

THE FUTURE OF MUTUAL TRUST AND THE PREVENTION OF ILL-TREATMENT

JUDICIAL COOPERATION AND THE ENGAGEMENT OF NATIONAL PREVENTIVE MECHANISMS



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LIST OF ACRONYMS

AFSJ	Area of Freedom, Security and Justice
APT	Association for the Prevention of Torture
BIM	Ludwig Boltzmann Institute of Human Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CAT	UN Committee against Torture
CEP	Confederation of European Probation
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIO	European Investigation Order
ERA	Academy of European Law
ESO	European Supervision Order
EU	European Union
FD	Framework Decision
FD 829	Framework Decision on the European Supervision Order
FD TOP	Framework Decision on the Transfer of Prisoners
FD PAS	Framework Decision on Probation and Alternative Sanctions
FD EAW	Framework Decision on the European Arrest Warrant
FRA	European Union Agency for Fundamental Rights
FTI	Fair Trials International
HRC	UN Human Rights Committee
MS	Member State
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the United Nation's Convention against Torture
SPT	UN Subcommittee on the Prevention of Torture
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToP	Transfer of Prisoners
UNCAT	UN Convention against Torture
UNSRT	UN Special Rapporteur on Torture

ABOUT THE AUTHORS

As part of a joint project conducted between the Ludwig Boltzmann Institute of Human Rights (BIM) and the Academy of European Law (ERA), this Study was written by Moritz Birk, Tiphonie Crittin and Gerrit Zach of the Ludwig Boltzmann Institute of Human Rights, and Jean Tomkin of the Academy of European Law.

The **Ludwig Boltzmann Institute of Human Rights** was established in Vienna, Austria, in 1992 as an independent research centre with the aim of contributing to the scientific discourse of human rights at the national, European and global level. The team Human Dignity and Public Security at the BIM is composed of experts on the prevention of torture and ill-treatment and has supported the mandate of the UN Special Rapporteur on Torture, Manfred Nowak, from 2004 to 2010. The team has conducted extensive research on torture and ill-treatment, inter alia by the publication of a comprehensive commentary on the UN Convention against Torture and implemented numerous projects dealing with fighting impunity and strengthening safeguards and monitoring bodies in different countries across the globe.

The **Academy of European Law (ERA)** was established in 1992 through an initiative of the European Parliament to provide training in European law to legal practitioners. ERA is a non-profit public foundation, whose patrons include most EU member states, and which is supported financially by the European Union. ERA organises conferences, seminars and language courses at different levels at its centre in Trier, its office in Brussels and around Europe. It also provides e-learning courses and publishes a quarterly journal, ERA Forum. ERA works with all practitioners of law, including judges, prosecutors, lawyers in private practice, notaries, in-house counsel, tax advisors, law enforcement officers or lawyers in public administration.

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EXECUTIVE SUMMARY

Mutual recognition and mutual trust as a basis for cooperation in criminal matters in the EU

This Study developed during the course of a critical time for the European Union. A crucial time for enhancing and supporting mutual trust and recognition, but equally a time recognising the priorities of the Union not only rooted as an economic entity but also one firmly committed to safeguarding the fundamental rights of its citizens.

Over the last decade, criminal justice has increasingly played a significant role in the operation of the EU. To this end, and with a view to guaranteeing an area of freedom, security and justice within its territory, the EU has established systems of cooperation between Member States, as well as common minimum standards. In order to ensure the effectiveness of national criminal laws despite the removal of internal borders, a number of EU legal instruments were introduced to foster cooperation in criminal matters. This Study centres around the Framework Decision on the European Arrest Warrant (FD EAW), and three of the key Framework Decisions on detention, namely the Framework Decision 909 on the Transfer of Prisoners, (FD TOP) Framework Decision 829 on the European Supervision Order (FD ESO) and Framework Decision 947 on Probation and Alternative Sanctions (FD PAS).

These mutual recognition instruments involve a process of judicial decision making whereby a decision taken by a judicial authority in one EU Member State is given effect in another EU Member State. Mutual recognition is essential for effective cross-border cooperation and the practical implementation of EU instruments. It is based on a principle of mutual trust – an understanding that each Member State can and should trust that all the other Member States respect fundamental rights standards, as is a prerequisite to membership of the EU. The underlying principle rooted in the fact that although the various legal systems differ, they provide equivalent and effective protection of fundamental rights.

While in many ways these Framework Decisions are crucial to effectively address crime in the EU, they also raise fundamental rights concerns that must be borne in mind. The focus of this Study relates to fundamental rights concerns particular to Article 3 ECHR, and Article 4 CFREU, which provide for the absolute prohibition of torture and ill-treatment. Other fundamental rights will be referenced to, where relevant to the prevention of ill-treatment, but will not constitute the focus.

From the outset, it is worth noting that none of the Framework Decisions contain a specific fundamental rights based refusal ground as a basis to refuse to execute an EAW or the Framework Decisions on detention. This can be contrasted with the Directive on the European Investigation Order which does make such a specific reference to Fundamental Rights. As a result, many member states have formulated fundamental rights based refusal grounds within their implementing legislation, or have sought, through jurisprudence, to elaborate safeguards.

The Framework Decisions on Detention as a challenge to the prevention of ill-treatment

As mutual recognition is the bedrock of the functioning of the European Union, mutual trust, which enables it, must therefore be the starting point for any judge presented with an EAW to execute, or is required to determine upon the transfer of a prisoner from EU Member State to another. However, as is often the case, a disparity exists between theory and practice, and this is particularly evident in the context of detention conditions. Notwithstanding minimum standards and accepted practice, prison conditions vary greatly between the Member States of the EU. Jurisprudence across Europe shows that fundamental rights are not always respected uniformly in each Member State.

To this end, there has been a significant body of case law emanating from the Court of Justice of the

EU (CJEU) and the European Court of Human Rights (ECtHR) recognising and addressing the limits to mutual trust and recognition and the role of fundamental rights in the context of mutual recognition instruments.

The case law initially stemmed from asylum procedures, albeit AG Sharpston in her Opinion in *Radu*, raised the issue previously in the context of criminal proceedings. Gradually, as European criminal law developed, a greater number of cases raising questions surrounding cross-border criminal matters, and the fundamental rights implications arose. In April 2016, the joined case of *Aranyosi and Căldăraru* was brought before the CJEU for a preliminary ruling specifically addressing the concerns of a judge tasked with executing an EAW. The issue was that by executing the two arrest warrants there was a risk that the individuals concerned could be subjected to inhuman prison conditions, contrary to Art. 4 CFREU.

The CJEU held that in cases where there is a real risk that the prison conditions in an issuing Member State may violate Art. 4 CFREU, the responsibility rests with the executing judge to obtain information from the issuing authority regarding the specific conditions of the prison where the individual would be sent. Moreover, it was held that courts should delay executing a warrant until such time as they are satisfied that there would be no risk of a breach of fundamental rights of the individuals concerned. This judgment, confirms that the cooperation in criminal justice matters in the EU, particularly the implementation of the Framework Decisions related to detention, cannot lead to a violation of the prohibition of ill-treatment.

The Framework Decisions as a chance for the prevention of ill-treatment

In addition to the Framework Decisions on the Transfer of Prisoners and the EAW, which potentially raise fundamental rights concerns stemming from poor prison conditions to lack of informed consent, there are two Framework Decisions on detention that seek to address overcrowding which can amount to, or result in, inhuman treatment. The ESO looks to reduce the overuse of pre-trial detention while the FD on Probation and Alternative Sanctions (FD PAS) relates to post sentencing measures with an aim to promote rehabilitation and address recidivism.

In contrast to the enthusiasm with which Member States apply the FD EAW, FD ESO and FD PAS are much less frequently applied. The reasons for this are manifold, and include a lack of awareness of their existence amongst practitioners and the judiciary, a lack of clarity in terms of how the instruments are to be applied in practice and the bureaucracy that the process entails.

How National Preventive Mechanisms can contribute to the prevention of ill-treatment in the implementation of EU law

The CJEU in the case of *Aranyosi and Căldăraru* specifically mentions the role of national monitoring bodies, as well as European and International ones, as a source of reliable information for judges. It, however, left many questions unanswered in terms of the actual application of the test established in this case, and the practical role national monitoring mechanisms could play in the context of EU law.

On foot of this judgment, the potential role of NPMs to contribute to the implementation of EU law in accordance with Art. 4 CFREU is further considered in this Study. NPMs enjoy a broad mandate in terms of access to places of detention, and as such, the Study analyses where NPMs mandate could suitably thrive in the context of mutual recognition instruments, and in particular EAWs, in providing up-to-date, first hand, reliable, independent information on prison conditions in Member States.

However, also with regard to a national context, the Study suggests that engagement between NPMs

and the judiciary could generally contribute to improving detention conditions. Ultimately, by improving conditions of detention in a national context, which would also indirectly contribute to strengthening mutual trust and thus cooperation in criminal matters across the EU.

The Study looks at possibilities and existing practices to improve the visibility of NPMs to promote better use of their work, resulting in increased effectiveness of their mandates. Much of this relates to the publication of reports, and widespread dissemination, as well as creating formal and informal channels of communication between judges and NPMs, for example, through trainings and sharing information and reports, always within the bounds of both parties maintaining independence and respecting confidentiality. Another area of engagement identified related to giving expert evidence in Court. This proved to be problematic for some NPMs, who firmly felt that this infringed on independence, raised potential challenges to confidentiality, and generally felt that this could go beyond their prescribed mandate. Others embraced it as another concrete way in which their work could be given greater practical effect.

While NPMs largely advocate for alternatives to detention, only a small number of them do so relying specifically on the Framework Decisions. Looking at alternatives to detention and providing respective recommendations could thus constitute another way in which NPMs could contribute to strengthening mutual trust.

Prevention of ill-treatment in the implementation of the Framework Decisions: Role of the international community

Through projects such as this, and ongoing training programmes the Commission also seeks to support and fortify NPMs and judges. One project that is envisaged for 2017 and 2018 is an “EU NPM network,” bringing together EU NPMs and contributing to the implementation of EU mutual recognition instruments in keeping with NPMs very specific mandate relating to the prevention of torture and ill-treatment.

Other areas of support discussed during the consultation process throughout this project related to the level of support and guidance that the SPT could provide to NPMs on the engagement between NPMs and Judiciary. Another possibility explored, relates to the establishment of a database, comprising a comprehensive overview of all NPM reports, so that judges and other stakeholders can easily locate and access them. In this regard, the EU Agency for Fundamental Rights has announced a pilot project on compiling information on detention conditions in EU Member States to be commenced in 2017. International bodies, such as Eurojust, are tasked with assisting international cooperation and specifically mutual recognition instruments, and seek to support judges in their cross-border work. The SPT sets out the guidelines for the operation of NPMs, and this Study considers how it can further support the work of NPMs in the context of their mandate to prevent ill-treatment and torture, and develop their work in the context of addressing the challenges that arise when implementing mutual recognition instruments.

PART ONE

THE CHANCES AND CHALLENGES TO THE PREVENTION OF ILL-TREATMENT ARISING FROM FRAMEWORK DECISIONS ON DETENTION

INTRODUCTION

Article 3(2) of the Treaty on European Union (TEU) stipulates that the European Union (EU) shall offer its citizens an area of freedom, security and justice (AFSJ) without internal frontiers, thus guaranteeing them free movement across EU Member States. The AFSJ was achieved largely by establishing systems of cooperation between the national legal systems of Member States, while at the same time working on the establishment of common minimum standards. This includes cooperation in criminal matters to prevent an accused or convicted person avoiding a trial or a sentence by crossing borders, and also to ensure the effectiveness of national criminal laws in a Union without internal borders. To address this, and to replace a previously more cumbersome process of extradition, the Framework Decision on the European Arrest Warrant (FD EAW) established an automated procedure for surrender, as well as Framework Decision 909 on the Transfer of Prisoners, Framework Decision 829 on the European Supervisory Order (FD ESO) and Framework Decision 947 on Probation and Alternative Sanctions (FD PAS). These measures enable an individual to carry out their sentence, whether one of imprisonment or a probation measure, in an EU Member State other than where the sentence was handed down. In addition, they provide also for supervision measures, which allow for the pre-trial supervision of an individual awaiting trial to be carried out in an EU Member State, where they normally reside, and where there are employment or family links and not in the country where the trial would take place. The Framework Decisions are based on the principle of mutual recognition of judicial decisions. This principle is considered to be the “cornerstone”¹ of judicial cooperation in criminal matters within the EU, coupled with the principle of mutual trust, which embodies an understanding and recognition among EU Member States that all, in line with the European Convention of Human Rights, respect and protect fundamental rights.

However, mutual trust between Member States has been called into question in the past due to perceived differences in the protection of fundamental rights in the EU. Judges in some Member States have refused to execute a surrender due to the risk of exposing an individual to cruel, inhuman or degrading treatment (ill-treatment) upon return, in violation of the principle of *non-refoulement* prescribed by Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the EU (CFREU). While it has been recognised, *inter alia*, by the CJEU that mutual trust cannot be equated to ‘blind trust’² and that Member States must be able to refuse the surrender or transfer of individuals where serious fundamental rights concerns arise, it remains to be seen how such a conflict between the duty to implement EU law and the respect of fundamental rights can be adequately resolved in practice. This conflict does not only have implications on the fundamental rights of individuals but also on the future of the principles of mutual recognition and mutual trust and thus the effective judicial cooperation between EU Member States.

This Study therefore will consider the principle of mutual trust and recognition in light of the varying standards of prison conditions across the EU, and the reality being that often prison conditions fall below the minimum standards required to ensure compliance with Article 3 ECHR. To this end the Study will consider how executing judicial authorities can equip themselves with information to ensure that while implementing the Framework Decisions on detention, the rights of the individual concerned are vindicated. In terms of the executing judicial authorities, the Study takes into account the different systems across the EU. In particular the different role of judges. For the most part, it is judges whether in the District Court or High Court that determine the issuing and executing of EAWs and ESOs, while the Transfer of Prisoners under the Framework Decision generally are decided by

1 European Council, Conclusion of the Presidency, Tampere 15 and 16 October 1999, SN 200/1/99 Rev.1, para. 33.

2 Costello, Catherine, Dublin Case: NS/ME Finally and end to Blind Trust across the EU available at <http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Asylum%20Law%20Seminar%2012-13%20December%202013/CostelloNSMENote2012.pdf>

the relevant department within the Ministry of Justice, with judicial oversight in terms of appeals. The Study therefore takes into account the different executing bodies.

Furthermore, the focus of the role of judges will be limited to the effects of the prevention of ill-treatment. It will consider criminal processes, in terms of pre-trial detention, and sentencing post-conviction, and administrative law in so far as the result of a decision made by a court will result in the imprisonment of an individual, for example, in the case of the execution of an EAW.

When speaking broadly of 'rights' it is clear that many rights come into play when a person is imprisoned or extradited. In particular Article 5 ECHR, Article 6 CFREU the right to liberty, and stemming from that, arbitrary detention, Article 6 ECHR due process, Article 47 CFREU Right to a fair trial, Article 8 ECHR family and privacy rights, Article 7 CFREU respect for private and family life. To this end, where those rights are considered, for the purpose of this Study it will be through the lens of Article 3 ECHR, as this Study is particularly focusing on the prevention of ill-treatment in the application of EU law.

METHODOLOGY

The Study began with a comprehensive desk research phase, which involved analysing the relevant legal instruments, the case law, and practices across the EU. It was followed by quantitative research, using surveys sent out to judges across the EU that work with mutual recognition instruments and EU National Preventative Mechanisms. The questions were for the most part closed, and were directed at NPMs and members of the judiciary across the EU. All 22 eligible EU NPMs provided replies in the framework of the survey for NPMs and 31 judges across the EU participated in the survey for judges.

Following on from the survey as the accompanying desk based research, there were two workshops. The first workshop was held in Trier between the 21st - 22nd April 2016 where judges from across the EU, as well as a number of experts, attended. There was a separate workshop for NPMs organised on the 7th-8th June 2016 in Vienna. At each of the events, a targeted baseline Study was prepared as the foundation for exchange and discussion.

Arising from the information obtained during the course of these workshops, the next phase focused on a qualitative based research. This included follow up targeted interviews undertaken with almost all NPMs and a number of Judges and experts from the SPT, CPT, FRA, APT, and European Commission as well as through an analysis of legal commentary, and national and regional case law. These involved open ended questions exploring and developing the issues raised from the surveys and workshops.

The final conference held between the 16th-17th November 2016 brought together representatives from NPMs, judges and experts from the Council of Europe, the European Committee for the Prevention of Torture (CPT), the UN Subcommittee on the Prevention of Torture (SPT), the EU Commission, EU Agency for Fundamental Rights (FRA), civil society organisations and practitioners. The aim was to present the research findings, create a platform for engagement between NPMs and judges, and to promote discussion and find common grounds of work going forward. The broad range of perspectives and experiences present at the conference ensured to refine practical recommendations in the final Study based on conclusions drawn from the direct experience of judges and NPMs.

PURPOSE OF THE STUDY

Judicial cooperation in criminal matters within the EU is based on the principle of mutual recognition of judicial decisions and approximation of Member States' criminal laws. The EAW and the three Framework Decisions related to detention, are instruments created in an effort to improve judicial cooperation in the EU and to ensure an equal treatment of non-residents and residents in criminal proceedings. Their implementation is based on the principle of mutual trust, which implies that conditions of detention and procedural safeguards are equivalent in every State. In reality, however, discrepancies exist, which potentially raise significant fundamental rights concerns.

The poor implementation of the Framework Decisions have been highlighted by the European Commission, in its implementation report of February 2014, stressing the need for improvements and harmonisation among Member States.³ The European Commission stated that the rules *"have the potential to lead to a reduction in prison sentences imposed by judges to non-residents. This could not only reduce prison overcrowding and thereby improve detention conditions, but also – as a consequence – allow for considerable savings for the budget spent by Member States on prisons."*⁴

The European Commission's Green Paper on Detention notes that prison overcrowding and allegations of ill-treatment may undermine the principle of mutual trust. Ensuring mutual trust between Member States is still viewed as an important challenge to overcome, as it would imply that conditions of detention and procedural safeguards are equivalent in every State, while discrepancies prevail in reality. Therefore concerns exist with regard to ensuring that Art. 3 ECHR obligations are adhered to when national authorities implement EU legislation.

Member States furthermore highlighted the practical difficulty of finding updated information concerning prison conditions and criminal justice systems of other Member States.⁵ This was recently addressed in a judgment that was delivered in the CJEU in April 2016. In that decision which concerned the surrender of two individuals on foot of an EAW, concerns were raised as to the prison conditions of the issuing state, and the resultant article 3 ECHR implications. The Court held that where judicial authorities are in possession of evidence of a real risk of inhuman and degrading treatment, the executing judicial authority must obtain information on prison conditions in the issuing member states and directed national courts to judgments of the ECtHR, decisions and reports of CoE and UN bodies, and furthermore to consider the information obtained from national monitoring mechanisms mandated to visit detention facilities.⁶

National Preventive Mechanism (NPMs), established in accordance with the Optional Protocol to the UN Convention against Torture (OPCAT), could therefore play an important role in addressing fundamental rights challenges linked to the implementation of the EAW, the Framework Decisions on Detention and other relevant EU legislation. NPMs regularly monitor places of detention, provide State Parties with systematic observations and recommendations on the treatment and conditions in detention, thus increasing the protection of detainees against torture. Currently 24 NPMs have been established within the EU, which carry out monitoring visits and provide valuable expertise regarding the situation in their countries. Comprehensive research carried out at the BIM in the framework of a previous EU-funded project has shown that there is little interaction between judges

3 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of 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 (COM (2014) 57 final) 5 February 2014.

4 Ibidem p.12.

5 Analysis of the replies to the Green Paper on the application of EU criminal justice legislation in the field of detention, p.8

6 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Caldărăru* [2016] paras. 88 -89.

and NPMs on the national level and even less so across Europe.⁷

There is no EU mechanism at the moment that systematically collects the information produced or maintains any form of institutionalised coordination with NPMs. The expertise of NPMs as the main bodies monitoring detention thus could be used more systematically in the application of EU law.

This Study aims to fill this gap by increasing the awareness of judges in the EU of NPMs and their relevance for the implementation the Framework Decisions on Detention, as well as the EAW, and other relevant EU legislation as well as the coordination between judiciary and NPMs. In addressing these questions, the Study contributes to the overall objective of ensuring the correct, consistent and fundamental rights compliant implementation of EU legislation.

STRUCTURE OF THE STUDY

The Study is divided into two parts. The first addresses the challenges and chances of the Framework Decisions with regard to the prevention of ill treatment. The three chapters in part 1 provide an introduction to the Framework Decisions and the principles that underline them including mutual trust and recognition. It then looks at each of the Framework Decisions in light of the challenges and chances that arise in their application or implementation. Overall, **Part 1** is a legal analysis of the Framework Decisions on detention, and looks at national and regional jurisprudence, as well as practice to illustrate the opportunities and obstacles associated with the Framework Decisions.

Part 2 considers how strengthened cooperation with judiciary and NPMS contribute to the prevention of ill-treatment. Part 2 addresses in four parts the actors that impact upon the implementation of Framework Decisions and the role they play in the prevention of ill-treatment. **Chapter 1** examines the role of judiciary and NPMS, in the prevention of ill-treatment. **Chapter 2** and **Chapter 3** considers methods and modes of engagement domestically and in the context of cross-border procedures. **Chapter 4** looks at the role of the international community, and how regional and international bodies can support NPMS and judges in the implementation of Framework Decisions on detention in a manner compliant with the prevention of ill-treatment.

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BIM/HRIC, "Strengthening the effective implementation and follow-up of recommendations by torture monitoring bodies in the EU", JUST/2013/JPEN/AG/4538.

CHAPTER 1. THE COUNCIL FRAMEWORK DECISIONS RELATED TO DETENTION: IMPROVING JUDICIAL COOPERATION

1.1. BACKGROUND

One key element of the AFSJ is the abolition of internal border controls between Member States and the creation of one single European area, guaranteeing freedom of movement.⁸ However, it is not accompanied by one common legal area, as the law remained largely territorial and within the competence of individual EU Member States. Consequently, one of the principle challenges for European integration in the AFSJ has been how to ensure that national systems interact in this borderless area. Since harmonisation of national law, including the establishment of minimum standards, has been limited, the focus so far has primarily been on the development of cooperation systems between Member States, aimed at extending national enforcement capacity in order to deal with the practical effects of border controls. Such largely automatised cooperation mechanisms between Member States were established on the basis of the principles of mutual recognition and mutual trust, which will be outlined in more detail in this chapter.⁹ On the basis of these underlying principles, a number of Framework Decisions were passed, including the FD 2002/584/JHA on the EAW (FD EAW)¹⁰, FD 2008/909/JHA on the Transfer of Prisoners (FD TOP)¹¹, FD 2008/947/JHA on Probation and Alternative Sanctions (FD PAS)¹² and FD 2009/829/JHA on the European Supervision Order (FD ESO).¹³

The largely automatized inter-state cooperation established by the FD EAW to prevent those accused or convicted of a criminal offence from evading prosecution or sentence by fleeing the country where the crime or allegation originated¹⁴ has been criticised from a fundamental rights perspective.¹⁵ Scholars and activists have voiced concerns over the adequate protection of the fundamental rights of individuals subject to an EAW, such as the right to a fair trial, the right to liberty, the presumption of innocence, the principles of *nulla poena sine lege*, or the prohibition of cruel, inhuman and degrading treatment (ill-treatment). It has further also been the subject of several national and CJEU court proceedings, which will be discussed in greater detail during the course of chapter 3.

