard from the EU Commission: Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2019) 499 final, Brussels 22.10.2019.

[72] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, para 112; *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 68.

[73] *M.L. v Hanseatisches Oberlandesgericht Bremen* (C-220/18) 25 July 2018, paras 113-116.

further engagement and to deepen synergies. The questions addressed included: what, under FD-EAW, are the minimum standards for custodial conditions required by Article 4 CFR?; is there an "absolute" minimum cell size requirement?; if so, how can cell size can be mitigated?; what standards are to be used to assess whether conditions comply with fundamental rights?; and how comprehensive an assessment of custodial conditions in the issuing state is permitted, specifically were the German courts in this case limited to an "examination as to manifest errors"?

In answer, the CJEU reiterated that more is required than a superficial assessment limited to 'obvious inadequacies'[74] and the *Aranyosi* process was indicated to 'determine, specifically and precisely' whether there is a real risk to the person whose extradition has been sought,[75] in view of which the executing judicial authority is 'solely required to assess' prisons (and temporary facilities) where that individual would, according to the issuing state, be detained.[76] In this way the assessment remains limited, as indeed is the CJEU's overall approach to standards. For here also, the CJEU repeated its insistence that, as in *Melloni*, Member States may set their own minimum standards for detention conditions higher than those required by Article 4, but they are irrelevant to FD-EAW where compliance with Article 4 only is relevant to the surrender decision.[77] Nevertheless, the standard required by Article 4 is imported directly from the European Court of Human Rights jurisprudence,

[74] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 62.

[75] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 63.

[76] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 66.

[77] *Dumitru-Tudor Dorobantu v Geralstaatsanwaltschaft Hamburg* (C-128/18) Grand Chamber 15 October 2019, para 79.

specifically as set out in *Muršić v Croatia*.[78] It has been observed that although the CJEU has previously ruled out the ECHR having direct effect in EU law, this direct incorporation of the *Muršić* standard is done without reference either to general principles of EU law or to the CJEU's own jurisprudence on the indirect relevance of the ECHR.[79] Accordingly, and especially given the CJEU cites ECHR jurisprudence less frequently since the Treaty of Lisbon, Mohay remarks that *Dorobantu* 'underlines the relevance and significance of judicial dialogue between European courts.'[80]

VI The EU's Power to Prevent Ill-Treatment

Evident in the above discussion, the CJEU's Article 4 case law has four notably positive features. Firstly, by *Aranyosi*, it has broken away from the rigid insistence that grounds for non-execution of an EAW request are exhaustive and do not include non-compliance with fundamental rights. Instead it recognises that Article 4 requires an assessment to be made of the risk in the issuing state. Secondly, the CJEU has become increasingly bold in respect of outcome if the existence of a real risk to the individual subject to the EAW cannot be ruled out. Whereas it had first indicated in *Aranyosi* that the EAW procedure could be postponed

[78] *Muršić v. Croatia* (2017) 65 E.H.R.R. 1. It is notable, but does not impact the key argument in this article, that the space requirement set by the European Court of Human Rights differs from the CPT's standard. For discussion see C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018), 35-6.

[79] Ágoston Mohay, 'Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order', EU Law Analysis Blog: http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html [Accessed 13 October 2020].

[80] Ágoston Mohay, 'Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order', EU Law Analysis Blog: http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html [Accessed 13 October 2020]. Such dialogue is also notable in the asylum context, albeit regrettably beyond the scope of the present work.