8 Valsamis 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' Yearbook of European Law, (2012) Vol.31(1) pp.320 et seq. [hereinafter: Mitsilegas (2012)].

9 European Commission, Green Paper: Strengthening mutual trust in the European judicial area. A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, 14 June 2011, p. 2 [hereinafter: European Commission, COM (2011) 327 final]. Also see Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The fourth annual Sir Jeremy Lever Lecture (30 January 2015) available at <https://intranet.law.ox.ac.uk/ckfinder/userfiles/files/The%20Principle%20of%20Mutual%20Recognition%20in%20the%20Area%20of%20Freedom,%20Judge%20Lenaerts.pdf>, p.1 [hereinafter: Lenaerts (2015)].

10 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW), OJ 2003/ L 109/1.

11 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD TOP), OJ 2008/L 327/27.

12 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions, [2008] OJ 2008/L 337/102.

13 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to pre-trial detention (ESO), OJ 2009/L 294/20.

14 Lenaerts (2015) p.2.

15 See Mitsilegas (2016) p. 151: Mutual recognition, mutual trust and fundamental rights after Lisbon. 'See also Torres Perez, (2016) 'A predicament for domestic courts: caught between the European Arrest Warrant and Fundamental Rights,' National Courts and EU Law New Issues, Theories and Methods. Elgar 2016 p192.

In order to reconcile the principle of mutual trust with fundamental rights protection and the strengthening of the rights of suspects and accused persons in EU Member States, a Roadmap on Procedural Rights was introduced in 2009 to establish common minimum standards in EU Member States. The Roadmap includes as priority measures, with the possibility of adding other rights, the right to interpretation and translation, the right to information, the right to legal aid and legal advice, before and at trial, the right for a detained person to communicate with family members, employers and consular authorities, children's rights, the right to protection for vulnerable suspects as well as a Green Paper on pre-trial detention, and the Directive on the presumption of innocence.

In order to discuss the fundamental rights compliant implementation of mutual recognition instruments within the ASFJ, the key principles and instruments shall at first be described briefly in this chapter, in order to then enter in a more in-depth discussion and analysis of current challenges with regard to law and practice.

1.2. MUTUAL RECOGNITION

The principle of mutual recognition of judicial decisions in order to simplify extraditions (referred to as "surrenders" following the adoption of the FD on EAW) between EU Member States was stipulated as a priority in order to foster judicial cooperation in criminal matters when the AFSJ was established.¹⁶ Accordingly, in its Communication on the subject, the EU Commission specified that

*"mutual recognition is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state [...]. Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case [...] Recognising a foreign decision in criminal matters could be understood as giving it effect outside of the state in which it has been rendered."*¹⁷

Consequently, effective mutual recognition presumes that a Member State recognises and executes judicial decisions in criminal matters issued by another Member State without review. In this sense, mutual recognition creates extraterritoriality, as the decision of the authority in one Member States can be enforced across its borders. In its 2001 Programme of measures, the EU Commission placed emphasis on the broad scope of the principle and clarified that it applies to pre-trial, trial and post-trial decisions. At the same time, it is acknowledged that the principle is subject to limits and thus that refusal grounds do exist.¹⁸ The effective implementation of the principle of mutual recognition is based on a high level of mutual trust between EU Member States.

16 European Council and Commission, Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice (3. Dec. 1998) OJ 1999/C 19/1. The first official reference was in 1998 during the Cardiff Council presidency conclusions. Specifically in terms of improving mutual recognition and introducing it in the area of cooperation in criminal matters. Thereafter, it was elaborated in the Tampere Presidency conclusions 1999, and then Mutual Recognition Implementation plan 2000.

17 European Commission, Communication from the Commission to the Council and the European Parliament on mutual recognition of final decisions in criminal matters, COM (2000) 495 final, 26 July 2000, p.4 [hereinafter: European Commission, COM (2000) 495 final].

18 European Union, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 2001/C 12/10, pp.10-12 [hereinafter: EU, Programme of measures].

1.3. MUTUAL TRUST

Mutual trust is “*premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms.*”¹⁹ A series of EU instruments which go beyond pre-existing, traditional forms of cooperation set out under public international law, were adopted under this presumption of fundamental rights compliance by all Member States. This presumption was also used to justify the automatic procedures of inter-state cooperation within the AFSJ.

*“That trust is grounded, in particular, on the Member States’ shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.”*²⁰

The Hague Programme later referred to mutual confidence as being based on “*the certainty that all European citizens have access to a judicial system meeting high standards of quality.*”²¹ In this context, the CFREU and the ECHR provide the framework within which Member States have to act when applying EU law. Additionally, their national criminal laws and procedures must comply with the standards prescribed by the ECHR and set out by the European Court of Human Rights (ECtHR). The mutual trust principle thus also requires that Member States have trust in each other’s criminal justice processes and implies, at the same time, that the conditions of detention and procedural safeguards are equivalent in all Member States.²²

While mutual trust between Member States has been described, *inter alia*, by the CJEU as the “*raison d’être*” of the EU,²³ in reality discrepancies between norms and practice exist. Such discrepancies become all the more apparent by the significant number of findings of human rights violation of EU Member States before the ECtHR. The ECtHR, for example issued 51 judgments regarding eleven EU Member States concerning a violation of Article 3 ECHR because of poor conditions of detention.²⁴ In 2015 alone, 23% of all violations found by the Court related to Article 3 ECHR²⁵. This does not only raise real concerns with regard to the protection of the fundamental rights of individuals under the jurisdiction of EU Member States but it potentially could also undermine mutual trust as well as the functioning of judicial cooperation. The EU Commission stressed that “*detention conditions can have a direct impact on the smooth functioning of the principle of mutual recognition of judicial decisions*”, adding that “*prison overcrowding and allegations of poor treatment of detainees might undermine the trust that is necessary to underpin judicial cooperation within the European Union*”.²⁶ As such, criminal matters, including detention issues, still largely fall within the competences of the individual Member States, but the EU maintains an interest in the workings of national criminal proceedings including the conditions of detention in order to ensure the functioning of the principle of mutual trust.

When it comes to the application of mutual recognition instruments on the basis of mutual trust, Recital 10 of the FD EAW for example provides that:

19 Mitsilegas (2012) p.322.

20 EU, Programme of measures, p.10.

21 European Council, The Hague Programme: strengthening freedom, security and justice in the European Union, OJ 2005/C 53/11, para. 3.2.

22 See Lenaerts (2015), p.3.

23 Case C-411/10, *N.S et al* [2011] para. 83.

24 Figures extracted from the European Court of Human Rights HUDOC database 2016.

25 The ECHR in Facts and Figures 2015 at page 7 available at http://echr.coe.int/Documents/Facts_Figures_2015_ENG.pdf.

26 European Commission, COM (2011) 327 final.

“the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the TEU determined by the Council.”

While it has been argued that fundamental rights violations might constitute such exceptional cases for some time by a number of authors,²⁷ this was finally confirmed by the CJEU in its recent *Aranyosi/Caldărăru* judgment, which will be discussed in detail in chapter 3. Before considering this important decision further, the fundamental rights challenges relating to Article 3 ECHR, linked to the different mutual recognition instruments affecting detention will be examined.

1.3.1. COUNCIL FRAMEWORK DECISION 2002/584/JHA ON THE EUROPEAN ARREST WARRANT

The transposition deadline for the implementation of the FD EAW was the 31 December 2003. The FD EAW was the first of such measures rooted in mutual recognition to have been fully implemented across the EU, and the last Member State transposed it in July 2013.²⁸ It changed extradition procedures substantially between Member States,²⁹ replacing the former Council of Europe mechanisms.³⁰ It set up a cooperation mechanism between the national judicial authorities establishing a largely automatic extradition procedure.³¹ The FD EAW combines arrest and surrender in one single judicial act, which previously had been two separate proceedings.³² As a consequence, the process of surrender is simplified and sped up.³³ Some principles of extradition law were overhauled between Member States, for example the exception for the surrender of nationals and residents, exceptions for political offences and the principle of double criminality.³⁴ The substantive and procedural criminal systems in Member States are not assumed to be identical, but deemed to be equivalent.³⁵

27 Jannemieke Ouwerkerk, ‘Mutual Trust in the Area of Criminal Law’ in Meijers Committee, *The principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights*, Forum Institute for Multicultural Affairs (Dec. 2011) p.41 [hereinafter: Ouwerkerk (2011)]; Christine Janssens, *The Principle of Mutual Recognition in EU Law* (1st edn, Oxford University Press 2013) pp.142-143 [hereinafter: Janssens (2013)].

28 The last EU MS to transpose the EAW was Croatia, see European Judicial Network, ‘Status of implementation of 2002/584/JHA: European Arrest Warrant (EAW) of 13 June 2002’ available at www.ejn-crimjust.europa.eu/ejn/EJN_library_statusOfImpByCat.aspx?CategoryId=36 Croatia transposed it upon joining the EU.

29 See Case C-399/11, *Melloni* [2013] para. 37: The “‘Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States;” Also see Peers, *EU Justice and Home Affairs Law* (2nd edn, Oxford University Press 2008) p.696 [hereinafter: Peers (2008)].

30 For further details see: Peers (2008) pp. 693-696. e.g. EU: Schengen Convention 1990; European Union Convention on Simplified Extradition Procedure (1995); European Policy Centre: EPC Convention on the application of the Council of Europe terrorism Convention (1979), EPC Convention on double jeopardy (1987), EPC Convention on the transfer of sentenced persons (1987), EPC Convention on the international validity of criminal judgements (1990), EPC Convention on transfer of criminal proceedings (1990); Council of Europe: Council of Europe Convention on Extradition (1957). Supplemented by Additional Protocol (1975) and Second Additional Protocol (1978). Council of Europe Convention on the suppression of terrorism (1977).

31 Nicola Vennemann, ‘The European Arrest Warrant and Its Human rights Implications.’ *ZaöRV* (2003) Vol.63, available at www.zaerv.de, pp.103 et seq. [hereinafter: Vennemann (2003)].

32 Vennemann (2003) p. 108; Mitsilegas (2012) p.322.

33 Mitsilegas (2012) p. 324.

34 Vennemann (2003) pp.110 et seq.

35 European Commission, COM (2011) 327 final, p.4.

An EAW can be issued for the purpose of conducting a criminal prosecution as well as to execute a detention order or a custodial sentence.³⁶ Accordingly, an EAW might also entail pre-trial detention for the person surrendered. The warrant can be issued for crimes punishable in the issuing Member State by a maximum period of at least 12 months, where a sentence has been passed or a detention order has been made, for sentences of at least four months.³⁷

There are mandatory and optional refusal grounds listed in the FD EAW, whereby the executing State can refuse to surrender the requested person. Mandatory refusal grounds serve as an amnesty by the executing State or a situation whereby the person to be surrendered was already sentenced by another Member State for the same crime and has served the sentence. One of the optional refusal grounds would be that the person is prosecuted for the same act in the executing State. Whereas recitals 10 and 12 in the FD EAW refer to Article 6 of TEU and thus to fundamental rights and Recital 10 also indicates that a serious and persistent breach of fundamental rights by a Member State may undermine mutual trust and have an effect on mutual recognition, fundamental rights are not explicitly included in either the mandatory nor the optional refusal grounds (Article 3 and 4 FD EAW).

The absence of such an explicit provision in the FD EAW, however, has not prevent Member States from interpreting it as allowing for the introduction of mandatory fundamental rights refusal grounds not specifically included in the text (see chapter 3 below).

Numerous challenges with the implementation of the FD EAW have been reported by the Commission³⁸ and the European Parliament,³⁹ such as the lack of entitlement to legal representation in the issuing State during the surrender proceedings in the executing State as well as unacceptable detention conditions and lengthy pre-trial detention.⁴⁰ One of the main concerns regarding the application of the FD EAW relates to the fact that certain Member States issue EAWs often for minor offences, thus not fully respecting the principle of proportionality⁴¹ as set out in Article 2(2) that only certain severe or serious crimes can form the basis of the EAW.⁴² As was indicated in the introduction, while not discounting other fundamental rights that come into play when implementing the Framework Decisions on detention, this Study will focus on issues of ill-treatment.

In the survey of judges conducted in the framework of the project, by far the most common concern was described to be the poor conditions of detention in some Member States that were requesting

36 Article 1 (1) FD EAW.

37 Article 2 (1) and (2) FD EAW.

38 European Commission, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, COM (2005) 63 final, 23 Feb.2005. At the time when this report was adopted only half of the Member States had transposed the FD into their legal order. See also European Commission, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (revised version)' COM (2006) 8 final, 24 Jan. 2006 [hereinafter: European Commission, COM (2006) 63 final]; European Commission, 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, 11 July 2007; European Commission, Report to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM (2011) 175 final, 11 April 2011 [hereinafter: European Commission, COM (2011) 175 final].

39 European Parliament, Study on the Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level, PE 410.671 (January 2009) [hereinafter: European Parliament, Implementation of the EAW (2009)]; Anne Weyembergh, 'European Added Value Assessment - The EU Arrest Warrant. Critical Assessment of the Existing European Arrest Warrant Framework Decision', PE 510.979 (Jan. 2014) available at [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET\(2013\)510979\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf) [hereinafter: Weyembergh (2014)].

40 European Commission, COM (2011) 175 final, p.7.

41 Weyembergh (2014), pp.32-37.

42 See about this Luisa Marin, 'Effective and legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' in *New Journal of European Criminal Law* (2014) Vol.5 (3).

the surrender of individuals. The recent developments in case law, most notably the recent joined decision of the CJEU, in *Aranyosi and Căldăraru* have shown that these concerns actually hinder the application of the FD EAW. Other common challenges identified included the varying legal systems, the delay in response from issuing States for requests of further information, the effects on family rights, as well as the assessment of the validity of a claim that the actual rights would be infringed on foot of a surrender. On a practical level, the insufficient time, and difficulties stemming from language barriers were also identified as obstacles by the surveyed judges.

1.3.2. FRAMEWORK DECISION 2008/909/JHA ON THE TRANSFER OF PRISONERS

Council Framework Decision 2008/909/JHA of 27 November 2008⁴³ on the application of the principle of mutual recognition of judgments imposing custodial sentences or measures involving deprivation of liberty (hereinafter FD TOP) establishes a post-trial mechanism to transfer a convicted person to the Member State of nationality, or habitual residence in order to execute the sentence. The deadline for implementation was the 5 December 2011. As of October 2016, 26 Member States had transposed the FD TOP into their national legal orders with Ireland and Bulgaria still having ongoing processes of implementation.⁴⁴ The European Commission is communicating with Member States on this matter and considers taking legal action to ensure that all Member States comply with the EU framework.

Cooperation in the field of transfer of prisoners is based on the presumption that the Member States mutually recognise judgments imposing custodial sentences or measures involving the deprivation of liberty issued by another Member State.⁴⁵ In this context, FD TOP was presented as complementing the FD EAW in criminal matters on a European level. The objective of FD EAW is to request an arrest or/and a surrender to the Member States issuing the EAW to ensure that those accused or convicted of a criminal offence do not avoid a trial or a sentence by crossing borders. The rationale for the FD TOP was to enhance social reintegration, by transferring prisoners so that they can serve their sentence in a Member States in which there is a connection, be it nationality, permanent residence or other factors that presume a close link, including family structures or professional ties.⁴⁶ There is little data available as to the exact numbers of transfer requests made, and executed under FD TOP. Europris are currently tasked by the Commission to collate data in this regard and have attributed the lack of figures recorded to the fact that some Member States have no competent authority gathering statistics.⁴⁷ The concrete findings to date provided by Europris indicate that there is a steady increase in the use of FD TOP in terms of requests made, and transfers executed amongst EU Members that have implemented it. Furthermore, the number of requests made, are far in excess of the transfers completed. For example according to the available numbers provided by Europris, of 102 transfer requests made from Sweden in 2015, 18 transfers took place that year, 19 were refused, and 65 are pending or require further processing.⁴⁸

There have been a number of practical challenges identified. In particular, it was found in Austria

43 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (ToP), OJ 2008/L 327/27.

44 For the latest information on the implementation process see European Judicial Network, 'Status of Implementation of Framework Decision 2008/909/JHA on transfer of prisoners', available at www.ejn-crimjust.europa.eu/ejn/EJN_library_statusOfImpByCat.aspx?CategoryId=36.

45 Recital 4 of FD 2008/909/JHA.

46 Francesca Ferraro, 'EU rules on transfer of sentenced persons' (European Parliament, Jan. 2013) available at [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130411/LDM_BRI\(2013\)130411_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130411/LDM_BRI(2013)130411_REV2_EN.pdf) p.3.

47 Details from discussions with Europris 2 November 2016.

48 Figures provided by Europris <http://www.europris.org/>.

that notwithstanding the time frame envisaged by the FD, the actual transfer procedure takes much longer now than it did prior to the introduction of FD TOP. The effect of the bureaucratic in addition to practical hurdles is that a transfer process can take up to a year.⁴⁹

1.3.3. FRAMEWORK DECISION 2008/947/JHA ON PROBATION AND ALTERNATIVE SANCTIONS

Council Framework Decision 2008/947/JHA on Probation and Alternative Sanctions⁵⁰ (FD PAS) of 27 November 2008 allows a convicted person to return to the Member States of his/her nationality or another State with close ties (executing State) and to comply with probation measures or alternative sanctions imposed by another Member State (issuing State). The FD PAS was to be transposed by 6 December 2011. After a slow start regarding transposition across the EU⁵¹, as of May 2016, 26 Member States have transposed it, with the exception of Ireland⁵².

The objective of the FD PAS is *“to enhance the prospects of the sentenced person’s being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public.”*⁵³

The consent of the convicted person is essential since a forced return to another Member State would run contrary to the intention of FD PAS, which presumes that the person concerned has been released in the issuing State and may return to his/her home country in compliance with alternatives to detention and/or probation measures.

Mutual trust as well as the existence of measures of alternatives to detention in all Member States are prerequisites for an effective application of the FD PAS. Article 4(1) may also have the effect of setting minimum standards, as it foresees specific measures as alternatives to detention. However, the modalities of probation, conditional sentencing and alternative sanctions in fact do not exist in each national legal system in an equal manner.⁵⁴ Some Member States have also not transposed all mandatory measures as listed in the FD PAS in their national legal systems. Thus, a correct transposition into national law is required in order to ensure its effective application, especially in light of the fact that an increasing number of those sentenced in a Member State are non-nationals or non-residents.⁵⁵ Similarly to the two above-mentioned Framework Decisions, there is no explicit fundamental rights refusal ground in the FD PAS.

49 Interview with Austrian Ministry of Justice 28th October 2016

50 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions (PAS), [2008] OJ 2008/L 337/102.

51 Only 14 MS had transposed the FD 2008/947/JHA on Probation and Alternative Sanctions by 2014. See European Commission, Report from the Commission to the European Parliament and the Council on the implementation by the Member States of 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, COM (2014) 57 final, 5 Feb. 2014, p.6 [hereinafter: European Commission, COM (2014) 57 final]. For the latest information on the implementation process see European Judicial Network, ‘Status of Implementation of Framework Decision 2008/947/JHA: Probation of 27 November 2008’, available at www.ejn-crimjust.europa.eu/ejn/EJN_library_statusOfImpByCat.aspx?CategoryId=36.

52 The UK having decided to Opt out of FD 947.

53 Recital 8 to the FD 2008/947/JHA.

54 European Commission, COM (2011) 327 final, p.7.

55 European Commission, COM (2014) 57 final, p.8.

While databases⁵⁶ have been established to monitor the implementation of the FD PAS and to provide information to improve the cooperation between the Member States, in practice FD PAS is not as widely utilised as the others, and more needs to be done to collect and gather data on their application and use.

1.3.4. FRAMEWORK DECISION 2009/829/JHA ON THE EUROPEAN SUPERVISION ORDER

The Council adopted the Framework Decision 2009/829/JHA on the European Supervision Order (FD ESO)⁵⁷ on 11 November 2009, which had to be transposed by 1 December 2012. To date, all EU Member States with the exception of Ireland and Belgium have implemented the FD on the ESO.⁵⁸ The European Commission is communicating with Member States on this on this matter and considers taking legal action to ensure that all Member States comply with the EU Framework.

FD ESO allows pre-trial supervision measures that were imposed in one Member State (issuing State) to be supervised and enforced by another (executing State). Due to the presumption of a substantial flight risk, EU non-nationals are often more likely to be subjected to detention measures than suspects who are residents in the Member State where the alleged crime was committed.⁵⁹ In some cases the maximum period can be up to four years, which impacts upon the right to liberty as enshrined in Article 47 CFREU and Article 5(3) ECHR.⁶⁰ On this issue, the Commission points out in its Green Paper that a judicial authority

“must apply the most lenient coercive measure appropriate, i.e. choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the risks of absconding or reoffending.”⁶¹

The ESO provides for such a non-custodial alternative and thereby aims at reducing the often rampant numbers of pre-trial detainees of non-residents in the Member State where they are suspected of having committed a criminal offence.⁶²

Over the last number of years the FD ESO has been applied rarely, although there is some indication that Member States who have implemented it have started to use it more often.⁶³

Although Member States have to provide for at least six types of supervision measures, as per Article

56 See for example EU Probation Project ‘Probation measures and alternative sanctions in the EU’, available at www.euprobationproject.eu/index.php ISTEP, ‘Facilitating Probation Transfers’, available at www.probation-transfers.eu/default.asp.

57 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to pre-trial detention (ESO), OJ 2009/L 294/20.

58 Belgium and Bulgaria had not implemented this FD, while Cyprus and Ireland are still in the process of transposing it. For the latest information on the implementation process see European Judicial network, ‘Status of implementation of Framework Decision 2009/929/JHA on supervision measures’, available at www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39.

59 Christine Morgenstern, ‘Die Europäische Überwachungsordnung. Überkomplexes Ungetüm oder sinnvolles Instrument zur Untersuchungshaftvermeidung von Ausländern?’ in ZIS (2014) 5, available at <www.zis-online.com> pp. 217 et seq. [hereinafter: Morgenstern (2014)].

60 European Commission, COM (2011) 327 final, p.9.

61 Ibidem.

62 No reliable standardised data on EU foreigners in pre-trial detention is available since the statistics (e.g. Council of Europe Annual Penal Statistics [SPACE], World Prison Brief [WPB]) do not differentiate between EU and non-EU foreigners at that stage of procedure. In 2004 the European Commission estimated that approximately 6.000 EU foreigners were placed in pre-trial detention within the EU. See Commission of the European Communities, ‘Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Impact Assessment summary’, SEC (2006) 1080, 29 Aug. 2006, p.40.

63 From 2012 to 2016 the Netherlands issued 13 requests to other Member States under the FD ESO.

8(1), it seems that some Member States have not yet fully transposed FD ESO into national law. Consequently, difficulties might arise when a supervision measure foreseen by an issuing State is found to be incompatible with the law of the executing State.

The issuing State has the discretion to decide whether or not to invoke the ESO measures and there is no automatic legal right to the supervision order. However, since pre-trial detention has to be seen as a “*measure of last resort*”⁶⁴ and must be used only if there are no other “*less stringent measures*”⁶⁵ to achieve the pursued aim,⁶⁶ it has been argued that courts have a legal obligation to consider the ESO as a suitable alternative to detention in cases of foreign nationals from an EU Member State.⁶⁷

64 *Lelievre v Belgium*, App.no. 11287/03 (ECtHR, 8 Nov. 2007) para. 97.

65 *Ladent v Poland*, App.no.11036/03 (ECtHR, 18 March 2008) para.56.

66 *Ambruszkiewicz v Poland*, App.no. 38797/03 (ECtHR, 4 May 2006) para.31.

67 Fair Trials International (FTI), ‘A Guide to the ESO’ (Fair Trials International, September 2012) available at <http://www.fairtrials.net/documents/ESOGuide>, p.13

CHAPTER 2. THE FRAMEWORK DECISIONS ON DETENTION AS CHALLENGES FOR THE PREVENTION OF ILL-TREATMENT

This chapter will consider the fundamental rights challenges with regard to Art. 3 ECHR and Art. 4 CFREU arising from the Framework Decisions on detention. To this end, it will provide an overview of the definition and scope of the absolute prohibition of torture and ill-treatment. Thereafter, the challenges associated with Framework Decisions on detention with particular emphasis on *non-refoulement* will be considered, firstly in terms of the case law emanating from the Court of Justice of the European Union, (CJEU) and the European Court of Human Rights (ECtHR) and finally, in the national context. The common challenge regarding the prevention of ill-treatment attributed to Framework Decisions on detention, in particular the FD EAW and FD TOP as relates to *non-refoulement*, remains central to this chapter.

The above mentioned rights are key not only in their own right, but the duties contained for example in the right to liberty and the right to a fair trial are highly relevant to the prevention of torture and ill-treatment. The connection between arbitrary detention, inhuman treatment, and an absence of due process cannot be overlooked.

As discussed in chapter 1, the principle of mutual recognition is based on the existence of mutual trust between Member States, which is premised upon the presumption that all Member States fully respect fundamental rights as enshrined in both the ECHR and the CFREU. This mutual recognition is in the context of an understanding that although criminal justice systems may vary amongst EU Member States, they remain equivalent. Article 6 TEU mandates that all EU institutions including the Council must act in accordance with fundamental rights derived from the ECHR and standards common to Member States. In the AFSJ context, Article 67(1) TFEU mandates that “*The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.*” The CFREU provides for legally binding standards that must be applied when implementing and interpreting EU law.

As previously noted, the Framework Decisions discussed in this Study do not include an explicit fundamental rights refusal ground, beyond references contained within the recitals and broader remarks in the operative clauses.⁶⁸ There are only two mutual recognition instruments that expressly include such a ground for refusal of a request: the Framework Decision on the Mutual Recognition of Financial Penalties⁶⁹ and the recent Directive on the European Investigation Order (EIO).⁷⁰ In relation to the latter, Recital 19 is noteworthy as it explicitly stresses the rebuttable character of the presumption of compliance with fundamental rights and mandates that “*if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter,*

68 See Recital 12-13 FD EAW

69 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005/L 76/16. Article 20 (3) provides that ‘Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions.’ This formulation has been criticised by Peers, who argues that when read literally, it would be impossible to apply the provision in practice as there is no way that a standard form certificate, that includes only boxes to be ticked and lines to be filled with factual information in order to ensure the judgement to be enforced, could easily raise concern about a possible human rights infringement. Steve Peers, *Justice and Home Affairs Law*, Third Edition. Oxford: Oxford University Press, 2011, 725.

70 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO), OJ 2014/L 130/1.

*the execution of the EIO should be refused.*⁷¹ Furthermore, Article 11 (1)(f) of the Directive permits a refusal to execute an EIO on human rights grounds.

In striking contrast to the EIO Directive, the Framework Decisions on detention and the FD EAW, contain rather vague references to human rights giving rise to ambiguities. As regards the FD EAW in particular, it was pointed out that the EU legislator chose not to include a specific human rights ground, as Member States can cooperate on the basis of a high level of mutual trust rooted in the presumption that fundamental rights are in principle fully respected at EU level.⁷² This absence of a fundamental rights based refusal ground in the text of the FD EAW was at the same time criticised as giving *“rise to the suspicion that Member States have not given serious consideration to the possibility of grave human rights abuses occurring in other Member States that would give rise to an obligation to refuse surrender.”*⁷³

The rationale for the omission was considered at the outset of the final conference held in connection with this Study. It was noted that the EAW is based on an assumption of fundamental rights compliance, secondly, at EU level there are specific measures established to approximate the rights of accused and suspected persons, and finally the suggestion pertaining to sovereignty, that Member States are not competent to assess the system of another Member State.⁷⁴

While it does not contain an explicit fundamental rights refusal ground, the FD EAW makes three important references to fundamental rights in the text. First, recitals 12 and 13 of the preamble state respectively that the FD *“respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter and that “[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment.”* Furthermore, the overriding importance of fundamental rights is illustrated in Article 1(3) of the FD, which states that *“[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”*

However, some authors have stated that these references do not seem sufficient, either because Member States occasionally violate the ECHR (or the Charter) or because the EAW system itself leads to a lack of certainty or sufficient protection against a violation of a defendant’s procedural rights.⁷⁵ This is why many commentators argue that a clear refusal ground should be included, as is contained in the EIO Directive.⁷⁶

71 Emphasis added.

72 Valsamis Mitsilegas, ‘The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’, *New Journal of European Criminal Law* (2015) Vol. 6 (4), p.466 [hereinafter: Mitsilegas (2015)].

73 Susie Alegre and Marisa Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – The European Arrest Warrant’, *European Law Journal* (2004) Vol. 10 (2), p.203.

74 Opening Session of Final Conference. Presentation of Wolfgang Bogensberger 16 November 2016.

75 Andrew Sanger, ‘Force of Circumstance: The European Arrest Warrant and Human Rights’, *Democracy and Security* (2010) Vol. 6 (1) p.27 [hereinafter: Sanger (2010)].

76 Peers referencing the explicit fundamental rights ground contained in the EIO Directive and the mere reference in the other Framework Decisions on detention demonstrate the view of the EU legislature that there ‘ought to be a genuine human rights exception from mutual recognition obligations.’ Peers *EU Justice and Home Affairs Law*, EU Law Library, 2016 at page 101; Gert Vermeulen et. al., ‘The Disqualification Triad, Approximating legislation Executing Requests Ensuring Equivalence’ in *IRCP Series* (2012) Vol. 45, p.100 [hereinafter: Vermeulen (2012)].

2.1. THE PREVENTION OF ILL-TREATMENT AND THE PRINCIPLE OF NON-REFOULEMENT

The absolute prohibition of torture and ill-treatment

Article 3 ECHR provides that “No one shall be subjected to torture or to inhumane or degrading treatment or punishment.” The prohibition of torture or cruel, inhuman or degrading treatment or punishment (hereinafter ill-treatment) is one of the few absolute human rights obligations meaning that it cannot be limited, balanced against any other right or interests “even in the most difficult of circumstances such as the fight against terrorism and crime”. It cannot be derogated from, even under exceptional circumstances such as “war or a threat of war, internal political instability or any other public emergency.”⁷⁷ The special status of the prohibition of torture and ill-treatment is explained due to its particular severity as a direct attack on human dignity with often irreversible consequences for the survivor. Challenges to the absolute prohibition to torture, for the fight against terrorism and crime are rebutted as torture has proven to be ineffective and any exceptions would lead down a slippery slope towards widespread practice and impunity.⁷⁸ While international law prohibits both, a distinction is made between torture and ill-treatment.

Definition of torture and ill-treatment

The definition of torture cumulates four essential criteria. Firstly, severe physical or mental pain or suffering must be inflicted on a person. The pain or suffering must “attain a minimum level of severity.”⁷⁹ Secondly, the aim must be to achieve a specific purpose such as extracting of a confession, a punishment, intimidation and so forth. Article 1 UNCAT is claimed to be a demonstrative, but not an exhaustive list of purposes suitable to be considered relevant under the prohibition of ill-treatment.⁸⁰ Thirdly, the pain or suffering must be caused intentionally to achieve a specific purpose. Lastly, the involvement of a public official is required. This provision, however is understood broadly, as to include “the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

There is no corresponding definition of cruel, inhuman and degrading treatment and punishment (ill-treatment) and in practice a differentiation to torture is not always clear.⁸¹ International bodies have differentiated according to the intensity of the pain or suffering,⁸² the purpose of the conduct and the powerlessness of the victim.⁸³ According to the ECtHR in order for treatment or punishment to be considered cruel or inhuman it needs to reach a minimum threshold of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, the sex, age and state of health of the victim as well as the purpose for which the treatment was inflicted.⁸⁴

77 Aksoy v. Turkey, Application No 21987/93 (ECtHR, 18. Dec. 1996), para. 62. Tomasi v France (27 August 1992) para 115 ; Art. 2(2) UNCAT ; Art. 7, 4(2) ICCPR

78 See also APT, Defusing the Ticking Bomb Scenario Why we must say No to torture, always, 2007, at: http://www.apr.ch/content/files_res/tickingbombscenario.pdf.

79 EHRR, *Ireland v. the UK* (18 January 1978) para. 162.

80 M Novak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law, Oxford University Press, p 75.

81 CAT, General Comment No. 2, “Implementation of article 2 by States Parties”, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), para. 3.

82 *Ireland v. UK* 5310771 (1978) ECHR 1.

83 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), para. 39.

84 See, among others ECtHR, *Ireland v. the United Kingdom*,; El-Masri, § 196; *Aksoy v. Turkey*, § 64)

Conditions of detention as ill-treatment

What is important is that ill-treatment cannot only be inflicted by bodily injury or threats but also unintentionally, for example by poor conditions of detention. This has been confirmed by the long-established jurisprudence of the ECtHR as well as the UN Human Rights Committee.⁸⁵ Conditions of detention are usually considered inhuman where there is an accumulation of factors such as such as overcrowding, a lack of medical treatment, unhygienic conditions, etc. that attain a minimum level of severity. The lack of resource is in any case irrelevant and cannot serve States as an excuse for inhuman detention conditions.⁸⁶ When conditions of detention can be considered inhuman depends on all circumstances of the case. Practical guidance on how persons in detention should be treated can be found in the many soft law documents, notably the recently revised UN Standard Minimum Rules for the Treatment of Prisoners (the so called Mandela Rules)⁸⁷ as well as the European Prison Rules⁸⁸ that are frequently used as guidance by the ECtHR and international human rights mechanisms when determining whether a state violates the prohibition of ill-treatment.⁸⁹

Positive obligations to prevent ill-treatment

The state has clear positive obligations and responsibilities under the prohibition of ill-treatment. It must provide adequate means and mechanisms to prevent ill-treatment in their national systems. This has been recognised by the ECtHR⁹⁰ and is explicitly prescribed in Articles 2 and 16 CAT: *“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture [respectively ill-treatment] in any territory under its jurisdiction.”*⁹¹ Moreover, Article 10 of the ICCPR contains a clear commitment to a rehabilitative justice system: *“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”* The UN Subcommittee for the Prevention of Torture has emphasised the broadness of the preventive obligation, that goes beyond the compliance with legal commitments but

*“should embrace as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.”*⁹²

This essentially means that in order to effectively implement the obligation to prevent ill-treatment one must look at the big picture how and when people are deprived of their liberty in a given context.

85 See for example *Dougoz v Greece*, *Peers v. Greece*, 2001; *Kalashnikov v Russia*, 2002; Human Rights Committee, 1981. Buffov. Uruguay, Application number 33/1978).

86 See ECtHR, *Poltoratskiy v Ukraine*, 2003; HRC, General Comment 21 to Article 10B ICCPR, 1992.

87 United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, available at: <http://www.refworld.org/docid/3ae6b36e8.html> [accessed 8 March 2017].

88 Include reference

89 Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, Rec(2006)2, available at: <http://www.refworld.org/docid/43f3134810.html>.

90 *Z and Others v. the UK* (10 May 2001). The case deals with the abuse of four children in their homes. And the state's responsibility to protect from ill-treatment committed by third-persons.

91 Article 2, para. 1 CAT.

92 SPT, CAT/OP/12/6, 30 December 2010.

2.1.2. EXTRADITION AND THE PRINCIPLE OF NON-REFOULEMENT: ECTHR JURISPRUDENCE

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Art. 19(2) CFREU

Understanding the principle of non-refoulement

The main bodies tasked with the promotion and protection of human rights in Europe rests with the Council of Europe, its “flagship” the European Convention on Human Rights and its monitoring body the ECtHR.⁹³ All members of the EU are also parties to the ECHR, and to the jurisdiction of the ECtHR.

While, unlike in the CFREU, the principle of non-refoulement is not explicit, it is regulated in the ECHR, the ECtHR has often been called upon to decide on issues surrounding the extradition of individuals. The central issue is whether a State assumes responsibility when extraditing or surrendering a person to a situation which would violate Article 3 ECHR. In the landmark judgment of *Soering v UK*, the ECtHR, for the first time held that the act of extradition of an individual was a violation of Article 3 ECHR and acknowledged the principle of non-refoulement.⁹⁴ This decision related to the extradition of an individual, who challenged a request for extradition to the US, where if convicted he would be subjected to what has become known as ‘death row phenomenon’. In that case, the Court found:

“The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”⁹⁵

The principles elaborated in *Soering v UK* have been reiterated in a series of ECtHR judgments, notably in relation to the deportation of aliens to their country of origin.⁹⁶ In *Saadi v Italy*,⁹⁷ the Court elaborated upon principles concerning the removal of a person from a State, including that it is for the applicants to prove that if sent to another State there would be a real risk that they would be exposed to treatment contrary to Article 3 ECHR. Furthermore, that a Court must examine the foreseeable consequences on the basis of both the general situation and the personal circumstances. The Court found that all relevant material should be taken into account, and that reports from independent human rights organisations or government sources are important to inform deliberations. Finally, where applicants can show that they are members of a particular group systematically exposed to a practice of ill-treatment, it is sufficient to prove membership of this group.⁹⁸ Moreover, the Court reiterated the absolute nature of the prohibition which also applies to the non-refoulement principle rejecting any suggestion of a flexible application even when dealing with an alleged terrorist.⁹⁹

93 Manfred Nowak, ‘An Introduction to the Human Rights Mechanisms of the Council of Europe’ in Manfred Nowak, Karolina M. Januszewski, Tina Hofstätter (eds.), *All Human Rights for All. Vienna Manual on Human Rights* (1st edn, NWV, 2012) p.121.

94 *Soering v UK*, Application No 14038/88 (ECtHR, 7 July 1989).

95 *Soering v UK*, Application No 14038/88 (ECtHR, 7 July 1989) para. 91.

96 For example see *Chahal v UK*, Application No 22414/93 (ECtHR, 11 Nov. 1996); *Mamatkulov and Askaron v. Turkey*, Application Nos. 46827/99 and 46951/99 (ECtHR, 4 Feb. 2005).

97 *Saadi v Italy*, Application No. 37201/06 (ECtHR, 28 Feb. 2008).

98 *Ibidem*, paras. 128-133.

99 *Ibidem*, para. 140.

The ECtHR found a transfer of an asylum seeker within the EU to be in violation of the non-refoulement principle for the first time, in its landmark decision *M.S.S. v Greece and Belgium* in regard to an asylum seeker, in applying the EU Dublin Regulations.¹⁰⁰ The ECtHR found that the presumption of respect of fundamental rights in the “intra-EU inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable.”¹⁰¹ In light of this, it held that it was a matter for Belgium “not merely to assume that the applicant would be treated in conformity with the Convention standards, but on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice”.¹⁰² Since it was recognised that the Greek asylum system suffered from systematic deficiencies, Belgium was found to be in violation of the ECHR. In later cases the ECtHR reaffirmed this principle, and it was developed further with regard not only to asylum proceedings, but also criminal justice matters.

In *Tarakhel v Switzerland*¹⁰³, the applicant argued a violation of Article 3, Article 8 (right to privacy) and Article 13 (effective remedy). The Court noted the applicants’ arguments, which essentially raised the systemic failures in Italy, and that in the absence of individual guarantees, their rights under Article 3 ECHR were at risk. The Court considered the deficiencies described in the *M.S.S.* case, including the living conditions and the Greek asylum procedures and noted that although there existed many deficiencies, the overall situation in Italy could not result in a ‘blanket ban’ when considering the returns of families. Therefore, rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a State action with fundamental rights, the Court made clear that effective protection of fundamental rights necessitates an assessment of the impact of a decision on the rights of the specific individual in the particular case before the Court.¹⁰⁴ The Court specifically noted that the presumption that a State participating in an automated transfer system such as Dublin complies with the prohibition of ill-treatment can be rebutted in the face of systemic deficiencies, and went beyond, emphasising that States were under the obligation to carry out a ‘thorough and individualised examination’ of the fundamental rights situation of the person concerned.¹⁰⁵ Consequently, the Court found a breach of the Convention with regard to specific individuals even in a case where generalised systemic deficiencies in the receiving State had not been ascertained.¹⁰⁶

Furthermore, the Court concluded

*“that there would be a violation of Article 3 of the Convention if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.”*¹⁰⁷

100 *M.S.S. v Belgium and Greece*, Application No 30696/09 (ECtHR, 21 Jan. 2011).

101 Mitsilegas, *Research Handbook of EU Criminal Law 2016*, p. 161.

102 *M.S.S. v Belgium and Greece*, Application No 30696/09 (ECtHR, 21 Jan. 2011) para. 359.

103 *Tarakhel v Switzerland*, Application No 29217/12 (ECtHR, 4 Nov. 2014).

104 According to Halberstam, *Tarakhel* is a strong warning signal to Luxembourg that the CJEU’s standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention. See Daniel Halberstam, “It’s the Autonomy, Stupid!” A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’, *University of Michigan Public Law Research Paper No. 439* (Feb. 2015) p. 27.

105 *Tarakhel v Switzerland*, Application No 29217/12 (ECtHR, 4 Nov. 2014) para.104 (emphasis added).

106 *Tarakhel v Switzerland*, Application No. 29217/12 (ECtHR, 4 Nov. 2014) para.115.

107 *Tarakhel v Switzerland*, Application No. 29217/12 (ECtHR, 4 Nov. 2014) para. 143 (2).

The case of *Sharifi and others v Italy and Greece*,¹⁰⁸ which concerned the return of the applicants, who had arrived from Afghanistan to Greece, is a further endorsement of the principles in *M.S.S.* On arrival from Greece to Italy, in the absence of any legal advice, or without any explanation in a language that they understood, they were returned immediately to Greece where proper reception conditions and procedures were absent. Further, there were concerns that they would be deported to Afghanistan where there was a risk that they would be subjected to torture or ill-treatment. The Court considered the case of *M.S.S.* and the issues raised in respect of the detention conditions in Greece, at that time. They noted the requirement to be compliant with convention rights when implementing Dublin Regulations, and found that there was a breach of Article 3 ECHR, as well as Article 4 of Protocol No. 4, relating to collective expulsion.

2.2. THE EAW AND CHALLENGES TO THE PREVENTION OF ILL-TREATMENT

The European Commission in its implementation report of 2011, having considered the several ECtHR judgments that had highlighted deficiencies in prisons of EU Member States', acknowledged that unacceptable detention conditions that reach a minimum level of severity can constitute a violation of Article 3 ECHR. In addition, the Commission confirmed that Article 1(3) of the FD 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.”*¹⁰⁹ Indeed Peers notes that *“any inability to reject mutual recognition on human rights grounds, on the assumption that the problem will be fixed months later in the issuing State or years later in the ECtHR, would mean that human rights protection in this field would be theoretical and illusory, not real and effective.”*¹¹⁰

In this sense, the previously rather cautious jurisprudence by the CJEU developed over time and essentially in this direction, clearly stipulating in its judgment in *Aranyosi and Căldăraru* that mutual trust must not result in breach of Art. 4 CFREU/Art. 3 ECHR, as will be outlined in the subsequent chapter.

2.2.1. JURISPRUDENCE FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION

In *Advocaten voor de Wereld*, in the Opinion of Advocate General commented on the critical role of fundamental rights in the context of EAWs, and urged that:

*“the Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms.”*¹¹¹

108 *Sharifi and others v Italy and Greece*, Application No. 16643/09 (ECtHR, 21 Oct.2014).

109 COM(2011) 175. Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

110 Peers, EU justice and Home Affairs 2016, page 101.

111 Opinion of Advocate General Ruiz-Jarabo Colomer, *Advocaten voor de Wereld* C-303/05 delivered on the 12th December 2006 at para 79.

A more recent case of the CJEU, *Lanigen*, noted that, “Article 1(3) of the Framework Decision expressly states that the decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and reflected in the Charter of Fundamental Rights of the European Union (‘the Charter’), an obligation which moreover concerns all the Member States, in particular both the issuing and the executing Member States.”¹¹² This demonstrates firstly, a practical fundamental rights reading into FD EAW, and secondly, it places the onus not only on the issuing state, but also on the executing state. It creates an explicit duty on the executing state to ensure that the fundamental rights of the individuals concerned are upheld.