but not abandoned, the CJEU made clear in *Dorobantu* that in such circumstances the executing state is 'obliged' not to carry out the arrest warrant. This strengthened position is positive not only for the certainty it grants Article 4 protection. It also demonstrates the CJEU's progressive willingness to depart from the legacy of its previous case law. Admittedly, this willingness is still limited at present, as faithfulness to the *Melloni* position attests. It is nevertheless indicative of an increasingly rights-based approach. Thirdly, *Dorobantu* demonstrates greater synergy with the ECHR than previously seen as it applies directly the European Court of Human Rights's standards for the assessment of appropriate custodial detention conditions. This point of intersection represents an opportunity for further synergies and cooperation to be built between the COE and EU, as proposed in Section VII. Fourthly, the approach indicated in *M.L.* operates as a complement to the European Court of Human Rights because although a legal remedy may be in place in the issuing state, even to the satisfaction of the European Court of Human Rights, the executing state must still be satisfied that the person subject to the EAW will not be held in inhuman and degrading detention conditions. In this way the CJEU has increased the oversight and thereby the protection afforded to the individual subject to an EAW request.

It was equally noted above that three key features marked the CJEU's approach to fundamental rights under the FD-EAW prior to *Aranyosi*, of which only the first, regarding grounds for non-execution of an EAW, has been fully addressed. The second and third, respectively the elevated status of MR within the FD-EAW scheme, and the CJEU's willingness to be satisfied with a minimum standard, have remained. Regarding the second, the Article 4 case law has moderated the priority accorded MR and relatedly the unity and efficacy of the system it protects, but undoubtedly it retains an elevated position. It remains the case that Member States' domestic standards relating to fundamental rights, even those

provided by their national constitutions, must yield to MR under the FD-EAW. In addition, the CJEU in *M.L.* used reasoning akin to balancing Article 4 against MR and efficacy considerations which, given the absolute nature of Article 4, should categorically never happen. The third observation, that the CJEU has still settled for a minimum level of protection, is linked to and based mainly (though not exclusively) on an assessment that takes prevention into account. Even before evaluating the CJEU's approach in such terms however, the minimum is perceptible in the following: debarring Member States from insisting on their own standards if higher than CFR standards; the position 'exceptional cases' only will be subject to an EAW refusal; the source of evidence in the second stage of the *Aranyosi* process being information from the issuing state, with no indication of additional sources being admissible; and the controversial role of diplomatic assurances.

Observed through a preventive lens (as explained in Section II) the CJEU's settling for a minimum is even clearer with reference to all of these factors as well as to the narrowness of the review itself. Preventively the narrowness of the review of risk, and specifically the second stage in *Aranyosi*, is not as helpful as it might be. It is not wrong to look 'specifically and precisely' at the risk to the individual subject of the arrest warrant. The European Court of Human Rights would do this also, and in both cases it cannot be forgotten the courts have become involved only because an individual is asserting their rights. However, there is a difference between the European Court of Human Rights's consideration of risk, which is generally[81] looking to establish whether an ECHR violation has (*already*) occurred, and guidance given by the CJEU in a preliminary ruling in respect of appropriately assessing risk *prior* not only to extradition but even the actual assessment of risk by the executing judicial authority. The fact extradition would not yet have happened in the EU examples is an

[81] Admittedly not always, for example: *Othman (Abu Qatada) v United Kingdom* (2012) 55 E.H.R.R. 1.

opportunity, and makes FD-EAW an ideal entry point by which the EU can embed prevention and thereby protect a far greater number of people than presently.[82] The European Court of Human Rights has, albeit incidentally, taken up a preventive role of its own via the pilot judgement scheme and the EU is exceptionally well placed to do similarly. If the EU could be persuaded to give prevention a more central place in its thinking, the CJEU and the EU institutions more broadly, could adjust their approach to the intersection between Article 4 and FD-EAW in ways that would have considerable preventive impact across the board in Member States where prison and remand conditions generally or systemically fall short of Article 4 requirements, rendering them inhuman. Practical suggestions towards achieving this are made in Section VII, but first the argument for the EU to adopt a much wider perspective which prioritises prevention is further advanced.