Violation in cases of systemic deficiencies in the asylum process

In the same year as the ECtHR published the *M.S.S.* decision the CJEU released its judgment in the case of *N.S. and M.E.*¹¹³ This case of *N. S.* also raised questions of mutual recognition in the context of asylum law. The issue was whether Member States, when returning an asylum seeker to the responsible country in accordance with the Dublin system (in that case to Greece), were under a duty to examine the compatibility of such a transfer with fundamental rights. The Court found that an application of the Dublin Regulation on the basis of a mere presumption that the Member State of return would adhere to ensuring fundamental rights could undermine the safeguards which are intended to ensure compliance with fundamental rights by the EU and its Member States.¹¹⁴

Essentially, the test elaborated in *N.S.*, as to when the transfer to a particular Member State should be suspended, was whether there were systemic deficiencies which amount to substantial grounds for believing that there exists a real risk of violation of Article 4 CFREU.

“Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”¹¹⁵

The reasoning in *M.S.S.* by the ECtHR was thus adopted by the CJEU in the *N.S.* case, while establishing a high threshold of systemic deficiency in the asylum process. There was however no provision made for individual assessment or for the gap between EU rules and the actual practice, as noted by AG Trstenjak.¹¹⁶ It is of interest also to note the comments of the Advocate General regarding the difference between the decisions of the ECtHR and the CJEU. In particular, she found that without lessening the importance of the landmark decision of *M.S.S.*, ECtHR judgments are case specific judicial decisions, while the CJEU judgments constitute a source of interpretation of EU law.¹¹⁷

112 Case C-237/15 PPU *Francis Lanigan*, 15th July 2015 at para 53.

113 Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011]. For comments on the case see inter alia Joanna Buckley, ‘Comment on *N.S. v Secretary of State for the Home Department*’, *European Human Rights Law Review* (2012/2), pp.205-210 [hereinafter: Buckley (2012)]; Cathryn Costello, ‘Dublin Case NS/ME – Finally an End to Blind Trust across the EU?’, *A&MR* (2012/2), pp. 83-92 [hereinafter: Costello (2012)].

114 Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011] para. 100.

115 Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011] para. 106.

116 See the AG Trstenjak Opinion in Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011] and Buckley (2012) pp.205-210; Costello (2012) pp.83-92.

117 AG Trstenjak Opinion in Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011], paras. 146-147.

The importance of mutual trust (Radu and Melloni, Opinion 2/13)

In the cases of *Radu* and *Melloni*, the CJEU did not follow the reasoning contained in AG Sharpston's Opinion and rejected complaints of a violation of the right to a fair trial in favour of the principle of mutual trust.¹¹⁸ In *Radu* a Romanian national was arrested on foot of four EAWs issued in Germany in order to prosecute an allegation of aggravated robbery. While the decision of the Court confined itself to procedural rights aspects of due process at the issuing phase of the EAW, it is worth noting the Opinion of AG Sharpston, which eloquently comments upon the tension between mutual trust and the respect of fundamental rights. In particular, the Opinion addresses the reality of any such automatic acceptance of mutual trust on the basis that *'the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice'*¹¹⁹

The importance of mutual trust was again confirmed by the CJEU in its Opinion 2/13 on the EU's accession to the ECHR. The CJEU argued that the accession to the ECHR *"is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."*¹²⁰ Both *Radu* and especially *Melloni*, as well as Opinion 2/13 do not sit comfortably with the ECtHR's jurisprudence, or with its own approach in mutual recognition in the context of the transfer of asylum-seekers under the Dublin Regulations following the ECtHR ruling in *M.S.S. v Belgium and Greece*, as discussed above.

Duty to defer surrender in case of a risk of inhuman detention conditions (Aranyosi and Căldăraru)

The CJEU's most recent judgment sheds some further light on the Court's interpretation of the relationship between mutual trust and fundamental rights, in particular Article 3 ECHR/Article 4 CFREU. The joined case of *Aranyosi* and *Căldăraru*¹²¹ involve a Hungarian and a Romanian national, both arrested in Germany on foot of an EAW. The case of Mr Căldăraru, which involved the breach of a suspended sentence handed down for driving without a valid licence, was dealt with under the urgent procedures mechanism on account of his being held in custody pending the surrender. The warrant in relation to Mr Aranyosi's was issued in order to prosecute an alleged offence of burglary and theft to the value of approximately €760. A preliminary reference from a German Higher Regional Court in Bremen, raised a series of questions in particular, whether the correct interpretation of Article 1(3) of the EAW meant that extradition for the purposes of prosecution is impermissible where there are strong indications that detention conditions in the issuing State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU.

The preliminary reference also sought clarification as to whether the executing State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant, and whether the executing State can or must lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought. Clarification was sought as to whether the FD EAW should be interpreted in such a way so that the issuing judicial authority is also entitled to provide assurances that detention conditions are compliant, or whether assurances remain subject to the domestic rules of competence within the issuing

118 Case C-396/11, *Radu* [2013] paras. 28 et seq.; Case C-399/11, *Melloni* [2013] paras. 35 et seq.

119 Case C-396/11, *Radu* [2013] paras. 41.

120 Opinion C-2/13 [2014] para. 194.

121 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Căldăraru* [2016]

Member State.

The case essentially considered the principles of mutual trust in the context of EAW proceedings, and how to reconcile this crucial principle of EU law with the reality that prison conditions in some Member States fall below minimum standards, with the standards being so low as to endanger the right not to be subjected to ill-treatment as guaranteed under the ECHR and CFREU. The starting point of the analysis was a recognition of the absolute prohibition of torture, and the obligations that stem from that prohibition. The Court then went on to formulate the following test: Where the executing authority has a concern that the conditions of detention of the issuing State are such that would give rise to a real risk of inhuman or degrading treatment, the executing authority must seek out information from the issuing authority as to the risks to the specific individual concerned. Until information is received that would indicate that there is no risk to the individual concerned, then the execution of the warrant should be deferred. Furthermore, in circumstance where there is undue delay in the receipt of information from the issuing authority, then the proceedings should be discontinued. The Court held that;

*“that where there is **objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State** that demonstrates that there are deficiencies, which may be **systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention**, the executing judicial authority must determine, specifically and precisely, whether there are **substantial grounds to believe that the individual concerned** by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, **will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment**, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.*¹²²

The Court went on to find that the executing judicial authority should seek additional information from the issuing authority, and until they are satisfied that there is no such risk to the individual the national judicial authority should postpone executing the warrant.

This is an important judgment, as it further elaborates upon the limits of mutual trust, and the onus on the executing authority to take due diligence when executing an EAW. It also highlights the absolute nature of the prohibition contained in Article 3 ECHR and Article 4 CFEU.¹²³ It importantly provides that systemic failures do not necessarily amount to a violation, and that specific evidence of the risk to the individual concerned must be demonstrated before refusing to execute the warrant. In this regard, the judgment refers specifically to the potential sources for consultation when assessing the risk, and refers *inter alia* to national monitoring bodies, regional and international courts, and monitoring bodies under the aegis of the UN and Council of Europe.¹²⁴ Finally, the issue of diplomatic assurances was not addressed in the course of the judgment of the court.

122 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Caldărăru* [2016] at para 104.

123 Ibid. at paras 85, 86 and 87.

124 Ibid at para 89 and 96.

2.2.2. NATIONAL PRACTICE

Implementation of Framework Decisions into national legislation

Following on from the considerations of Art. 4 CFREU/Art. 3 ECHR relating to the Framework Decisions on detention on a regional level, it is interesting to note how Member States have addressed fundamental rights during the course of implementation. Many Member States have criticised the lack of stronger references to fundamental rights in the FD EAW.¹²⁵ This omission has been partly addressed at the national level through its implementation. In particular, it appears that a significant number of Member States seem to understand the FD EAW as allowing the non-execution of an EAW on the basis of fundamental rights. In this context, it has been reported that around two thirds of Member States have gone beyond the letter of the EAW and have introduced a fundamental rights ground for refusal in various forms.¹²⁶ Some Member States have introduced an explicit ground. For example, in the United Kingdom, Section 21 of the Extradition Act 2003 provides for a review of whether the surrender is compatible with the ECHR within the meaning of the Human Rights Act 1998, thereby providing an additional ground upon which surrender may be refused. Greece and Finland have converted Recital 12 into a mandatory ground for refusal.¹²⁷ Other Member States have used a general fundamental rights clause similar to Article 1(3) EAW, which can however be used as a ground for refusing to execute an EAW. An example of this can be found in Section 73 of the German Mutual Legal Assistance and Extradition Act, even though it is used only for serious cases where human rights have been abused.¹²⁸ Finally, the Italian implementing legislation provides that the 'supreme principles' of the Italian constitutional order with regard to fundamental rights prevail.¹²⁹

National jurisprudence

During the course of a survey conducted with judges across the EU in the framework of this project, a majority of judges were of the view that the ECHR, combined with the Charter formed sufficient protection without the requirement to include an explicit reference in the Framework Decisions. Most of the judges surveyed added that their national legislation contained a specific or general fundamental rights clause, and that on receipt of a request to enforce an EAW, issues of fundamental rights are addressed.

Despite human rights refusal grounds in the majority of EU Member States' national legislation and this understanding of judges, there have for quite a while been very few cases where these were applied in practice by judges.¹³⁰ This finding is corroborated by a Study undertaken by the Centre for European Policy Studies (CEPS), whereby the refusal on the fundamental rights grounds is not listed among the most common grounds of non-execution of a request.¹³¹ In this regard, it has been pointed out that the option to challenge an EAW on the basis of human rights violations (e.g. that the requesting State has a negative record of poor detention conditions or unfair trials) would be

125 European Parliament, Implementation of the EAW (2009) p.19.

126 European Commission, COM (2011) 175 final, p.5.

127 Council of the European Union, 'Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States" – report on Greece', 13416/2/08 REV2, 13416/1/08 REV1 (3 December 2008) p. 38; Council of the European Union, 'Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedure between Member States" – report on Finland', 11787/2/07 REV2, 11787/1/07 REV1 (16 November 2007) p.36.

128 Vermeulen et. al (2012) p.100.

129 European Parliament, Implementation of the EAW (2009), p.19. See Corte di Cassazione Case, No. 1654 (15 May 2006).

130 Vermeulen et. al (2012) p.100.

131 Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System' in CEPS (March 2013) Paper no. 55, p.10.

significantly cumbersome for the requested State and politically controversial.¹³²

However, recently there have been an increasing number of cases refusing surrender due to prison conditions violating Article 3 ECHR and on other human rights grounds, as will be outlined in further detail. While the below section cannot be considered to constitute an exhaustive overview of all existing national jurisprudence in this matter across the EU, it nevertheless demonstrates that there is an increasing tendency to refuse surrender within EU Member States on human rights grounds. In accordance with the focus of the Study, the cases outlined below centre on the issue of inadequate detention conditions and violations of Article 3 ECHR resulting from a surrender.

Germany

The case of Aranyosi/Căldăraru – A refusal to surrender on Art. 3 ECHR / Art 4 CFREU grounds

Following on from the 5th April 2016 decision of the CJEU in *Aranyosi/Căldăraru*, the Higher Regional Court in Bremen (Hanseatisches Oberlandesgericht) applied the decision and on the 30th June the Court handed down a ruling refusing to surrender Mr Căldăraru to Romania. In doing so the Court noted that there had been communications received from Romania indicating that they could not provide details of the exact prison that he would be sent to, but that most likely it would be one near to where he resides, which has a capacity of 330, and the current occupancy level is at 659, which led to approximately 2 square metres available per person. The General Prosecutors Office (Generalstaatsanwaltschaft) withdrew their application to execute the warrant, and applied to vacate the previous order of the 11th November 2015 seeking to surrender Mr Căldăraru to Romania. The Court in refusing the surrender, referred to the general duty to surrender, but the obligation to ensure that Mr Căldăraru would not be exposed to a risk of treatment contrary to Article 3 ECHR.

In relation to the case of Mr Aranyosi, the Court lodged a further preliminary reference on the 16th September 2016 with the CJEU, following on from the decision of the 5th April 2016, looking for further clarity on whether the Court should receive information also on pre-trial detention conditions, and whether they should also know of the prison conditions that the individual could be subjected to on foot of any subsequent conviction.

A further case also before the Higher Regional Court in Bremen, dealt with a request for surrender to Latvia¹³³ of an individual pertaining to alleged driving offences. In that case the Court referred to the *Aranyosi and Căldăraru* decision of the 5th April 2016, as well as the German Constitutional Court decision of the 15th December 2015 which refused to execute the European Arrest Warrant in circumstances where the extradition would risk the violation of European Union fundamental rights. In doing so the Court stated the principles of mutual trust can be '*shaken*', and that it was not without its limits, and that the minimum guarantees of the rights of an accused person must be respected.¹³⁴

Relying on these decisions, the Court refused to surrender the individual to Latvia, but on the basis that it was only as a result of reports pertaining to the instant case before the Higher Regional Court, and would not serve as an automatic basis for refusal for all requests seeking surrender to Latvia.

132 Sanger (2010) p. 24.

133 OLG München Beschluss: 27 October 2015 - 1 AR 392/15 available at <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-18224?hl=true>.

134 See the Press Release of the Second Senate of the Federal Constitutional Court available at <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>.

The Higher Regional Court in Munich, also recently considered both the issues of surrender in the context of concerns of prison conditions, but also relating to assurances. The Court refused a surrender request to Bulgaria on account of prison conditions. The first case related to conditions in Burgas, where the court found that detainees were ill-treated by the penitentiary staff and that there were instances of violence between the prisoners. In addition, the detainees were kept almost 23 hours in their cells since there were no outdoor activities. Reference was made to the CPT report of 26th March 2015, where three prisons were visited, but the court considered it a systematic problem which reached beyond the three institutions reported. The Bulgarian authorities submitted a report and referred to the prison conditions in terms of ventilation, lighting, sanitary facilities, and explained that standards could be guaranteed in relation to the particular need of the individual, and where specific assurances were requested. The Court sought assurances and noted that they would only be deemed adequate where they were notified of the prison the person would be detained in on surrender, as well as providing a specific assurance that the minimum standards and conditions would be ensured pursuant to Article 3 ECHR. To this end, they sought a description of the prison conditions including details of the number of prisoners, the capacity, the size of the cell, the sanitation facilities available, access to healthcare and guaranteed access for the diplomatic and consular representatives to the person concerned throughout their imprisonment.¹³⁵

On foot of a communication from the authorities in Bulgaria, the Court found that the statements could not be seen as adequate as no assurance was given per se, it was only stated that the imprisonment is normally carried out near the place of residence, and in that case it would be Burgas. The authorities stated that the minimum safeguards in Burgas could not be guaranteed, and the possibility of a move to another prison was not deemed a sufficient guarantee. In addition there was no assurance made in respect of diplomatic access.

In a subsequent case between the Higher Regional Court in Munich relating also to a surrender request to Bulgaria, the court again addressed the issue of assurances and prison conditions. In contesting the EAW, Article 3 ECHR, Article 6 TEU and Section 73 of the International Mutual Assistance in Criminal Matters Act were relied upon. In that case the surrender was deferred due to the prison conditions in Bulgaria which it was found to amount to inhuman and degrading treatment on cumulative grounds. As with the previous case, assurances were requested in relation to detention conditions, in particular that the minimum European standards had to be met to safeguard Article 3 ECHR. In response, the Ministry of Justice in Bulgaria submitted that the situation in Sofia prison had significantly improved and a detailed description of the conditions were provided to the Court in Munich. The description noted that the detainees had almost 4sqm per person as well as heating, heating ventilation and sanitary facilities and the additional facilities corresponding to the standards required by the German authorities, as well as the nutrition requirements and the access to medical treatments. Since 2015, the detainees were also give the possibility of 2 hour slots of outdoor activities, and educational facilities including training and courses geared at reintegration. The authorities also guaranteed that the diplomatic and consular representatives could access the individual throughout their imprisonment. In light of these assurances, and the subsequent confirmation that the individual would be brought to the prison in Sofia the individual was surrendered.¹³⁶

135 OLG München Beschluss 14 December 2015 – 1 AR 392/15, available at <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2016-N-04622?hl=true>.

136 OLG München Beschluss 08 March 2016, 1 AR 2/16. Available at <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2016-N-05463?hl=true>.

In Ireland, Section 37(1)(c) of the EAW Act of 2003 states that in order to refuse the execution of an EAW it is sufficient to establish that “*there are reasonable grounds for believing that*” the person would be “*tortured or subjected to other inhuman or degrading treatment.*” In the case of *MJELR v Rettinger*, the applicant submitted that if transferred to Poland he would face a risk of ill-treatment on the basis of Article 3 ECHR due to the overcrowding of prisons.¹³⁷ The High Court had considered that the threshold of a real risk could not be reached in the absence of knowing the prison to which the applicant would be surrendered, i.e. that it would be important to know which prison the person would be sent to in order to establish the risk of ill-treatment for the concrete situation.

The Irish Supreme Court on appeal, set out the test to be applied when considering whether or not to refuse a surrender where there is a risk that the individual would be subjected to conditions in breach of Article 3 ECHR. The Supreme Court referred to jurisprudence of the ECtHR. In particular it drew upon a number of principles enshrined in *Saadi v Italy*, and in doing so established important guidelines in relation to the standard of proof when examining extradition requests, which continues to be the relevant test in such cases.

“Thus I would apply the following principles: (i) A Court should consider all the material before it, and if necessary material obtained of its own motion. (ii) A Court should examine whether there is a real risk, in a rigorous examination. (iii) The burden rests upon an application [...] to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR. (iv) It is open to a requesting State to dispel any doubts by evidence [...] (vi) The court may attach importance to reports of independent international human rights organisations (vii) the mere possibility of ill treatment is not sufficient to establish an applicant’s case [...]”¹³⁸.

The case of *McGuigan* before the Irish High Court involved a contested EAW issued in Lithuania, with the individual being subject of the EAW raising adverse prison conditions upon surrender.¹³⁹ In challenging the surrender, the grounding affidavit relied on CPT reports, and a report of the Lithuanian Ombudsman’s Office, referring to the “*up to date and authoritative evidence*” of both. The Court applied the test in *Rettinger*, considered the reports by expert witnesses, the CPT and the report of the Lithuanian Ombudsperson and refused the surrender on the grounds of prison conditions of detention in Lithuania. Interestingly, the Court in that case, noted that

“it is somewhat unfortunate that the report for the most recent visit by the CPT to Lithuania has not been published yet, as that would provide very up to date information to guide the Court in its decision.”¹⁴⁰

The absolute nature of the prohibition of inhuman and degrading treatment was described in *McGuigan* noting that there was “*no margin of appreciation. These rights are absolutely guaranteed.*”¹⁴¹

137 Minister for Justice, Equality and Law Reform vs. Robert Rettinger [2010] IESC 45.

138 The Minister for Justice, Equality and Law Reform vs. Robert Rettinger [2010] IESC 45. Paragraph 27.

139 The Minister for Justice and Ors v McGuigan [2013] IEHC 216.

140 The Minister for Justice and Ors v McGuigan [2013] IEHC 216.

141 The Minister for Justice and Ors v McGuigan [2013] 216.

In the subsequent case of *Tagijevas*,¹⁴² prison conditions in Lithuania were raised again. The Court distinguished *Tagijevas* from the *McGuigan* decision in light of the evidence submitted, and found that it was not “satisfied that there are substantial grounds for believing that there is a real risk of [...] being subjected to inhuman and degrading treatment.”¹⁴³ Furthermore, the court considered that the findings of other bodies and courts as to the inhuman conditions in remand prisons alone would not be definitive to satisfy the test which is whether the individual subjected to the EAW in that particular case is at real risk of being “subjected to inhuman and degrading conditions [...] on surrender to Lithuania.”¹⁴⁴

The jurisprudence suggests that each case will turn on its own merits, Edwards J was clear in *McGuigan*, that the case was decided on the particular facts and the strength of the evidence adduced. It demonstrates the cross-border reliance on the reports of Ombuds institutions and NPMS, and the thirst and interest of the Courts for current and reliable information on prison conditions.

The Netherlands

As regards the Netherlands, Section 11 of the Surrender Act, which is the FD EAW implementing legislation provides that surrender is not permitted where there is a justifiable suspicion based on facts or circumstance that the surrender would lead to a flagrant breach of fundamental rights. In the first years of implementation, some challenges to the EAW on the basis of fundamental rights were successful,¹⁴⁵ since then no refusals have been based on fundamental rights concerns.¹⁴⁶ Recently, a court in Amsterdam refused to decide on Hungarian EAW’s provisionally, due to poor detention conditions in Hungary.¹⁴⁷ On the 26th January 2017 a Court in Amsterdam dealt with a case relating to a surrender request from Romania. In that case the Court specifically referenced the decision in *Ara-nyosi and Căldăraru*, the test of a real risk to inhuman treatment on surrender, and considered the requirement to seek further information from the issuing authority. In applying this test, the Court refused to execute the warrant as it had not received the information within the specified time.¹⁴⁸

United Kingdom

In *Krolik v Regional Court in Czestochowa, Poland*¹⁴⁹ the Court relied on the presumption of respect of fundamental rights and held that a clear cogent and compelling evidence to the contrary would be required to have the presumption rebutted.

An example where an individual subjected to an EAW was not surrendered on account of prison conditions was the case of *Campbell*. In that case, Mr Campbell faced extradition to Lithuania in order to be prosecuted for terrorist offences.¹⁵⁰ On the basis of multiple findings of poor prison conditions in Lithuania, the High Court of Northern Ireland refused the execution of the request.

142 The Minister for Justice and Equality v. Tagijevas [2015] IEHC 455.

143 Ibidem at para 78.

144 Ibidem at para 20.

145 Weyembergh (2014) p.9 refer to RB Amsterdam, 1 July 2005, ECLI:NL:RBAMS:2005:AT8580, and RB Amsterdam, 19 Aug. 2005, ECLI:NL:RBAMS:2005:AU1314.

146 Weyembergh (2014) p.9 refer to these judgments: ECLI:NL:RBAMS:2013:5374, ECLI:NL:RBAMS:2013:7540 or ECLI:NL:RBAMS:2011:BV0505.

147 For further information, see De Internationale Rechtshulpkamer (IRK), ‘Voorlopig geen beslissingen over overleveringsverzoeken Hongarije’ (de Rechtspraak, 31 Dec. 2015) available at www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Schending-mensenrechten-in-Hongaarse-gevangnissen.aspx.

148 Case Number 13/751069-16 RK/1510 Rechtbank Amsterdam 26 January 2017 Available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:414&showbutton=true&keyword=%22RBAMS%3a2017%3a414%22>.

149 [2012] EWHC 2357, [2013] 1 W.L.R. 490.

150 *High Court of Justice in Northern Ireland Lithuania v Liam Campbell* [2013] NIQB 19.

The UK High Court, in the case of *Badre*, considered the issue of ECHR compliance and the EAW. It found, relying upon *Saadi v. Italy*, that the Article 3 test in an extradition case required substantial grounds for believing that he or she, if extradited, would face a real risk of being subjected to treatment contrary to Article 3. The burden of proof was considered to be less than that of the balance of probabilities, but the risk must be more than ‘fanciful.’¹⁵¹ It noted the strong, but rebuttable, presumption attributable to a member state that is a signatory to the ECHR in relation to its willingness to fulfil its obligations under the Convention.¹⁵²

Assurances on foot of surrender

In *Badre*, a number of assurances were given in writing from the Italian Ministry, firstly that Mr Badre would be kept in conditions complying with the provisions of Article 3 ECHR and secondly that he would not “necessarily be incarcerated” in a particular prison. In assessing the value of assurances the Court relied upon the case of *Othman* whereby the Court would look to “*the quality of the assurances given and, second, whether in light of the receiving State’s practices they can be relied upon.*”¹⁵³ In that case the court considered eleven different criteria to assess the assurances, including whether the assurance was general or specific in nature, the source of the assurance, and “whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms [...]”¹⁵⁴

The Court in its further consideration of diplomatic assurances and the issue of prison conditions in the context of Article 3 ECHR noted that no “*thought has been given to the practicalities of ensuring that, [...] if returned the appellant will not be exposed to prison conditions that are in breach of Article 3. Whilst of course every case will be fact specific, in my view, in the face of a pilot judgment identifying a systemic failure of a state’s prison system, a simple assurance from that state that the Article 3 rights of an individual (who, if returned is at risk of being detained) will not be breached, will, without more, rarely if ever be sufficient to persuade a court that there is not a risk of such a breach.*”¹⁵⁵ In the subsequent case of *Elashmawy*¹⁵⁶ the Court considered additional assurances subsequent to *Badre*, and found that there were sufficient assurances to grant execute the warrant.

A series of cases before the English High Court considered the issues of Article 3 ECHR relating to prison conditions in Poland, in the context of extraditions between the UK and Poland. The Court considered what steps should be taken in both the cases before the Court and future extraditions involving Poland, where there was a risk that on surrender an individual might be subjected to torture or inhuman treatment. The Court considered firstly, that Poland,

*“as Member State of the Council of Europe, is presumed to be able and willing to fulfil its obligation under the Convention, in the absence of clear, cogent and compelling evidence to the contrary.”*¹⁵⁷

It then drew from the jurisprudence of the CJEU, in particular *NS*, and noted that mutual confidence in other states is the *raison d’être* of the EU. In order to rebut this presumption of compliance with the Convention, an individual raising the issue of inhuman prison conditions was required to support

151 *Hayle Abdi Badre v. Court of Florence* [2014] EWHC 614 at paragraph 40.

152 *Hayle Abdi Badre v. Court of Florence* [2014] EWHC 614 at paragraph 40. See also the decision of Mr Justice Hickinbottom, at paragraph 64.

153 *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1. Para 189.

154 *Ibidem*.

155 *Hayle Abdi Badre v. Court of Florence* [2014] EWHC 614 at paragraph 66.

156 *Elashmawy v Italy* (2015) EWHC 28 (Admin).

157 *Hayle Abdi Badre v. Court of Florence* [2014] EWHC 614 at paragraph 41 see also *Krolik & Otrs v Several Judicial Authorities of Poland* [2012] EWHC 2357 (Admin) para 4.

submissions with a significant volume of reports from the Council of Europe, the UNHCR and NGOs. The Court concluded that as to the type of evidence should be “*something approaching an international consensus.*”¹⁵⁸ In that case, the evidence supporting the challenge of the surrender, was principally correspondence between the Deputy Human Rights Ombudsman to the Director of the Polish Prison Service. A request was sent to the judicial authority for evidence from Poland, through the prosecution. The response noted that the judge was not familiar with details of the problems in Polish prisons, and noted that as far as the Court was aware there would be no difficulties serving a sentence on account of the prison conditions. In *Florea II*, the Court referred to the “*non-curial protections*” and specifically mentioned the Helsinki Committee of Romania, and “*much more significantly there is the ombudsman.*”¹⁵⁹

The High Court in the UK has recently had cause to consider the issue of assurances from Romania in light of *Othman* described above. In the 2014 case of *Florea*¹⁶⁰ which dealt with prison conditions the court held that the assurances were sufficient and reliable. Indeed in the subsequent case of *Blaj and others*¹⁶¹ the Court accepted a general assurance which would be applied to all those to be extradited to Romania. However, in August 2016, the Romanian Government admitted breaching these general assurances after evidence was obtained from prisoners. On account of the breach of the assurances, the Court refused to surrender in two subsequent cases.¹⁶² A month later, the Romanian Government provided a new assurance. On the 4th November 2016, the High Court in *Zagrean* in light of the new assurances, overturned the refusal to extradite on the basis of the failure to adhere to the assurances and found that the assurances could be relied upon, and concluded that there was no real risk of a violation of Article 3 ECHR.

Sweden

In September 2016, the Svea Court of Appeal, one of the largest appeal courts in Sweden, handed down a decision refusing to surrender a Romanian national to Romania stemming from a request sent through an EAW. In its decision the Court relied on Chapter 2, section 4 (2) of the law on surrender from Sweden following a European Arrest Warrant 2013:1156, which provides that

*“Surrender may not be granted if it would contravene the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the supplementary Protocols to the Convention applying as law in Sweden.”*¹⁶³

In this particular case, the Swedish prosecutor had requested additional information from the Romanian authorities both during the course of proceedings at the District Court stage, and also before the Court of Appeal. The information given by the Romanian prison service was that it would not be possible to designate the prison in which the person would serve a five-year sentence. The Romanian prison service guaranteed, however, that his treatment would not be in violation of Article 3 ECHR, and that although the space awarded each prisoner was limited to 2-3 square metres, they submitted that this was compensated through good ventilation, access to daylight and other space adjoining the cells, as well as access to other activities.

158 *Krolik & Otrs v Several Judicial Authorities of Poland* [2012] EWHC 2357 (Admin) at para 7.

159 *Florea II* [2014] EWHC 4367 at para 25.

160 *Florea II* [2014] EWHC 2528 (Admin).

161 *Blaj and others* [2015] EWHC 1710 (Admin).

162 *Zagrean and others* [2016] EWHC 2786(Admin)

163 Available at: http://www.law.uj.edu.pl/~kpk/eaw/legislation/Sweden_National_legislation_EAW.pdf.

In its decision, the Court of Appeal cited the ECtHR case of *Orchowski v Poland*¹⁶⁴ and found, as the first instance had, that the person would be at serious risk of being subjected to treatment in violation of Article 3 ECHR if surrendered regardless of what had been submitted to the Court during the appeals proceedings. The Court of Appeal, unlike the Solna District Court at first instance¹⁶⁵ had not referred to the *Aranyosi and Căldăraru* decision when finding that the request for surrender should be denied.¹⁶⁶

164 *Orchowski v Poland* Application no. 17885/04 Judgment of 22 October 2009.

165 Decision of Solna District Court 3 May 2016 in the case B 2768-16.

166 Information received from the Swedish Ombuds institution 19th December 2016.

Greece

The Appeal Council in Greece, refused the execution of EAWs issued by the Italian authorities against five students who had participated in a demonstration in Milan in May 2015.¹⁶⁷ The reason given for the refusal to execute the request was the belief that if the students would be sent to Italy they would face penalties of imprisonment of between 8-15 years, while under Greek legislation the offences were misdemeanours and therefore the students would normally be released on probation. Therefore, according to the Greek authorities, their right to fair trial was undermined. The broad concept of the prevention of torture and ill treatment is also closely linked to right to a fair trial and the rule of law more general. The UNODC Counter Terrorism and Human Rights Working Group noted that the right to a fair trial

“comprises various interrelated attributes and is often linked to the enjoyment of other rights, such as the right to life and the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment.”¹⁶⁸

Belgium

In Belgium, in a decision of December 2006 a Chamber of the Courts of Appeal¹⁶⁹ in Brussels refused to execute an EAW issued by the Austrian authorities against an individual accused of rape. In the context of refusing to execute the warrant, it was found that the individual was not summoned in connection with the proceedings before the Linz Court of Appeal. While this lack of notice was justified by the fact that the legislation at that time did not foresee such a duty, according to the Court the right to be heard is a fundamental right that needs to be respected especially since Austrian law was since modified in this regard. Furthermore, it was found that the principle of the presumption of innocence was not respected, since certain parts of the warrant seemed to prejudge the guilt of the person concerned and the sentence that will be imposed.¹⁷⁰ The presumption of innocence has been linked to Article 3 ECHR with regard to the privilege of self-incrimination and the protection against forced confessions.¹⁷¹ A recent example of a refusal to execute an EAW from Belgium in 2013, is the case of *Jauregui Espina*. In that case the Court refused the surrender of an alleged ETA terrorist suspect to Spain, based on the particular use of ‘incommunicado detention’ in relation to ETA terrorist suspects in Spain.¹⁷²

167 Three decisions have been issued in this regard on 7.1.2016 (for two students), 8.1.2016 (for two students) and 11.1.2016 (for the fifth student), available at <http://www.tovima.gr/en/article/?aid=767853>. As of 15 January 2016, they have not been published yet.

168 UNODC Right to a fair trial and due process in the context of counter terrorism available at <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf> para 9.

169 Chambre des Mises en Accusation.

170 Chambre des mises en accusation de Bruxelles (8 Dec. 2006). For further information in this regard, see Anne Weyembergh and Veronica Santamaria, *‘La reconnaissance mutuelle en matière pénale en Belgique’*(2006) p.76.

171 Peers and others, *The Charter of Fundamental Rights – A Commentary*, 2014 at page 1323. See also the UNODC Right to a fair trial and due process in the context of counter terrorism available at <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf> para 51.

172 Meysman, *Belgium and the European Arrest Warrant: Is European Criminal Cooperation Under Pressure?* *EuCLR European Criminal Law Review*, p.186 – 210.

2.3. THE TRANSFER OF PRISONERS FRAMEWORK DECISION AND CHALLENGES TO THE PREVENTION OF ILL-TREATMENT

As with the FD EAW, Recital 13 of the FD TOP states that *“this Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof.”*

Article 3(4) FD TOP, clarifies that the obligation to respect fundamental rights is not modified. Almost identical provisions exist in both the FD PAS (Recital 5 and Article 1(4)) and the FD ESO (Recital 16 and Article 5). This wording seems to be a compromise between the divergent views on ensuring automaticity and fundamental rights protection.

FD TOP stipulates in Article 3(4) 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.”* A fundamental rights reference mirrored in Recital 13 which notes that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the TEU and reflected by the CFREU.

One of the most significant developments in relation to the transfer of prisoners, arguably a controversial departure from the CoE Convention on the Transfer of Sentenced Prisoners is the issue of consent. An important fundamental rights aspect relates to the effect of a forced transfer on rehabilitation, to a country where prison conditions are such that would expose an individual to inhuman treatment in violation of article 3 ECHR.

That the question of how consent is indirectly linked with questions of rehabilitation as well as prison conditions is also more closely discussed in the UNODC Handbook on the International Transfer of Sentenced Prisoners: The requirement of consent is on the basis firstly, that it should not be used as a backdoor for expelling or deporting individuals. Secondly, it draws attention to the varying level of prison conditions from country to country, noting that the social rehabilitation of a prisoner is better served by transferring those who do so voluntarily. This is particularly relevant in relation to FD TOP wherein rehabilitation is the primary, if not sole objective.¹⁷³

Article 6, *the Opinion and Notification of the sentenced person* sets out the requirements of consent. Article 6(1) provides for the transfer of prisoners only with the consent of the sentenced person in accordance with the law of the issuing state. Subsection 2 however notes that the consent of the sentenced person shall not be required where the judgment together with the certificate is forwarded: a) to the Member State of nationality in which the sentenced person lives, b) to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order [...] c) to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

Thus, the FD TOP limits the situation whereby an individual can be transferred in contravention to his or her wishes. It provides that a transfer can only take place in limited circumstances namely, on foot of a deportation order, where a person has fled, or where the transfer involves the return of a

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UNODC Handbook available at https://www.unodc.org/documents/organized-crime/Publications/Transfer_of_Sentenced_Persons_Ebook_E.pdf see also the UN Model agreement on the transfer of foreign prisoners and recommendations for the treatment of foreign prisoners - Note by the Secretariat A/CONF.121/10

person to the *country of nationality* and where the individual *lives*.¹⁷⁴

In Sweden transfers are made on foot of 4 requirements. First, the judgment must be final, second, the individual must consent to the transfer¹⁷⁵, third, the transfer must serve the purpose of facilitating social rehabilitation, or fourth, it is otherwise appropriate. Under the third requirement the issuing authority takes into consideration the individuals attachment to the executing state, evaluating family, linguistic, cultural social or economic ties to the state of transfer. It is usually considered that the social rehabilitation is best places where the sentenced person would reside after release. Under the fourth heading, Sweden's commitments to the ECHR are taken into account. At this point prison conditions of the executing authority are assessed. Prison conditions are one of the most common grounds for an objection or appeal against a transfer.¹⁷⁶ However, in a report of an expert working group from Europris several Member States reported that a high proportion of transfers sought to have been made were made despite the individual concerned did not provide his or her consent.¹⁷⁷

Non-refoulement

As with the EAW, poor conditions of detention in the executing member state and thus non-refoulement are equally a potential challenge to Art. 4 CFREU/Art. 3 ECHR.¹⁷⁸ Although there is no explicit fundamental rights refusal ground in the FD TOP, the Commission in its Green Paper on Detention opined that due to the fact that consent is not required for a transfer, "*even greater attention must be paid to the possible infringement of fundamental rights post-transfer. Greater access to information on prison conditions and criminal justice systems in other States will enable issuing States to take all relevant factors into account before initiating transfer.*"¹⁷⁹ The Green Paper also acknowledges that the FD TOP may cause considerable challenges, e.g. overcrowding, in those Member States, to which prisoners are transferred.¹⁸⁰ Other current challenges to fundamental rights identified in terms of implementation included involuntary transfer, lack of informed consent, prison conditions of the executing state, calculation and adaptation of sentence.

While non-refoulement is equally an issue regarding the FD TOP, there is not yet the same volume of case law emanating from the CJEU or ECtHR,¹⁸¹ as with the EAW. There is one CJEU preliminary

174 Albeit arguably beyond the scope of this Study, it is worth mentioning how this instrument might affect that it would have upon other aspects of EU law, in particular how the FD would be applied in such a way so as to limit free movement, and the law governing EU citizenship.

175 Unless the executing state is the State of nationality of the sentenced person in which he or she lives or the executing State is the State of nationality of the sentenced person, to which the sentenced person will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment.

176 Email Survey conducted with a representative of the Kriminalvårdens Huvudkontor, Rättsenheten, Sektionen för internationella och andra särskilda klientärenden, Sweden. 26 January 2017.

177 EuroPris Framework Decision 909 Expert Group, 9 May 2016 Brussels, Belgium available at http://www.europris.org/resources_package/europris-framework-decision-909-expert-group/.

178 Other fundamental rights challenges, that however go beyond the scope of this Study relate to due process, and access to an effective remedy, and potentially family rights. Furthermore, there is a potential of the instrument to be used as a swift way to remove or deport an individual. It potentially could raise the issues of how the FD TOP sits with the 2004/38 EC Citizenship Directive, wherein it provides firstly, that criminal convictions shall not in themselves constitute grounds for restricting the right to reside in an EU Member State. See European Communities (Free Movement of Persons) Regulations 2006 and 2008 (insofar as they transpose Council Directive 2004/38/EC) and Council Directive 2004/38/EC. Article 27(2). Furthermore, FD TOP is of course open to abuse on both sides, and there is the risk of 'forum shopping' by prisoners to find prisons with better conditions, or earlier release dates.

179 European Commission, COM (2011) 327 final, p.6.

180 Ibidem page 6.

181 The cases before the ECtHR ie Szabo v. Sweden No. 28578/03, 27 June 2006 relates to the Convention on the Transfer of Sentenced Persons and the Additional Protocol, but addresses similar concerns. This case was also referred to in the current pending case of *Atanas Ognyanov* before the CJEU.

reference from Bulgaria, *Atanas Ognyanov*,¹⁸² regarding a Bulgarian national sentenced by a Danish court to 15 years imprisonment for aggravated robbery and murder. Mr Ognyanov was detained in a Danish prison from January 2012 to October 2013 whereupon he was transferred to the Bulgarian authorities. The issue was whether Mr Ognyanov could benefit from a more generous remission system available in Bulgaria than in Denmark. The Opinion of AG Bot considered firstly the principle of mutual recognition “*in accordance with which court decisions are executed directly throughout the Union without the need for any endorsement procedures.*”¹⁸³ Thereafter the Opinion considers the objective of the FD “*so as to facilitate the social rehabilitation of the sentenced person [...] by giving them a chance to maintain family, linguistic and cultural links.*”¹⁸⁴ The Opinion sets out the process that must take place including that the issuing state should satisfy itself of the fact that objective of the Framework Decision will be met, and notes that in line with the freedom of movement the transfer of sentenced persons to a Member State of origin or residence, “*is meant to improve the prospects of their social rehabilitation by giving them a chance to maintain family, linguistic and cultural links.*”¹⁸⁵

Information and representation as tools for the prevention of ill-treatment

Ensuring good quality information is given to the prisoner in terms of prison conditions, adaption of the sentence, possibility of consent and so forth, as well as the provision of legal advice can serve as a safeguard for the prevention of ill-treatment. True also is that absence of such information, or access to representation can conversely expose an individual to a higher risk of ill-treatment. Research conducted by the FRA in the context of the provision of information regarding the availability of transfer noted that for the majority of the EU Member States, the only information provided is the legislation implementing the Framework Decision.¹⁸⁶

To address this, in Sweden, for example, a public counsel is assigned to an individual contesting a transfer, but also in cases where the individual is a juvenile or is mentally impaired.¹⁸⁷

The FRA Study on criminal detention and alternatives in the EU notes that the FD does not provide for any special procedures provision of information to concerned individuals which leaves it to Member States to adopt measures accordingly. In this regard their report notes that more than half of the EU Member States have adopted measures, and in each Member State it varies as to the source of the information, whether the information derives from prison authorities, through leaflets, judicial authorities or law enforcement.¹⁸⁸

Overcrowding

Another aspect that would require further consideration is whether transfer of prisoners would in some cases actually exacerbate overcrowding and lead to the further decline of prison conditions, and the greater risks of a violation of Article 3 ECHR. The Europris expert group on FD TOP commented that prison conditions were a concern and specifically referred to those cases where the ECtHR

182 C-554/14 *Atanas Ognyanov*.

183 Ibidem at paragraph 13.

184 Ibidem at paragraph 15.

185 Ibidem at paragraph 15.

186 Criminal detention and alternatives in the EU: fundamental rights aspects in pre and post trial cross-border transfer procedures. 10 November 2016 at paragraph 6.1.

187 Email Survey conducted with a representative of the Kriminalvårdens Huvudkontor, Rättsenheten, Sektionenför internationella och andra särskilda klientärenden, Sweden. 26 January 2017.

188 Criminal detention and alternatives in the EU: fundamental rights aspects in pre and post trial cross-border transfer procedures. 10 November 2016.

had been critical of the prison conditions of Member States, and were wary of further sanctions in the context of FD. Of concern was the fact that other members of the expert group referring to countries where the prison conditions had been the subject of criticism, indicated, that “they will nevertheless issue requests aimed at transferring prisoners to those countries.”¹⁸⁹

Practice in and among EU Member States

At the moment there is little concrete data available detailing the Europe-wide transfer of prisoners under the Framework Decision,¹⁹⁰ the level of consideration given to rehabilitation, and the effect of the transfer. The issue of prison conditions and the risk of a violation of Article 3 ECHR remains relevant and the due process that surrounds the transfer constitutes a necessary aspect that must be further examined, as it can help or hinder the prevention of Article 3 ECHR.

The Europris Expert Group noted that the procedures of applying the FD, and the level of scrutiny addressing the prison conditions and the merits of the transfer in terms of rehabilitation vary greatly among the EU MS. There are however good practices. For example in the Netherlands visits are conducted to prisoners abroad to assess the prisoner and determine whether rehabilitation in the Netherlands is appropriate.¹⁹¹ The visits are undertaken by policy officers, specially tasked with the Framework Decisions on detention. This level of consideration is not common across the EU.

In Austria, the Ministry for Justice (Bundesministerium für Justiz) oversees the implementation of FD TOP. They reported that in 2015, 102 transfers were made, an increase from 84 in 2014. During the course of an interview with representatives from the Ministry, they indicated that approximately 55% do not consent initially, but rarely is a decision to transfer without consent ever challenged in the courts. The main cause for an objection from prisoners relates to prison conditions, separation from family members, and the length of the sentence on transfer. Although it is foreseen that the transfer procedure should take 90 days the process takes up to one year. This is a much slower transfer process than under the previous legislation, owing in part to the different levels of implementation across the EU, as well as the varying requests for information sought from country to country, and the different bodies responsible across the EU, whether the Ministry of Justice, or the Courts.

At the Europris expert group the issues surrounding time limits were considered. The reasons suggested for the delays included interpretation requirements, with some courts requesting a translation of the judgment in full.¹⁹² In this regard the Expert group noted that judgments from different jurisdictions will naturally appear in different formats, and that the executing authority will have to understand the judgment in order to enforce it. However, it is not the case that the executing authority should look to evaluate it as that could risk ‘a second judgement of the person.’

189 The Europris Expert Group on the Framework Decision 909, page 14 available at http://www.europris.org/wp-content/uploads/EP_FrameworkDecisions_Report.pdf.

190 European Commission supported project of Europris is currently working with an Expert group gather data in this area. See <http://www.europris.org/expert-groups/framework-decision-2008909jha-transfer-of-prisoners/>.

191 The Europris Expert Group on the Framework Decision 909, page 7.

192 Europris Expert Working Group May 2016 p11.

2.4. FRAMEWORK DECISIONS ON DETENTION AS CHALLENGES TO THE PREVENTION OF ILL-TREATMENT: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Both the CJEU and ECtHR remain firmly committed to the absolute prohibition of torture and ill-treatment, and Member States' well established obligations in this regard. Cases such as *Saadi* and *Chahal* from the ECtHR, or *N.S.* and *Aranyosi/Căldăraru* from the CJEU demonstrate the firm position that an individual should not be returned where there is a risk of Art. 3 ECHR/Art. 4 CFREU, and indicate the extraterritorial nature of Article 3 ECHR in such cases.