The protection of fundamental rights is one of the core general principles on which the EU was founded.[83] Its commitment is marked very clearly by the CFR and by the TEU including Articles 2, 7 and in particular Article 6 which makes the CFR binding on EU Member States when implementing EU law,[84] obligates the EU to accede to the ECHR,[85] and makes rights guaranteed by the ECHR 'general principles of EU law'.[86] The intended coherence between ECHR and EU is visible also in Article 52(3) CFR which provides that CFR rights corresponding with ECHR rights have the same meaning and scope as laid down by the

[82] For prison populations and statistical breakdowns, see World Prison Brief data: https://www.prisonstudies.org/map/europe [Accessed 13 October 2020]; Hungary in 2018, for example, had a prison population of 16,303.

[83] Article 2, TEU; C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: OUP 2013), 206, citing for example *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases (C-402/05 P and C-415/05 P), Grand Chamber 3 September 2008, para 303.

[84] Article 6(1).

[85] Article 6(2).

[86] Article 6(3).

ECHR. At the same time Article 52(3) creates space for the EU in respect of these rights to 'provide more extensive protection' than the ECHR affords. According to this and taking into account the CJEU's approach to Article 1(3) FD-EAW in the latest Article 4 case law, the EU has a clear remit to handle fundamental rights matters progressively. A preventive approach offers much greater protection than currently afforded because any action taken with this at its heart would be geared towards protecting vastly more people than currently from ill-treatment. If the EU truly wishes to be progressive therefore, prevention should be given greater prominence in its approach to Article 4 and the significant legal and political power it has at its disposal can be harnessed to improve detention conditions and treatment in the criminal justice systems of its Member States.

Prevention is not in fact alien to the EU's strategy to eradicate torture and ill-treatment, and is present in both Regulation (EU) 2019/125 *concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*[87] and the EU's 'Guidelines to EU Policy towards third state countries on torture and other cruel, inhuman or degrading treatment or punishment' (the Guidelines).[88] However, EU law and policy in this relation is outward looking, applied in EU foreign policy to address the problem in third (i.e. non-EU) states, but not directed internally towards EU Member States.[89] Space does not permit a detailed examination the reasons for this, although a helpful first step would be to adapt and adopt relevant aspects of the Guidelines, not least their stated

[87] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (codification).

[88] 2019 Revision of the Guidelines, adopted by the Council at its 3712 meeting held on 16 September 2019.

[89] C. Bicknell, "Council of Europe and the European System" in M. Evans and J. Modvig (eds) Research Handbook on Torture (Northampton: Edward Elgar Forthcoming December 2020).

safeguards, such that they apply internally to EU Member States.[90] One can speculate however, it is probably far easier to reach a consensus among Member States for measures that impact the conduct of third states than to collectively recognise issues internally with Article 4 and set in train means of addressing them. Whether true or not, but especially if is, the CJEU is ideally situated to begin making prevention more central to EU thinking on Article 4. The FD-EAW provides it with the perfect opportunity to do this should an appropriate case arise, particularly since no state agreement is required and it is firmly within the CJEU's mandate to embed prevention in the ways suggested below. How the CJEU and in turn the EU and COE institutions might start to achieve this is what we turn to now.

VII Preventing Ill-treatment in Practice

Throughout this article the value of synergies between the EU and the COE has been indicated. Their relevance is most apparent when the practicalities of building prevention into the EU's approach to Article 4 within its own Member States are considered. All EU Member States are COE Member States, and the COE has, in the CPT, a particularly visible and established preventive dimension to its approach to torture and ill-treatment (Article 3 ECHR). The CPT undertakes regular preventive visits to places of detention based on which it makes recommendations and, in the spirit of cooperation, maintains an ongoing dialogue with states to improve conditions and treatment in detention.[91] Since the pilot judgment procedure was introduced to enable the European Court of Human Rights to deal with repeat cases based on systemic problems within a state, it also has a preventive dimension to its

[90] C. Bicknell, "Council of Europe and the European System" in M. Evans and J. Modvig (eds) Research Handbook on Torture (Northampton: Edward Elgar Forthcoming December 2020).