The various tests that developed from the case of *M.S.S.* and the significant line of case law that followed from both Courts demonstrate the tension that exists in relation to mutual recognition and a refusal to execute an EAW arising from the concerns of another Member States human rights standards of detention conditions. The high threshold as elaborated by the CJEU in *N.S.* which, largely followed the ECtHR position in *M.S.S.*, found that a Court "cannot be unaware" of systemic deficiencies and the real risk of inhuman and degrading treatment should a transfer take place. In *Aranyosi and Caldărăru*, and the move away from the systemic deficiencies test, noting that in and of itself systemic deficiencies could not prevent the execution of a warrant in the absence of concrete and specific information from the issuing State regarding risks to the individual concerned. While the tests applied in each case by each Court vary somewhat, the constant thread throughout, which is the refusal to permit the return of an individual at risk of being subjected to treatment contrary to Article 3 remains firm. As one author noted in the context of fighting terrorism and the absolute prohibition of torture;

*"The message sent by the ECtHR is clear; in the fight against terrorism, democracies indeed carry a higher burden, which in itself defines them as democratic systems. The reaffirmation of these principles, when the pressure to use less protective means in fighting terrorism is very high, could not have been more timely."*¹⁹³

National Courts have addressed the Article 3 ECHR challenges and the chances that arise from the application of the Framework Decisions in different ways. Notwithstanding the differences, a number of similar practices and priorities can be identified from the jurisprudence of national courts, the interviews conducted during the course of the project and the discussions from the conferences and workshops. Judges championed the virtues of mutual trust, as an essential precondition for operating mutual recognition instruments. However, in line with the jurisprudence of the CJEU and ECtHR, mutual trust can be "shaken" or displaced where there is a risk that the absolute prohibition of torture and ill treatment is in jeopardy. This is not done lightly, but decided on a case by case approach, rooted firmly in evidence, and where there is a significant risk to the specific individual concerned.

The issue of obtaining up-to-date, reliable evidence and guaranteeing article 3 rights following on from a surrender remains problematic. One possibility of addressing the challenge of up-to-date information, through the work of NPMs, will be addressed in the subsequent chapter. National courts also grapple with the question of assurances, and how to ensure monitoring and follow up in relation to EAWs once they have been executed.

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Gianluca Gentili, *European Court of Human Rights: An absolute ban on deportation of foreign citizens to countries where torture or ill-treatment is a genuine risk*. Oxford University Press (2010), Vol. 8 No. 2, 311–322.

RECOMMENDATIONS

- Adequate and accessible information must be provided to prisoners in relation to their rights and details of any proposed transfer. As appropriate, access to a practitioner should be ensured.
- In order to improve the implementation of FD TOP in accordance with fundamental rights obligations a handbook and guidelines on transfer would be of benefit, as well as greater discussion on the implementation of FD TOP.
- Two of the Member States participating in the Expert Group on FD TOP noted that they arranged to have the entirety of the judgment translated into the language of the executing authority from the outset, citing that it reduced delays in the long run. This good practice should be considered across the board.
- Other good practices including the example from the Netherlands, and the visiting committees that undertake visits to prisoners abroad to assess their suitability for rehabilitation on foot of a transfer.
- A further good practice example emanating from the Netherlands includes the provision of information to prisoners in relation to transfers and the support provided to foreign detainees should be explored further and shared across the EU.
- Greater access to information for judges should be secured in relation to the prison conditions across the EU, e.g. through one databank collecting all relevant reports.
- Further consideration of the use of consular assistance as part of the monitoring mechanisms of prisoners post transfer or surrender should be explored.
- In addition to these Framework Decisions, Member States should look to implement the procedural rights directives with a view to ensuring uniform application of minimum standards and safeguards across the EU.

CHAPTER 3. THE FRAMEWORK DECISIONS ON DETENTION AS CHANCES FOR THE PREVENTION OF ILL-TREATMENT

Three ways have been described in which fundamental rights concerns of mutual recognition instruments have been addressed in legislation.¹⁹⁴ The first is through the insertion of fundamental rights refusal grounds in subsequent legislation, the second through implementing the principles of proportionality, the third is through the use of “*parallel mutual recognition instruments*.”¹⁹⁵

The FD PAS and FD ESO constitute such parallel instruments that provide for alternatives to detention both at the pre and post-trial phase of criminal proceedings and thereby directly and indirectly contribute to the prevention of ill-treatment.

While the previous segment of this paper identified how the FD on detention can present challenges to the prevention of ill-treatment, this chapter will consider possible chances for the prevention of ill-treatment primarily by offering alternatives to detention.

3.1. ALTERNATIVES TO CUSTODY AND THE PREVENTION OF ILL-TREATMENT

According to the UN High Commissioner for Human Rights, in his 2015 report on the human rights implications of over incarceration and overcrowding, approximately 3 million people of 10.2 million of those incarcerated worldwide are in pre-trial detention.¹⁹⁶

The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) adopted by the General Assembly aim to promote the use of non-custodial measures at all stages of the administration of criminal justice, with a view to *inter alia* avoiding unnecessary use of imprisonment and addressing the requirements of social justice and the rehabilitation needs of the offender.¹⁹⁷

The rationale behind these principles stems from a position, that there “*is a growing belief that non-custodial sanctions and measures may constitute a better way, providing penalties that are proportionate to the offence committed by the offender and that carry greater possibilities for the rehabilitation and constructive reintegration of the offender into society.*”¹⁹⁸

The commentary to the Tokyo Rules details the value of non-custodial measures for offenders and the community, and describes that often prisons in addition to being a financial burden on the state, do not better an individual’s reintegration into society, which impacts upon recidivism rates.¹⁹⁹ Addressing recidivism rates might indirectly also impact the prevention of ill-treatment. As it would lead to fewer prisoners and a reduction of overcrowding which again would improve prison conditions. During the course of the final conference as part of this Study, Anton Van Kalmthout, a member of the CPT, confirmed that pre-trial detention is of “high concern” and the fundamental preconditions for the application of pre-trial detention should be that it is a measure of last resort,

194 Mitsilegas, Research Handbook on EU criminal law p. 152.

195 Ibid. p. 152.

196 UN High Commissioner for Human Rights on the Human rights implications of over incarceration and overcrowding A/HRC/30/19 page 3.

197 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by the UNGA resolution 45/110 of 14 December 1990.

198 Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) available at <https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf>.

199 Ibid. at page 5-6.

it should be applied for the shortest possible duration, and applicable to serious crimes, applying a proportionality test.²⁰⁰ A further issue particular to those in pre-trial detention and in addition to the problems related to overcrowding which is linked to ill-treatment, is the specific exclusion pre-trial detainees face. It is often the case that those on remand are denied access to activities directed available to sentenced prisoners.

The link between overcrowding and Article 3 ECHR was also noted by the former UN Special Rapporteur on Torture: *“The negative impact of the overuse of incarceration on human rights is manifold. The overuse of imprisonment constitutes one of the major underlying causes of overcrowding, which results in conditions that amount to ill-treatment or even torture.”*²⁰¹ Both the CAT Committee and the CPT have stated that overcrowding *“has been established to constitute a severe form of ill-treatment, in human or degrading treatment.”*²⁰² Having identified overcrowding as one of the problems contributing to violations of Article 3 ECHR, how then to address these issues through the practical implementation of procedures that tackles this problem?

The UN General Comment on Article 9 of the ICCPR noted the obligation on the judiciary to consider from the outset alternatives to detention. Indeed, in relation to pre-trial detention it states that detention in custody in those cases should be the *“exception rather than the rule.”*²⁰³ In cases where the defendant is a non-national that reason alone must not automatically equate a flight risk:

*“Courts must examine whether alternatives to pre-trial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction. After an initial determination has been made that pre-trial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.”*²⁰⁴

The Commission, when assessing the Framework Decisions on detention in 2014, referred to them as being part of a *“package of coherent ad complementary legislation that addresses the issue of detention of EU citizens in other Member States and has the potential to lead to a reduction in pre-trial detention or to facilitate social rehabilitation of prisoners in across-border context.”*²⁰⁵ The report went on to note the ‘operational links’ between the Framework Decisions on detention relating to alternatives to detention both pre and post-trial and the FD on the EAW as discussed in the previous chapter.

200 Final Conference Vienna, 16th and 17th November 2017, comments of A.M van Kalmthout session 2 16th November 2016.

201 A/HRC/30/19 available at <https://documents-ddsny.un.org/doc/UNDOC/GEN/N13/422/85/PDF/N1342285.pdf?OpenElement>.

202 Ibid. at paragraph 15 referring to SAT/OP/BRA/1 para 75, CPT/Inf(92) 3 at para 46 and CAT/OP/MLI/1 para 49.

203 UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, available at: <http://www.refworld.org/docid/553e0f984.html> [accessed 27 May 2016] at para 38

204 UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, available at: <http://www.refworld.org/docid/553e0f984.html> [accessed 27 May 2016] at para 38

205 COM (2914) 57 Final Report from the Commission to the European Parliament and the Council on the implementation by the Member States of 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.

3.2. THE FD ON THE EUROPEAN SUPERVISION ORDER

Pre-trial detention and ill-treatment

Detainees held in pre-trial detention face the most significant risk of torture and ill-treatment.²⁰⁶ They are at particular risk of being abused because the incentives and opportunities for torture and ill-treatment are most prevalent during the investigation phase. A number of other systemic factors contribute to this, *inter alia*, criminal justice systems centred on confessions, lack of access to legal assistance, people without the resources to defend themselves and the popularisation of a “tough on crime” approach to criminal justice.

Van Kalmthout noted that the frustration of these preconditions through overcrowding is likely to lead to ill treatment. Exacerbating these issues is the high percentage of foreigners in remand, that are refused bail due their inability to provide a local fixed address, and that they are deemed a flight risk.

The UN General Comment reflecting upon Article 9 of the ICCPR noted that obligation on the judiciary to consider from the outset alternatives to detention. Indeed, in relation to pre-trial detention it indicated that detention in custody in those cases should be the “*exception rather than the rule.*”²⁰⁷ In cases where the defendant is a non-national that reason alone must not automatically equate a flight risk:

*“Courts must examine whether alternatives to pre-trial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction. After an initial determination has been made that pre-trial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.”*²⁰⁸

Indeed one judge during the conference questioned how to deal with the situation where there is no fixed address in terms of maintaining contact with suspects. In this respect it was in turn noted that in Ireland for example, the accused will often be asked to carry a mobile phone with them at all times so that the police could make contact as necessary.

Other issues of concern include the particular hardships of those in pre-trial detention, which is evidenced through data that suggests that the suicide rate is two to three times higher among detainees in pre-trial detention than among those who are convicted and have been sentenced.²⁰⁹

206 See Open Society Foundations, Ludwig Boltzmann Institute of Human Rights, University of Bristol, Pre-trial Detention and Torture: *Why Pre-trial Detainees Face the Greatest Risk*. New York, 2001, p. 11.

207 UN General Comment no.35, Article 9 (Liberty and Security of person) CCPR/C/GC/35 at para 38.

208 Ibidem.

209 A.M. Van Kalmthout presentation at final conference in Vienna, 16th November 2016.

3.2.1. ADDRESSING THE CHALLENGES RELATED TO PRE-TRIAL DETENTION: THE RATIONALE BEHIND THE ESO

The FD ESO provides that an individual charged with a criminal offence in an EU Member State can remain on bail in the country in which he or she normally resides rather than the country in which the criminal charges stem and where the prosecution of the alleged offence would be held. Recital 4 notes that the FD ESO aims at “*enhancing the right to liberty and the presumption of innocence in the European Union and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision. As a consequence, the present Framework Decision has as its objective the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention [...]*” The intent to promote the use of non-custodial measures is also reflected in Article 2 (b) of the FD.

The pre-trial supervision measures foreseen by the FD ESO ensure that the individual would be monitored and supervised in the Member State in which they normally reside (executing state). The competent authority of the executing Member State notifies the issuing Member State should the individual breach conditions and in the event that the subject of the ESO fails to return to the issuing state to dispose of the case, then an EAW can duly issue to ensure the return. As Klipp refers to the ESO as “an innovative step by serving all interests involved.”²¹⁰ The Commission highlights in its Green Paper that the successful operation of FD 829 requires a high level of mutual trust between Member States.²¹¹

The FD ESO thus seeks to provide options for alternatives to pre-trial detention to those that are normally refused bail on account of having been deemed a flight risk due to a lack of ties to the Member State where the charges originate. It is a measure that reinforces and gives effect the right to liberty and addresses the possible long term, disproportionate and more onerous effects that an individual would be subjected to through incarceration in a foreign EU Member State for long periods of time.²¹²

As mentioned, it is recognised to be particularly difficult for a foreign prisoner to be imprisoned for long periods of time where he or she does not speak the language, and where they would not have the family support network around them. Furthermore, the FD ESO addresses hardships specifically associated with pre-trial detention of non-nationals, for example the risks to employment in the country of residence, the lengthy separation from families and the financial disadvantages.²¹³

The FD ESO also supports the principle that detention should be a measure of last resort²¹⁴ and resolves the discrimination that can occur between residents and non-residents of a member state, as the latter group are subject to pre-trial detention more often than residents in similar situations.²¹⁵ The very real benefits of the ESO advancing the presumption of innocence, due process, detention as a measure of last resort and addressing overcrowding are clear and should be used in practice more readily to guarantee these important principles, and address the current challenges related to pre-trial detention.

210 Klip, A. *European Criminal Law, An Integrative Approach* 2016 page 448.

211 European Commission, COM (2011) 327 final, p.7.

212 COM (2006) 468 Final 2006/0158 (CNS) Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union page 2.

213 Recital 4 ESO. Also see: Morgenstern (2014), p.216.

214 COM (2006) 468 Final 2006/0158 (CNS) Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union

215 See Klip, A. *European Criminal Law, An Integrative Approach* 2016 page 448. See also Peers, *EU Justice and Home Affairs Law*, 2016, page 111 and Commission.

3.2.2. PRACTICAL APPLICATION OF THE ESO BY EU MEMBER STATES

The effective implementation of the ESO, which seeks to address the fundamental rights challenges outlined above, remains uncertain²¹⁶ and from the existing information it seems, that it is rarely applied by EU Member States²¹⁷.

UK

The UK noted that “greater use should be made of the so-called European Supervision Order.”²¹⁸ In support of this position, the report referred to the case of Andrew Symeou. In that case, Mr Symeou, a British national having been surrendered on foot of an EAW was refused bail in Greece and spent 10 months in pre-trial detention in Greece, in a case that took four years before the trial took place, which led to his ultimate acquittal.²¹⁹

Mr Symeou had been refused bail on the grounds that he was not a Greek resident, notwithstanding the fact that there was an apartment in Athens belonging to a relative that he could have stayed in while awaiting trial. An aggravating factor was the delay in the trial process, as well as the repeated adjournments compounded by the poor prison conditions in Greece recognised in the 2009 report of the CPT.²²⁰ In that report reference was made to the chronic overcrowding and other structural deficiencies and generally the conditions in some prisons that amounted to cruel and inhuman treatment. Specific reference in the report was made also to conditions at Korydallos prison in which Mr Symeou was held for much of his detention. A 2009 Human Rights Report on Greece issued by the US Department of State addressing prison conditions in Greece noted that they did not meet international standards.²²¹

The case of Andrew Symeou serves to highlight the possible benefits of the ESO, as the objective of the ESO is to address exactly those situations, and the potential encroachments on fundamental rights.

In 2015, the first ESO was applied in the UK in a case that involved an individual returning to Spain to be monitored by the Spanish authorities, pending trial in the UK. Two separate applications were made before the Crown Court in the UK. In both cases, neither the judge nor the prosecution were aware of the FD ESO, and from the outset, the case was adjourned to allow both to consider the FD and better understand the implications. In particular the judges in both cases were concerned that the instrument be used in the right way, in the absence of specific procedural guidelines beyond the FD itself. These two examples from the UK²²² involved Spanish nationals charged with criminal offences in the UK. Both cases involved young men aged between 19-30, with no previous convictions, no ties in the UK, one having a source of employment, and the other a full time student. Both cases involved allegations of a serious nature, the first an allegation of sexual assault, and the second rape. In both cases the court identified that notwithstanding the seriousness of the nature, both accused were in the normal course of events, good candidates for bail and were it not for the fact that they were non-nationals of the UK, they would have been granted bail. This is precisely the situation for

216 Bruno Min, ‘The European Supervision Order for transfer of defendants: why hasn’t it worked?’ (Penal Reform, 25 September 2015) available at www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/.

217 There is almost no reliable data on the ESO application across the EU.

218 A review of the United Kingdoms Extradition Arrangements, presented to the Home Secretary on 30 September 2011 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

219 See Fair Trials International <https://www.fairtrials.org/andrew-symeou/>.

220 CPT report September 2009, available at http://www.cpt.coe.int/documents/grc/2010-33-inf-eng.htm#_Toc259109946.

221 US Department of State report, 11 March 2010.

222 Interview with Richard Saynor Barrister, 23 Essex Chambers 9th November 2016.

which the ESO was envisaged.

In terms of the practical steps taken, the first UK ESO example involved an initial adjournment to allow the prosecution and the judge to consider the ESO, followed by a two week period during which the issuing UK authorities translated the documents and sent them to the Spanish authorities. The Order was sent through the Liaison Magistrates, there the authorities took over 21 days to consider its contents. The whole process took approx. 6-8 weeks in total. During this time the individual was held in custody.

In the second example, also from the UK, the accused was granted bail in the UK pending a decision on the ESO. This initial bail application was made arising from the previous lengthy procedural delays experienced during the course of the first ESO application.

In both cases, the objections to the ESO were grounded on the concern of a risk that the accused would not return for trial. On foot of granting the application for the ESO, the individuals were admitted to bail and permitted to return to Spain, with conditions including curfew, a specific residence requirement, reporting conditions to police of the local area. In addition there were conditions undertaking to maintain contact with the solicitor in the UK including a specific requirement notifying them of travel arrangements, and providing this information to the Crown Prosecution Service (CPS). The accused was also required to appear before Court on arrival to Spain to acknowledge the bond. In one of the cases there was a restriction, prohibiting the accused from entering Madrid where the complainant was Studying, and an additional security or bail payment in the sum of £5000.

As a result of the ESO, both accused were able to continue with their employment and studies, and both returned to the UK for trial and as was required for, and the adjournments that took place from time to time. The case which centred around the rape allegation recently concluded, some 12months after the defendant was admitted to bail pursuant to the ESO. The individual was acquitted on all counts, and the presumption of innocence was given real meaning. In a parallel setting, without the ESO, that individual would have remained in custody, with all the challenges of a foreign in prison, for a year awaiting trial in a matter where he would subsequently be acquitted.

Ireland

In Ireland, an application was made before Dublin District Court in January 2015 for a Hungarian national charged with a criminal offence in Ireland, to return to Hungary pending trial on the basis that the applicant would return to Ireland for each court appearance but would reside in Hungary under the auspices of the ESO, where there were family connections and employment.

The objections from the prosecution were based on the fact that Ireland had not yet implemented the Framework Decision. The applicant relied on the CJEU decision of *Pupino*²²³ and it was submitted that the State, by objecting to the application should not be permitted to benefit from the fruits of a failure to implement. The Court, while critical of the failure to implement the decision, felt however that its hands were tied by the fact that it had not been implemented. However, in the interest of justice, the Court amended the terms of the bail without a supervision requirement, to allow the applicant to return to Hungary and only to return to Ireland for each court appearance, which she duly did to the conclusion of the case.

223 In *Pupino* it was held that “the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues”. Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] para 43.

Netherlands

A similar case between the Netherlands and Ireland, involved two Irish defendants detained in the Netherlands. In that case, the Judge in the Netherlands had sought to apply the ESO to allow the return of the two accused, but as Ireland had not implemented the ESO, the Court, taking a pragmatic view granted bail with conditions that they sign on at the Dutch Embassy in Ireland. This case is illustrative of the negative effect non implementation by one Member State can have on another that has already implemented the legislation.

3.2.3. CHALLENGES REGARDING THE PRACTICAL APPLICATION OF THE FD ESO

Both examples emanating from the UK illustrate the challenges in terms of the practical implementation of the ESO. The first was the lack of awareness of its existence by the relevant stakeholders, such as the judge and the prosecutor, and the second revolved around how the ESO's application indeed works in practice, as Richard Saynor, the barrister involved in the two ESO cases identified, *"it is not entirely clear who is responsible for what"*²²⁴.

Two issues arise from this, the first relates to legal costs, and access to legal aid. Both of the examples referred to above involved private clients, and so the question of legal aid did not arise, but would otherwise be highly relevant. Secondly, the lack of a system or clear procedural path increased the amount of work that was involved in the case and ultimately it took approximately a hundred hours of work per order. Furthermore the lack of a clear procedure and the resulting delays in obtaining an order meant that both individuals spent a considerable amount of time in pre-trial detention ranging from 2-3months.

Other issues identified revolved around the significant volume of documentation that was required during the course of the application: It was identified that in excess of 50 pages was accumulated including skeleton arguments, draft order, references and the information required by the Spanish authorities. A more consistent implementation across the EU of ESO is needed to better safeguard the presumption of innocence and the right to liberty.

In considering and evaluating the application of ESO, it is clear that the ESO can serve to ensure that pre-trial detention is a measure of last resort. It tackles the discrimination that a foreign accused person might face in terms of a bail condition on account of the flight risk concerns emanating from a lack of ties to a particular jurisdiction. It addresses the significant obstacles an individual accused of an offence abroad can face in terms of being removed from family support, their regular employment, not speaking the language, and the greater barriers that they face in custody.

Greater reliance on alternatives to detention in cases where imprisonment is not necessary, leads to reduction in overcrowding which impacts upon detention conditions and the better protection against inhuman treatment. As the UN handbook on alternatives to detention notes *"implementing effective alternatives to imprisonment will reduce overcrowding and make it easier*

224 Interview with Richard Saynor, Barrister on 9th November 2016.

to manage prisons in a way that will allow states to meet their basic obligations to the prisoners in their care."²²⁵

Why then, one might wonder, does such a potentially positive FD remain so underutilised? Beside the already mentioned lack of awareness about the instrument itself and the necessary steps and procedures to actually apply it, including the question of bureaucracy and costs, a representative from the FRA posited in one of the workshops held during the project that it could also be a lack of incentive, that prosecutors once they have the accused in custody or at least within their territory are reluctant to let them go, either because investigators might require to question them again or just on account of the fear that once returned to their Member State it might be difficult to ensure their return. The priority of the prosecutor lies in the investigation and prosecution of an alleged offence. Other possible explanations, as to the lack of use of the ESO were advanced during the final conference. Firstly, it was suggested that there is a lack of an actual belief in the presumption of innocence. Secondly a change in focus from social rehabilitation to social protection. Linked to this point is the concern among judges for the backlash that they might face when admitting people on bail as opposed to where pre-trial detention measures are applied. Judges have experienced pressure exerted by the media and members of the public in cases where pre-trial detention is not used.

Addressing the concerns linked to the ESO and its practical application

If these concerns are correct, then it needs to be considered how to strengthen and improve the ESO's practical application and thereby give meaning to the presumption of innocence, often described as the golden thread in criminal proceedings. Many judges in the course of this project explained that while there are in place considerable training opportunities surrounding the application of the EAW, more can be done to raise awareness amongst judges and practitioners on other FD on detention.

Furthermore, it would be useful tools to aid their practical implementation by providing guidance on the practical application, e.g. through the issuance of handbooks.

With regard to the role of practitioners, the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest explicitly sets out under Article 4.4, for right of access of a lawyer to places of detention.²²⁶ This is a further safeguard that will serve to enhance the fundamental rights implementation of Framework Decisions on detention

Additionally, it might help to use existing or build new networks in order to facilitate cross-country exchange on the application of the ESO.

Last but not least, there is perhaps a need to educate members of the public on the risks of pre-trial detention, as well as its corollary - namely the long term benefits for society where alternatives to detention are deployed.

225 The UN Handbook of Basic Principles and Promising Practices on Alternative to imprisonment Available at https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf at Page 4.

226 Art. 4.4. provides: that 'The lawyer shall have the right to check the conditions in which the suspect or accuse person is detained and to this end shall have access to the place where the person is detained.

3.3. THE FRAMEWORK DECISION ON PROBATION AND ALTERNATIVE SANCTIONS

Alternatives to detention at the post-conviction phase are contained within the FD on Probation measures and alternative sanctions (FD PAS). Just as FD TOP on the transfer of prisoners, the FD PAS aims to facilitate social reintegration.²²⁷ Recital 9 provides that

“the aim of mutual recognition and supervision of suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release is to enhance the prospects of the sentenced person’s being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public.”

It provides for the recognition and enforcement of a judgment from an issuing member state in relation to a non-custodial sentence by the executing member state. Article 4 sets out the measures that may be adopted in line with the FD PAS which can for example include community service measures, therapeutic treatment requirements or compensation payments.

Current challenges that exist in relation to the FD PAS is the lack of awareness of its existence by authorities, which has led to its very limited use.

In cooperation with the European Commission, the Confederation of European Probation (CEP) is working to raise awareness in this regard and for example organised an expert meeting in Brussels to discuss what steps would be required to support the implementation of the FD on Probation and Alternative Sanctions. One of the outcomes of that meeting was that there is a need for greater contact between the practitioners that work with the Framework Decisions so that they can discuss the practical issues arising from actual cases, in order to enhance a more efficient implementation. CEP’s work programme therefore also foresees greater cooperation with other network organisations that involve judges, prosecutors and professionals, as well as the development of e-learning programmes.

Another challenge is the lack of evaluation data available – CEP is therefore tasked by the Commission to carry out a needs based analysis.²²⁸ In addition CEP plans to update the FD related website and further develop the system map tool, as well as to add contact points for each jurisdiction. The organisation will continue to work with the European Commission and others to develop a model for the evaluation of FD PAS and FD ESO in practice. One of the suggested plans for CEP moving forward, is to develop a network with the aim of enabling transfers and discussing FD PAS and FD ESO practice.²²⁹

Other suggestions that came up throughout this project to foster the use of the FD PAS and the FD ESO, include further training for lawyers and judges, the preparation of a handbook on its use, increased coordination between probation services across the EU and generally, greater incentives for prosecutors to encourage their use. As a member of FRA indicated in the context of this Study, the incentives must form part of the solutions, and could be financial or otherwise, including provision of electronic tagging.²³⁰

227 See Recital 24, and article 1 FD PAS.

228 Final conference, presentation of CEP representative 16 November 2017.

229 Reference from <http://cep-probation.org/wp-content/uploads/Notes-Expert-Meeting-15-16-september-20161.pdf>. Suggested actions 2017-2018.

230 Interview with Jonas Grimheden, FRA, 24.10.2016.

3.4. FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS

Having addressed already the potential concerns arising from the FD TOP, its positive contributions to the prevention of ill-treatment should also be considered. Firstly, as already mentioned the underlying purpose of FD TOP is to provide better opportunities for the rehabilitation of individuals. To this end, Article 4(2) of FD TOP notes that the forwarding of the judgment to another Member State may occur once the issuing authority is *satisfied* (emphasis added) that the enforcement by the executing authority would facilitate the social rehabilitation.

There are many disadvantages foreign prisoners face during the course of their imprisonments, which can in turn give rise to greater hardship than the rest of the prison population. These can include isolation, an inability to engage in activities, speak with counsellors or health care professionals, communicate with other prisoners or prison officers, and understand the rules and procedural handbooks of the prison. While some prisons do have prison regulations translated available in other languages, a report on foreigners in European prison found that in practice, there is little consistency regarding the availability of the specific institutions rules in other languages.²³¹ They are less likely to have regular or indeed any family visits. They are less likely to be able to meet the requirements for conditional or early release where they do not have a fixed home or employment opportunities.²³² Foreign prisoners also are confronted with racism and religious intolerance.²³³

Coupled with the those disadvantages, the benefit of serving a sentence close to the community ties of the prisoner have long been recognised. Article 17 of the European Prison Rules provides that prisoners should be *'allocated as much as possible to prisons close to their homes or places of social rehabilitation.'* The benefit of rehabilitation closer to home is clear. Social rehabilitation can be better provided for where the prisoner understands the language, and can partake in all the available rehabilitation programmes, and can benefit from the close proximity of family support structures.

"Strong family ties and support from partners have consistently been identified as key elements of successful reintegration and prisoners who are visited by their families or friends have been found to be less likely to reoffend than those who do not receive visits."²³⁴

In 2015, it was reported that there were almost 115,000 foreign prisoners in European countries.²³⁵ The Council of Europe report entitled 'Combatting ill treatment in prisons,' found that the average percentage of foreigners in the total European prison population is over 20%.²³⁶ Taking into consideration the particular hardships that foreign prisoners face, coupled with the implications on rehabilitations and recidivism it is not difficult to see the potential fundamental rights benefits that the proper application of FD TOP can produce. Indeed the UN Handbook on the prevention of recidivism and the social reintegration of offenders states that

"early repatriation of foreign prisoners (either through prisoner transfer programmes, conditional release programmes or other mechanisms) is often important to the future social reintegration of the offender. Transferring such persons to serve their sentences in their country of origin can contribute to

231 Kalmthout A.M *Foreigners in European Prisons* volume 1 2007 page 21.

232 Ibidem page 16.

233 Ibidem page 17.

234 Available at http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Prevention_of_Recidivism_and_Social_Reintegration_12-55107_Ebook.pdf.

235 Council of Europe Report on Combatting Ill treatment in prison 22 December 2015 page 53 available at http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Ill-treatment%20REPORT%20December_ENG.pdf.

236 Ibidem at page 53.

*dealing with them fairly and effectively. Almost all instruments that regulate international prison transfers specify social rehabilitation as one of the grounds for supporting such transfers. The transfer of foreign sentenced persons to serve their sentences in their home countries is an alternative way of implementing a sentence. All other things being equal, sentenced persons who serve their sentences in their home countries can be better rehabilitated and reintegrated into the community. This is a positive reason for transferring sentenced”.*²³⁷

National Practice

In Austria the Ministry for Justice assesses the benefits of the transfer using criteria such as the views of the individual concerned, citizenship and residence, and family ties.

The Netherlands has a particularly well developed system for the assessment of the transfer of prisoners, comprising of social workers that visit prisoners abroad in order to assess whether it would be appropriate to transfer the individual for the purposes of rehabilitation.²³⁸ The Experts Working Group evaluating FD TOP particularly emphasised the need for this assessment process in particular where the transfer is voluntary, noting that where it is compulsory, *‘the question regarding social rehabilitation is de facto no longer deemed relevant by some authorities, since the issuing Member State makes the assumption that a transfer is in the persons’ best interest.’*

The Netherlands also have a body, called the International Office, that is under the auspices of the Dutch Probation Service, comprised by volunteers. The International Office aims to improve rehabilitation services, lower recidivism, and support Dutch nationals service prison sentences abroad through the provision of information relating to their repatriation and return to the Netherlands on completion of the sentence, but also through advising and coordinating the transfer of sentences within Europe and the Netherlands. This organisation also publishes materials in English, providing information on the process of seeking to be transferred to the Netherlands during the course of a sentence. It also contains a ‘databank’ with information about the probation practices useful contacts across the EU. For Dutch citizens detained in other countries, their first visit, as is often the case, is from the Consulate or Embassy. During this visit they are informed of the work and given the contact details of the International Office. Once the International Officer services are engaged, prisoners receive frequent visits from its volunteer members, to plan for their future post release, and serves as a link to the aftercare services established in the Netherlands for prisoners on their release. In addition the individual visiting reports prepared as well as the information gathered, forms part of the actual transfer process, as it is all forwarded to the Dutch authorities, in particular the Public Prosecution Service, and the International Transfer of Sentenced Persons Division and the Judicial Institutions Service for further consideration.²³⁹

Evaluating FD TOP, therefore requires consideration of the far reaching provisions, including the transfer of individuals without consent, and the removal of double criminality. It raises issues relating to the compatibility of free movement of persons, but also acknowledgment that it seeks to improve the rehabilitation of prisoners, addresses recidivism and facilitates social integration. These significant measures can reduce overcrowding which in turn can serve to better the conditions that

237 http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Prevention_of_Recidivism_and_Social_Reintegration_12-55107_Ebook.pdf page 136.

238 Europris Expert Group on Framework Decision 909 page 7.

239 International Office publication ‘Probation doesn’t stop at the border- About the work of the International Office’ Bureau Buitland available at https://www.reclassering.nl/documents/Algemene%20brochure_ENG_WEB.pdf.

prisoners across Europe endure and in doing so fortify article 3 ECHR.

The lack of data, and information Europe wide on the practical implementation is problematic. More should be done by Member States to collate the information regarding the use of FD TOP, to share experiences and establish best practices in terms of determining upon the appropriate transfer of a prisoner. Greater efforts to ensure a harmonious approach towards providing prisoners with the information so that their views on a potential transfer are informed. The information should include the prison conditions of the executing state and any implication on sentencing and release dates and post release measures. Legal aid should be extended to ensure that appropriate advice is available where necessary and that there is adequate oversight by and access to Courts in order to ensure that FD TOP, with all the significant measures that it contains is implemented in a fundamental rights consistent manner.

3.5. FRAMEWORK DECISIONS ON DETENTION AS CHANCES FOR THE PREVENTION OF ILL-TREATMENT: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

In relation to the Framework Decisions that seek to improve the conditions of detention that can reduce the likelihood of a risk of ill-treatment the main issue remains the lack of implementation across the EU, which effects the impact of these Framework Decisions. Practitioners and Judges lack awareness of the existence of alternatives to detention in pre-trial matters, and those that are aware of them, are concerned of the effect on the investigation and prosecution of an individual. Admitting an individual to bail pursuant to the ESO is a discretionary order, and any application must be subject to the normal rigorous considerations as is the case for any bail application.

The rights of the accused and the presumption of innocence must be weighed up as against the interests of society and justice. The examples cited about in relation to case of Andrew Symeou contrasted with the UK examples where the ESO was successfully deployed serve as stark reminders of the benefits of alternatives to pre-trial detention.

RECOMMENDATIONS

- The benefits of the FD ESO and FD PAS should be promoted amongst judges, prosecutors and practitioners.
- More training is required for judges, prosecutors, practitioners, NHRIs and NPMs on the practical application of FDs TOP, PAS and ESO. This also includes the circulation of a dedicated handbook on the practical operation of those FDs.
- Two of the Member States participating in the Expert Group on FD TOP noted that they arranged to have the entirety of the judgment translated into the language of the executing authority from the outset, citing that it reduced delays in the long run. This good practice should be considered across the board.
- It was also identified during the course of the project that it would be useful if there was one website, database or search tool, dedicated to providing access to updated information on the following: competent authorities and contact information, applicable law for each state regarding conditional/early release, information on prison conditions, reports from CPT, NPMs, judgments, applicable law for each state regarding probation and other alternative sanctions. It would have to be considered, that such website would have to be available in all official EU languages.
- A comprehensive collection of data should be undertaken to evaluate the current status of the application of FD TOP, FD ESO, and FD PAS on probation and alternative sanctions, with consideration of good practices working towards the publication of a handbook on each of the Framework Decisions.
- Promoting the use of alternatives to detention where appropriate, including reducing pre-trial detention, and implementing post sentencing supervision measures in order to achieve rehabilitation with a view to reducing recidivism, and addressing systemic overcrowding in prisons.
- Member States that have not yet implemented the FD TOP and FD ESO should without any further delay implement these Framework Decisions and set up appropriate channels and mechanisms to ensure their application.

PART TWO

**HOW STRENGTHENED ENGAGEMENT
BETWEEN THE JUDICIARY AND NATIONAL
PREVENTIVE MECHANISMS CAN
CONTRIBUTE TO THE PREVENTION OF
ILL-TREATMENT**

CHAPTER 1. THE ROLE OF JUDICIARY AND NPMS IN THE PREVENTION OF ILL-TREATMENT

1.1. THE ROLE OF THE JUDICIARY IN THE PREVENTION OF ILL-TREATMENT

Although the precise role of judges, and the particularities of legal systems may vary from Member State to Member State, the adoption and interpretation of EU law must be harmonious to be effective. In addition, while in some instances judges are tasked with implementing each of the Framework Decisions under discussion, in some EU Member States the Ministry of Justice is the responsible authority to apply it, while the judiciary act as an oversight mechanism. In such situations an individual can bring an application to the courts to review the decision of the Ministry. Specifically, while the practical application of the FD EAW and the FD ESO across the EU remains with a judge either at District or High Court level, the FD TOP is implemented largely on the executive level, with judicial oversight.

Therefore, when we speak generally of judiciary in the framework of this project, all responsible implementation authorities within the national contexts are taken into consideration. When we speak of judges throughout the Study we refer to judges in the traditional sense, but qualify it if it is the Ministry that is tasked with executing a decision, or implementing a measure.

Notwithstanding the varying criminal justice systems, principles relating to the task of judges including the administration of justice with independence and impartiality applies across the board and right of access to an impartial court or tribunal is an absolute one, and central to due process.²⁴⁰ As the UN noted, “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.”²⁴¹

Where the decision of the Court will entail a custodial sanction, and in light of the far-reaching and significant remit of the Court in such cases, any deprivation of liberty can only be administered in accordance with law.²⁴² Article 5 ECHR provides for the limitations on the right to liberty, and it notes that once detained a person from the outset should be brought before a judge within a reasonable amount of time.²⁴³ It follows that the deprivation of liberty and all that it entails, as one of the most powerful tools of the state against individuals, must adhere to due process requirements, and be subjected to the full rigors of judicial scrutiny.

Equally, the differences in the systems as noted above, whether rooted in civil or common law, adversarial or inquisitorial in nature, share the absolute prohibition of torture and ill-treatment: “While legal systems vary in some respects in different parts of the world, the legal prohibition of torture is universal.”²⁴⁴

240 Article 47 CFREU, Article 6 ECHR, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) General Remarks Paragraph 1. available at <http://hrlibrary.umn.edu/gencomm/hrcom32.html>.

241 Taken from the Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

242 Article 9(1) ICCPR, Article 5(1)(b) ECHR.

243 Article 5(3) ECHR, See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 11, and also UNODC Handbook on Criminal Justice Responses to Terrorism available at https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf.

244 Foley, Conor, Combating Torture: A Manual for judges and prosecutors, available at https://www.essex.ac.uk/combating-torturehandbook/manual/3_content.htm#2 at paragraph 3.6.

Courts have a legal duty to hear complaints of torture and ill-treatment whether in the context of criminal proceedings or civil complaints and to be aware of circumstances and situations where evidence might have been obtained on foot of torture or ill treatment.²⁴⁵ There is an obligation to promptly, impartially and thoroughly investigate fully such matters. Judges must ensure that all the evidence garnered during the course of an investigation was done so in accordance with law, and that the evidence gathered was obtained without coercion or ill-treatment, even in the absence of an express complaint or allegation. Another essential mechanism to prevent ill-treatment relates to judicial oversight and the right to challenge the lawfulness of detention.²⁴⁶ The “*primary role of judges in preventing acts of torture, therefore is to ensure that the law is upheld at all times.*”²⁴⁷ In practice, the question of how proactive judges are, and can be, in terms of raising conditions of detention and fundamental rights in the absence of the individual or his or her legal representation contesting the surrender on such grounds will also depend on the jurisdiction. There might be differences between common law jurisdictions, where in practice it is for the legal representatives to raise issues of prison conditions on behalf of the individual, or civil law jurisdictions, where judges play a more investigative role.

1.2. THE ROLE OF NPMS IN THE PREVENTION OF ILL-TREATMENT

In 2002, based on the conviction that the eradication of torture and ill-treatment would require greater focus upon the conditions in which detainees are kept, the Optional Protocol to the UN Convention against Torture (OPCAT) was adopted. Its aim was to open up places of detention to independent scrutiny by establishing “*a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty*” (Art. 1).²⁴⁸ Under the OPCAT, States are obliged to allow visits by the UN Subcommittee on the Prevention of Torture (SPT) and to “*set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment*”.²⁴⁹

NPMs have generated in just a few years an impressive and unprecedented volume of first-hand independent information on detention conditions as well as on the treatment of persons deprived of their liberty. Over the last years, NPMs have increasingly been seen as one of the central national actors in the prevention of torture and ill-treatment, providing reliable information on detention facilities, as well as coordinating actions with relevant State and non-State actors in the fight against torture and ill-treatment and the protection of persons in detention.

The key role of NPMs in monitoring the situation of torture and ill-treatment and potentially improving the rights of detainees in the EU is increasingly recognised, including by EU institutions. By funding this and previous projects, the European Commission recognises the role NPMs can have to improve the situation of persons deprived of liberty within EU Member States.²⁵⁰ Most recently in the *Aranyosi and Caldărăru* judgment, the CJEU acknowledged the pivotal role of national monitoring bodies in the implementation of EU law, in the context of the execution of EAWs, and called

245 See Art. 12, 13. Convention against Torture. Istanbul Protocol.

246 Carver R and Handley L, Does Torture Prevention Work? 2016 page 15.

247 See paragraph 3.6. Foley, Conor, Combating Torture: A Manual for judges and prosecutors, available at https://www.essex.ac.uk/combatingtorturehandbook/manual/3_content.htm#2_at_para.

248 Articles in this section refer to OPCAT unless otherwise indicated.

249 See Art. 3, 17 OPCAT.

250 See for example the following Study: Moritz Birk, Gerrit Zach, Debra Long, Rachel Murray, Walter Suntinger, ‘Enhancing Impact of National Preventive Mechanisms - Strengthening the follow-up on NPM Recommendations in the EU: Strategic development, current practices and the way forward’, JUST/2013/JPEN/AG/4538 (May 2015) available at www.bim.lbg.ac.at/sites/files/bim/attachments/enhancing_impact_of_national_preventive_mechanisms_0.pdf p. 68 [hereinafter: Birk et al. (2015)].

upon Member States to avail themselves of their findings.²⁵¹ The Court, however, did not provide much guidance on its modalities.

The European Commission has also underlined, that NPMs, through improving the situation of detention ‘at home’, i.e. in their national contexts, can contribute to enhanced mutual trust between EU Member States which again is a prerequisite for a functioning judicial cooperation.²⁵²

In a previous project implemented by the Ludwig Boltzmann Institute of Human Rights on follow-up to NPM recommendations, there were many questions and at times uncertainty amongst NPMs as to how to deal (or not to as the case may be) with the judiciary in their every-day work. Judges obviously not only have a crucial responsibility in the application of EU law related to detention to which NPMs can contribute, as will be outlined in the following Chapters, but also play an important role regarding the situation of detention in their own country. The relationship between these two actors domestically as well as how engagement could contribute to the improvement of detention conditions will be examined in the forthcoming chapters. This will be considered on the basis that an improvement ‘at home’ also contributes to a smoother functioning of judicial cooperation in criminal cross-border matters. The effects on cross-border cooperation will be also be considered.

1.3. NPMS AND THE JUDICIARY – THE BENEFITS OF ENGAGEMENT

Preventing torture and ill-treatment while an individual is deprived of liberty is the core mandate of NPMs. Judges are the guardians of the law and thus of the State’s human rights obligations vis-à-vis its citizens. Since all EU Member States are parties to the ECHR, judges are the ones who give life to Art. 3, as they are ultimately the ones to translate these legal obligations of the State into everyday practice. As referenced above, judges are often tasked with ultimate decisions over individuals’ lives.

The prevention of torture and ill-treatment is thus a joint interest of both, NPMs and judges. As will be discussed further below, following the CJEU’s *Aranyosi and Caldărăru* judgment of April 2016, judges might increasingly consider the conditions of detention in other EU Member States. Due to the fact that information regarding detention conditions will be necessary in order to take an informed decision on whether issuing States comply with Art. 3 ECHR obligations, as well as the reference to national monitoring mechanisms in the CJEU judgement, a greater interest from judges regarding NPMs is to be expected.

Prevention of torture and ill-treatment as a collaborative effort

Prevention of torture and ill-treatment are a collaborative effort in which the various actors hold different roles. NPMs as independent bodies have a very concrete mandate to visit places of detention and give recommendations to State authorities with a view to preventing torture and ill-treatment. The State either implements these recommendations or provides reasons for a refusal to do so. Judges, also as independent actors within the judicial system of the State, interpret and apply laws in practice. They have the power to issue binding judgements. Consequently, if national or international judges cite NPM reports in their judgments, the NPM non-binding findings and recommendations form part of binding judgments. This can significantly contribute to the implementation of recommendations and ultimately fulfil the NPM’s objective to prevent torture and ill-treatment.

In this regard, the Slovenian NPM noted that it had issued reports for a number of years on one specific place of detention. Little action was taken on foot of these observations by the authorities until the ECtHR referenced the specific NPM reports. Thereafter the authorities swiftly implemented

251 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Caldărăru* [2016] paras. 89 et seq.

252 Interview with Jesca Beneder, EU Commission, 28.10.2016.

the decision and made the changes requested, prompting the NPM to conclude that it was more effective than the years of preparing NPM reports.²⁵³

Raising awareness of the implications of a prison sentence

It has been noted that in many countries most judges have never been to a prison before.²⁵⁴ Malcolm Richardson, Chairman of the Magistrates Association of England and Wales commented that: "Sending offenders to prison, within the strict parameters of the sentencing guidelines, is one of the toughest decisions magistrates have to take on behalf of society. We therefore believe that seeing prison through visitation should be an essential part of judicial training for magistrates."²⁵⁵

Thus raising awareness of the implications of a prison sentence might possibly contribute to judges taking a different approach to sentencing, for example, applying alternatives to detention on a more frequent basis. To address this issue, the French NPM offers judges the possibility to join the NPM for visits to places of detention during the course of their training.²⁵⁶

Raising awareness of conditions of detention and social implications of handing down custodial sentences, should form part of judicial training. While this might differ from country to country, NPMs could in principle play a role in this, as demonstrated by the example of the French NPM practice, particularly as the mandate of the NPM centres around collecting relevant information relating to conditions of detention in the national context.