[91] C. Bicknell, M. Evans and R. Morgan, *Preventing Torture in Europe* (Council of Europe 2018).

work of which several cases have concerned inhuman and degrading treatment under Article 3 ECHR.[92] In spite of this it is known that several EU Member States continue to have significant issues with their detention conditions which have led other EU Member States (in spite of FD-EAW) to refuse extradition or to otherwise return persons to them.[93]

The supranational nature of the EU as a political organisation gives it a unique power to effect changes that promote its core principles of human dignity and human rights[94] internally in its Member States in ways that are not available under the COE frameworks. If mobilised strategically, the EU would, in its Member States, bolster the COE's efforts already in place to eradicate torture and ill-treatment through prevention. The COE for its part has significant expertise and experience that would be invaluable to both organisations if they chose to work collaboratively to this end. The following suggestions are by no means the only way of advancing the cause, but they represent what appears to be a good starting place with the CJEU and FD-EAW.

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[92] Concerning prisons in EU Member States: *Torreggiani and others v Italy* [GC] (App. No.43517/09), judgment of 8 January 2013; *Neshkov and others v Bulgaria* (App. Nos.36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13) judgment of 27 January 2015; *Varga and others v Hungary* (2015) 61 E.H.R.R. 30; *Rezmives and others v Romania* (App. Nos.61467/12, 39516/13, 48213/13 and 68191/13), judgment of 25 April 2017.

[93] Examples: Certain states routinely refuse to extradite to Greece and Romania because of the detention conditions in those states: Statistics on European Arrest Warrants, including their refusal are available at: https://e-justice.europa.eu/content_european_arrest_warrant-90--maximize-en.do [Accessed 13 October 2020]; Following a decision in its Supreme Court, Denmark has refused to extradite suspects to Romania on this basis: Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, 11804/19, Brussels, 30 August 2019, 44; In May 2019 (pre-Brexit), the Netherlands refused to return a prisoner to the UK considering prison conditions where he would likely end up 'inhumane': https://www.theguardian.com/world/2019/may/10/dutch-court-blocks-extradition-of-man-to-inhumane-uk-prisons [Accessed 13 October 2020].

[94] Article 2 TEU.

By its Article 4 case law the CJEU has demonstrated its willingness to depart, as necessary, from its previous jurisprudence in a manner that will afford greater protection for the individual subject to an EAW. Through *Dorobantu* and *M.L.*, elements of both synergy and complementarity with the ECHR are also apparent. This positive momentum should be maintained and the CJEU would demonstrate a much deeper commitment to the Article 4 prohibition if it were to shift its focus slightly to engage preventively with the issue. In the FD-EAW context this would mean looking beyond protection only of the individual under the EAW before it, to the bigger picture of detention conditions in its Member States. When approached preventively, the second stage of the *Aranyosi* process is too narrow. Identifying 'specifically and precisely' the risk to the individual and bringing the EAW process to an end if a real risk is established will help that person, but it does not place any particular pressure on the issuing state to improve conditions in which its general prison population are held. If however, as a matter of course, extradition were blocked to Member States which do not, more generally, meet acceptable detention standards under Article 4, this would send an extremely powerful message to the non-compliant Member State, the EU institutions, and to EU Member States alike.

Accordingly, it is not only argued that the EU should consider making prevention of torture and ill-treatment a priority. It is proposed also that to do so, the second stage of the *Aranyosi* test should be abandoned altogether. Although radical, such a move has very strong potential to bring a significant amount of human suffering to an end. Moreover, it is suggested that blocking extradition in this way should be ideally, and for best results, only the first stage of a further process towards improvement. Where extradition is blocked, a mechanism might be put in place to trigger additional measures of inquiry and support from elsewhere in the EU and COE. It is here particularly that cooperation and/or collaboration between institutions

within the two organisations, such as the EU Fundamental Rights Agency and the CPT could be most advantageous. It would make best use of experience, expertise, networks and resources to encourage and support the issuing state to improve prison conditions until they no longer show the generalised or systemic deficiencies which had led to blocking extradition in the first place.

If such prevention-focused blocking of EAW requests were established as the guiding approach by the CJEU, it would of course fall subsequently to executing states to implement the *Aranyosi* first stage and refuse extradition as appropriate. Notably this has happened already in some Member States, seemingly bypassing the CJEU.[95] If the approach were formalised through the CJEU and other partner EU and/or COE institutions as relevant however, the further review and support it could trigger would be more meaningful and have real potential to ameliorate the situation in the issuing state.

Such a strategy would also address the majority of weaknesses identified in the discussion as still present post-*Aranyosi*. An EAW refusal would no longer be 'exceptional' toward a transgressive state, but would remain so for states that do not have general or systemic issues of concern in their prison system. The evidence base to establish the existence of risk would revert to objective sources including those external to the state itself, rather than the second stage assessment of risk being based only on information from the issuing state. The EU position debarring Member States from insisting their own standards are met by the issuing state if these are higher than CFR standards would remain, and it is not core to the present argument that prevention necessarily requires a shift away from this. It is worth pointing out however that the presence of higher domestic standards are themselves an opportunity and

[95] See examples listed above.

could be capitalised upon by the EU, should it choose to, as a means of driving up expectations across the board. For example, higher domestic standards could be used to inform an EU statement of detention standards required of its own Member State and hence, rather than a race to the baseline minimum, there could become more of a race to the top. The requirement to rely on diplomatic assurances is also unchanged by the present suggestions, but may in any event become more reliable for the suggestions' positive impact reinforcing MT.

Placing prevention so centrally in the EU's approach in the ways proposed would require a reframing of MR's role within the FD-EAW system, which arguably the CJEU has already begun to moderate. Not least, it has accepted that MR, unity and efficacy of process should not override a person's freedom from torture and ill-treatment under Article 4. The only extension to this understanding required is to cast the net wider and recognise and exploit an opportunity (which meets a need) to protect *persons* rather than a single person. Instead of undermining MT between Member States, approaching FD-EAW in this manner in fact provides a means of nurturing and rebuilding it. If Member States can become more certain of their counterparts' Article 4 compliance, that the EU will support both them in their refusal to execute an EAW request on this ground, and that the issuing state will be supported to improve, ultimately MT and by extension MR in this context would no longer be so founded on a fallacy. This would restore confidence in the system and, even more critically, reinforce the rights of all prisoners across the EU territory to be treated with dignity and held in decent, humane conditions.

VIII Conclusions

Not all EU Member States are equally compliant with Article 4, and in a number there are known issues with the conditions and treatment in prisons and remand facilities such that they may be deemed inhuman. In spite of this, it has been demonstrated that the FD-EAW has long prioritised MR, unity among EU Member States, and efficacy of the EAW process above fundamental rights. It was not until *Aranyosi* that this was tested against Article 4, when in light of its absolute nature and the non-refoulement obligation it carries, the CJEU adapted its approach and introduced a two-stage process for assessing risk to the individual subject to an EAW in the issuing state. The case law has developed and the CJEU now accepts that where a real risk of ill-treatment exists, or cannot be ruled out, the executing state is obliged to bring the EAW procedure to an end. The CJEU's adaptable and progressive approach offers very much to be positive about. It has been argued in this article that the EU should look to deepen its commitment to the Article 4 prohibition and look to embed prevention into its approach. It is demonstrated that the FD-EAW provides an ideal opportunity for the EU to do this, and a means of doing so has been suggested. It includes setting aside the second stage of the Aranyosi process of assessment, and promoting increased synergy between EU and COE institutions helping to support transgressive issuing states to improve detention conditions in prisons and on remand. If it were to do so, MT between EU Member States would consequently be improved, and most importantly, significantly more people in the EU territory would have their right to live in dignity and free from torture and ill-treatment properly and appropriately respected.