At the same time, judges will possess information about jurisprudence and cases that might be very relevant for NPMs' work. Following relevant jurisprudence requires adequate resources for NPMs. Several NPMs confirmed that it would be useful to share information. It might thus be useful for both, judges and NPMs, to exchange information and experiences on joint subjects of concern relevant for both institutions' professional endeavours.

There are a series of different entry points where using information or other modalities of coordination between the judiciary and NPMs could be extremely useful for both of their professional contexts and which at the same time would contribute to achieving improved conditions of detention and safeguards, thereby preventing the ill-treatment of detainees. These entry points will be outlined in the following sub-chapters.

253 Interview with Slovenian NPM, 31.8.2016. The cases referred to are Mandić and Jović v. Slovenia (Application Nos. 5774/10 and 5985/10) regarding the detention conditions of prisoners on remand and Štrucl and Others v. Slovenia (Applications Nos. 5903/10 and 6003/10 and 6544/10 regarding detention conditions in the closed section of the same prison

254 See The Guardian, "Magistrates demand prison visit as part of judicial training". Available: https://www.theguardian.com/law/2016/nov/01/magistrates-demand-prison-visits-as-part-of-judicial-training?CMP=Share_AndroidApp_Gmail (3 November 2016).

255 Ibidem.

256 Cooperation/coordination between NPMs and judges who have a mandate to visit places of detention will be elaborated in more detail in Chapter 4.2.2.4 below.

1.4. NPMS AND JUDICIARY – THE CURRENT STATUS OF ENGAGEMENT

According to an EU wide research conducted on the follow-up procedures of NPM recommendations the relationship between the judiciary and NPMs remains weak.²⁵⁷ Although the important impact and role of NPMs as well as judges in torture prevention is widely recognised, there is still a lot of potential to increase the frequency and quality of the interactions between the two institutions. Research conducted in the framework of this project has shown an apparent lack of awareness and limited interaction between judges and NPMs in the different national contexts.

65% of NPMs have no or almost no relationship with their judiciary

A survey conducted among NPMs in the EU in the current project confirmed this, with 65% of the NPMs questioned stating that they do not have any relationship at all or almost no relationship with the judiciary of their own country. 20 of the 22 NPMs surveyed indicated that they do not have any form of institutional exchange with the judiciary.

More than a third of surveyed judges had not heard of NPMs

One of the reasons explaining the scarce cooperation is that judges seem to lack awareness of the existence of NPMs and the scope of their mandate, despite at least some dissemination efforts from the side of the NPMs. Several judges surveyed in the context of the project confirmed this assumption, with approximately 34% not knowing NPMs, and with 59% indicating that they had little or no contact with NPMs. This was confirmed in the workshop conducted for judges in the framework of this project, where many had not heard of NPMs even in countries where NPMs are long established.

Apart from a limited awareness regarding the role of NPMs, several additional reasons might explain the fairly low level of any sort of relationships between judiciary and NPMs at the domestic level. Firstly, many NPMs in the EU are established as part of Ombuds institutions and their mandate often explicitly excludes the monitoring of the judiciary. While the OPCAT itself does not foresee such limits on the NPM's mandate, many NPMs are bound by rather restrictive national laws in this regard.

Concerns of interference with judicial independence

Furthermore, there appears to be reluctance amongst some NPMs to liaise closely with the judiciary as it might be perceived to be an interference with judicial independence. In general, National Human Rights Institutions (NHRI) are limited in their mandate when it comes to courts and the judiciary due to the principle of independence²⁵⁸ but this does not preclude them from making recommendations and contributing to the application of EU law by offering information to the judiciary, as will be discussed in more detail below. Furthermore, NHRIs and NPMs have the mandate to report and refer their investigations' outcome to institutions such as the judiciary, the prosecuting authorities or the government.²⁵⁹ Judicial independence therefore should not constitute an obstacle to a closer NPM-judiciary relationship, and existing practices of coordination discussed throughout this chapter supports this position.

This view is also shared by the French NPM who noted that *“Article 1 of the law regulating our mandate says that we are not competent where judges are, meaning we should not interfere and overlap. But we can exchange. We realise over the years, and especially since several judges like me are at the CGLPL that it is fine to exchange, it is not seen as interference. We have contacts. But there is still some reluctance, some fears, due to the independence of the magistrates. There is also some self-censorship, as the whole issue is still unclear to many colleagues.”*²⁶⁰ Notwithstanding these concerns, there has been recognition also of the benefits exchange, and a notable shift towards engagement.²⁶¹

Almost all NPMs and the great majority of surveyed judges wish for an increased cooperation

Despite the limited existing relationships, there is appetite for the improvement and strengthening of the relationship between the judiciary and NPMs. The survey conducted in the framework of this project showed that 21 out of 22 NPMs wish for an increase of cooperation with the judiciary. 82% of the judges surveyed likewise stated that they wish for stronger cooperation, with several highlighting its potential benefits in the context of the EAW. The ones expressing doubts about cooperation justified it by the fact they need more information regarding the mandate of NPMs.

Need for guidance and procedures for cooperation

While most NPMs also favoured increased engagement with the judiciary, several NPMs requested guidance in this regard. Specific requests throughout the Study focused on shaping the process of engagement by which the judiciary can be approached, as well as how to share practices with other countries. At the NPM workshop, one additional challenge for NPMs was raised, namely how to identify which judge to contact. While there are judges' associations, outreach sometimes was found to be challenging, as it would be necessary to engage broadly and strategically, with a number of different individual judges.

258 OHCHR, National Human Rights Institutions (2010) available at www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf p.33.

259 Ibidem, p.91.

260 Interview with French NPM. Article 1 reads as follows: *“The Contrôleur general of places of deprivation of liberty, an independent authority, is hereby in made responsible subject to the prerogatives granted by law to judicial or quasi-judicial bodies for monitoring the conditions of management and transfer of persons in custody, so as to ensure that their fundamental rights are respected.”*

261 The Luxembourgish NPM confirmed that at the beginning, there existed significant tensions between the NPM and the judiciary, and judges would usually react to any critical points brought up by the NPM through pointing to their independence. This however has changed, and there has been a shift towards greater understanding of each other's work and mandate.

CHAPTER 2. METHODS AND MODES OF ENGAGEMENT TO CONTRIBUTE TO THE PREVENTION OF ILL-TREATMENT ON A NATIONAL LEVEL

In order to consider the method and modes of engagement that can strengthen the prevention of ill-treatment, a series of questions will be considered. In particular - what practices of coordination between NPMs and the judiciary exist already? How could greater awareness of each other's role and mandate be used to contribute to the prevention of ill-treatment? And how could concrete opportunities to enhance engagement look like?

2.1. ISSUING RECOMMENDATIONS TO THE JUDICIARY

The SPT, in its Assessment Tool notes that in addition to conducting visits the NPM should also make

“recommendations to the relevant authorities, with the aim of improving the treatment and conditions of persons deprived of their liberty and preventing torture and other cruel, inhuman or degrading treatment or punishment of those persons, and engaging in a meaningful process of dialogue with the State party responsible and any other relevant stakeholders concerning the implementation of any recommendations made”²⁶²

Whether NPMs can and should address recommendations to the judiciary was one of the most contentious issues during discussions in the framework of the project. The views and practices of NPMs greatly varied, depending also on their very specific national legal framework. A particular criterion regarding the question of how NPMs approach the issuing recommendations also seems to be connected to their institutional set-up and is related to whether or not they are part of an Ombuds institution.

Recommendations to the judiciary as an infringement to judicial independence?

Some NPMs have stated that they cannot give recommendations to the judiciary because it goes beyond the confines of by their mandate, or the perception that giving recommendations to the judiciary constitutes an infringement of judicial independence.²⁶³ Those that felt that they could not give recommendations directly, often used other methods such as sending their reports, or considered that a more fruitful method to raise issues would be through informal roundtables or informal discussions.

Recommendations to the judiciary as part of the NPM mandate

At the same time many NPMs in the EU already give recommendations to the judiciary and are of the opinion that this does not undermine judicial independence. The French NPM emphasised that recommendations are made to all relevant actors, and so also towards judges, which they believe to

262 SPT Assessment Tool for NPMs, para. 9a.

263 For example, the Lithuanian or Hungarian NPM. In the case of The Hungarian NPM visited psychiatric holding cells in a hospital, where the right to judicial review had not been granted to someone. They could not issue a recommendation, but sent a report about it to the top organ of the court. There was no answer given, as in contrast to issuing a formal recommendation, there is no obligation to provide for an answer. The NPM elaborated, “There is simply an interdiction for the NPM to target judges through recommendations. We can have exchanges, sometimes we do. So we can consider sharing the reports with judges this way, informally, directly.”

be unproblematic. If, for example, overcrowding is identified as an issue, the NPM will suggest that judges deploy alternatives to custody during sentencing. As the issue of overcrowding is of special relevance for many EU Member States, and is directly relevant to the relationship and potential exchange between NPMs and the judiciary.²⁶⁴ Similarly, the Estonian NPM has given recommendations to the judiciary without reproach.

*“We addressed the judiciary quite frequently. The courts never said that this is not our mandate. We recommended for example that if a person has to be detained in a mental health institution, that place should be visited, and that specific person as well. We also issued recommendations about immigration detention, and the use of electronic restraints”.*²⁶⁵

Recommendations were always immediately followed-up with meetings shortly afterwards, where for example the Ministry of Justice, the Ministry of Finance and other stakeholders, together with the judiciary, participated. Such meetings offered a platform for all stakeholders to present their concerns.

Some Ombuds institutions in which the NPM is a part, such as Sweden and Finland, have an explicit mandate to monitor courts. The Finnish NPM stated that it can receive and examine complaints relating to courts and judges and is mandated to inspect them, while respecting the independence of the judiciary. In practice, this means that evidence cannot be evaluated, nor the interpretation of legal issues considered, but issues such as administrative errors, delays, and behaviour or conduct, can be the subject of scrutiny, as well as undertaking inspection visits and examining covert measures of policing, for example wiretapping.

The Portuguese NPM explained, that as Ombudsman they receive many complaints regarding delays, especially from individuals waiting for judicial review in pre-trial detention. However, the NPM does not address judges directly but goes through the Council of the Judiciary to question the delay.

The SPT, when asked about its approach to NPMs addressing the role of the judiciary clearly stated that while *“NPMs of course cannot tell judges how to judge or interfere in judicial proceedings, they can point at international norms to be taken into account.”*²⁶⁶ Generally, the question would however be for the NPM to decide, including NPMs that are part of Ombuds institutions. Additionally, Mari Amos, (SPT) stressed that it would be important to get judges “on board” in order to effectively prevent ill-treatment. In this regard, the APT is of the view that NPMs can give recommendations to the judiciary. As it is a sensitive exercise, it was suggested to use such recommendations in a strategic manner and for systemic issues.²⁶⁷ This means that according to the APT, NPMs should have a strategic aim rather than acting ad hoc or reacting on requests to make use of the power of the judiciary.

The authors of this Study subscribe to this view. Judicial independence is always to be respected and recommendations as to how a court should dispose of a particular case would be unacceptable. However, recommendations on systemic issues or structural concerns not only fall squarely within NPMs’ mandate, but raising these general issues do not interfere with judicial independence. Parallels could be drawn between NPM recommendations and any recommendations given by interna-

264 Other EU NPMs including Slovenia also indicated that they make recommendations to the judiciary. This is practice also amongst non-EU NPM. The NPM of Paraguay made recommendations on the de-institutionalisation of children: In July 2013, after a respective recommendation by the NPM, the Supreme Court issued a resolution “to ensure that children and adolescents are only placed in institutions in exceptional circumstances and as a temporary arrangement, with a focus on finding and maintaining ties with their families.”

265 Interview with Mari Amos, SPT 30 August 2016.

266 Interview with Mari Amos, SPT 30 August 2016.

267 Interview with APT, 3 November 2016.

tional human rights monitoring mechanisms, such as the UN Human Rights Committee or the UN Committee against Torture (CAT).

While the issuing of recommendations to the judiciary is certainly a contentious issue, there is an existing practice within the EU of some NPMs address recommendations to the judiciary, which is in line with CAT and OPCAT. NPMs should define their own strategy in this regard, in line with their national legislation, so that any such approach is well-founded and not on an ad hoc basis. Ideally the NPM's approach will be coupled with additional trust building and awareness measures, such as through fostering of personal contacts.

An example of recommendations to the judiciary: Addressing overcrowding and proposing alternatives to detention

Overcrowding can directly affect the risk of Art. 3 violations in relation to detention conditions. As the Commission has outlined in its Green Paper on Detention, overcrowding and conditions of detention in EU Member States also have an effect on mutual trust and thus on the practical execution of mutual recognition instruments across the EU.²⁶⁸ Since overcrowding is a serious concern within many EU Member States it would be a question both for judges and NPMs, what could be the role in addressing this issue.

As discussed in the previous chapters, the EU has adopted two more recent instruments (FD ESO, FD PAS) that can be used as additional instruments to bolster recommendations. One NPM at the workshop of this project mentioned, that by having introduced the FD ESO and the FD PAS, the EU sent an important message to states that alternatives to detention should be favoured and that the mere existence of the instruments could help increase the use of alternatives. As outlined in Part 1, while there are some examples of their application, for the most part these two instruments however continue to be very much underused and thus the lack of application of alternatives to detention contributes to the overcrowding endemic.

Overcrowding directly relates to the NPM's mandate of preventing ill-treatment and thus issuing recommendations to the responsible authorities on this issue. This might not always be easy, as several NPMs confirmed that there is a general view amongst members of the public that persons accused of a crime, or indeed those convicted, do not deserve better treatment. There can be a general misconception amongst the public regarding pre-trial detainees that *"if they are there, they must have done something wrong. The presumption of innocence doesn't exist."*²⁶⁹ This can deflate political will to instil change or improve conditions.

Thus proposing alternatives to detention can also be problematic for judges, often found to be more controversial than directing a custodial sentence, as suggested by one of the EU NPMs during the workshop discussions: *"I think that judges are not convinced about the results of alternatives to detention and rather consider that detention will have results. Additionally, they are used to giving penalties and issuing alternatives to detention is more complex."*

At the same time, judges and their sentencing practices play a crucial role regarding the situation of overcrowding. In circumstances where persistent overcrowding constitutes a systemic issue, NPMs will normally issue recommendations to a number of different actors and several NPMs have addressed the role of the judiciary in responding to the impact of overcrowding.

268 COM(2011) 327 final page 3 Available at http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_327_en.pdf.

269 Interview with Slovenian NPM, 31.8.2016.

The French NPM drafted a thematic report in 2012 in which it highlighted the serious problems associated with overcrowding.²⁷⁰ It advised on how to address this issue, which included giving recommendations to judges. Generally, the NPM makes recommendations on the use of alternatives to detention and specifically mentioned a new law introduced in France in 2014²⁷¹ providing that judges should take into account detention conditions when issuing a judgment, with respect to an individual detained in a semi-open prison, with a view to granting day release, or release with electronic monitoring. This forms part of the sentence review procedure.

Many other NPMs have addressed the issue of overcrowding referring to CoE standards as well as national law. The Cypriot NPM for example recently raised the issue by suggesting that greater emphasis be placed on programmes that foster work beyond the prison walls, although such dialogue is limited to the Parliament.

The Austrian, Croatian, Czech, Luxembourgish, Polish and Romanian NPMs mentioned that they give recommendations on using alternatives to detention, for example on the increased use of electronic tagging and community based work for offences with prison sentences of less than two years (Luxembourg) on the reduction of prison sentences through imposing fines or community service orders (Romania) or to alter criminal policies (Poland).

Only two NPMs within the EU seem to have based recommendations on alternatives to detention pursuant to EU law so far, namely the Greek and Romanian NPM. The Greek NPM made recommendations on the use of the European Supervision Order. It highlighted in a report of the NPM that the *“final goal”* was *“less prisoners, less time of incarceration, particular attention to special cases, implementation of alternative detention measures.”*²⁷²

As overcrowding constitutes one of the risk factors of poor conditions of detention possibly leading to a violation of Article 3 ECHR, the authors of this Study believe that raising the issue with authorities is very much in connection with their mandate to prevent ill-treatment. Recipients of such recommendations can be the judiciary, but will also normally encompass other state authorities, such as the Ministry of Justice. The FD ESO and the FD PAS should be considered by NPMs in cases of detainees from other EU Member States. As most EU Member States do not yet make use of the instruments, NPM could play a role by bringing their existence to the attention of the responsible authorities.

270 Interview with French NPM, 4th October 2016..

271 See Law on Penalty Adjustment, 15 August 2014.

272 Greek Ombudsman Special Report 2015 page 3. Full report available at http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM2015_Greece.pdf.

2.2. INSTITUTIONAL EXCHANGE

Almost half of the NPMs share reports with judiciary

Almost half of the NPMs surveyed disseminate their annual reports to the judiciary, a third of all NPMs in the EU actively share their visiting reports and 3 out of 22 NPMs disseminate press releases to the judiciary. As discussed above, sharing reports of NPMs might not only contribute to raising the judiciary's awareness of ill-treatment as well as NPMs and their work in general, but it might ultimately also lead to the use of NPM reports by judges in their own work and ideally even reflected in the judgments they issue. This has the potential of greatly enhancing the impact of NPM recommendations. Another effect could be, that judges develop a better understanding of the conditions of detention and the consequences of a prison sentence, which might ultimately also inform sentencing practice.

In terms of existing practices of NPMs sharing the report, there are different approaches. The Finnish NPM publishes important decisions on its website and in the annual report, which is distributed to each court in Finland. The Spanish NPM sends their reports to prosecutors, who read the report and send feedback. The Polish NPM tries to reach out to judges and after every visit sends its visiting report to the judge responsible for the particular place of detention. Some NPMs send their reports to specific members of the judiciary, for example the Italian NPM shares its annual report with the President of the Constitutional Court.

One innovative idea by Mari Amos, SPT member, was that NPMs could integrate RSS-feeds in the part of their website dealing with reporting and invite focal points among the judiciary, judges and other relevant stakeholders to subscribe to these feeds. Such an instrument would allow the judiciary to follow the publication of new reports, without having to check the website on a regular basis.

Generally, NPMs should strive to disseminate their reports as widely as possible, including to the judiciary, in order to foster awareness about its mandate, activities and most importantly, recommendations. This offers other stakeholders, notably the judiciary, the possibility to pick-up these recommendations and contribute to their implementation.

Examples of current exchange between NPMs and the judiciary

One NPM at the workshop underlined, that it is very important to cultivate personal contacts. Currently, in the EU almost half of the NPMs participate in some joint events, a third of the NPMs conduct personal meetings and 25% are in email or telephone contact with judges. The Slovenian NPM has on some occasions invited the president of the competent court to participate in the closing talks at the end of monitoring visits, when the main findings and urgent recommendations are presented before the visiting report is produced. The French NPM has meetings with judges from the High Court once or twice per year.

Some NPMs also underlined the usefulness of informal relations with the judiciary and that this informal channel sometimes might be more beneficial than formal ones. The Austrian NPM for example mentioned, that due to its legal mandate precluding formal engagement with the judiciary, it is easier to engage informally with the relevant judicial actors and have fruitful discussions on this level.²⁷³

NPMs generally confirmed that personal contacts prove to be extremely useful, but that it takes time to build trust, which is again the prerequisite for information sharing. The size of a country will

273 Interview with Austrian NPM, 5.10.2016.

of course have a major impact on how easily such contacts can be established. The Luxembourgish NPM has mentioned in a previous project conducted by the Ludwig Boltzmann Institute of Human Rights, that building trust is important and that this has to be bolstered through professional legal competence “as each professional group, including judges, speak their own language.”²⁷⁴ To this end the NPM of Luxembourg stated, “We hold joint consultation with judges, the Ministry of Justice, etc. for example on draft laws, such as the penitentiary law reform, youth protection, etc., so we have a close cooperation. They listen to us, they respect us, we are well established now. [...] Sometimes, also the Ministry of Justice itself calls us for an opinion, as was the case regarding the use of electronic tags.”²⁷⁵ The NPM and the judiciary thus engage on joint matters of concern, with the NPM at all times respecting the independence of the judiciary.

The German NPM mentioned that an obstacle to the dissemination of reports and establishment of personal contacts is knowing whom to contact. Thus, it suggested that it could be helpful to establish specific contact points.

The authors of this Study therefore believe that each NPM, in the framework of their specific context should reflect upon how they would like to approach specific questions of coordination and exchange with the judiciary – always with the clear objective of preventing torture and ill treatment. In order to engage, it will be crucial to cultivate trustworthy personal contacts, which might take time to establish. NPMs and judges could also take part in or create personal forums of exchange, in order to be able to discuss issues of joint concern and to strengthen awareness of each other’s role.

A third of NPMs conduct trainings with judiciary

Eight of the consulted NPM participate in training courses for the judiciary, mostly but not limited to NPM related topics.²⁷⁶ For example, the Estonian Chancellor of Justice and her advisors quite often participate in trainings for judges – not only related to NPM matters, but also with regard to other areas of law. The French and Italian NPMs present their mandate in the framework of conducting trainings for judges. In France, trainee judges even have the possibility to do part of their legal clerkship (*stage*) at the French NPM. The Finnish NPM also holds lectures for court personnel and judges. In some countries, like Hungary, the Ombudsman who gives lectures to members of the judiciary.

The Italian NPM has also organised a workshop on a recent Grand Chamber Judgment of the ECtHR relating to prison overcrowding for members of its staff, the deputy president of the Constitutional court as well as magistrates overseeing detention.

NPMs should explore the possibilities within their national context of conducting or contributing to judicial trainings, particularly on the NPM’s mandate in order to raise awareness. Trainings on other subjects can be useful to increase the NPM’s visibility as well as to explain the rationale behind the recommendations. Such trainings also enable the NPM to enter into discussions with recipients of its recommendations and might constitute a good opportunity to establish trust and cultivate a co-operative relationship with relevant actors, such as prosecutors and judges.²⁷⁷

Contributing or conducting trainings would also be in line with the recommendations of the SPT. In line with the Paris Principles, the SPT stipulates in its Assessment Tool that NPM’s mandates should comprise of,

274 See Birk et al., p. 69.

275 Interview with Luxembourg NPM.

276 These seven NPMs are the NPMs from Czech Republic, Estonia, France, Germany, Italy, Lithuania, Poland and Portugal.

277 See Birk et al, p. 58-59.

“assisting in the formulation of programmes for the teaching of the prohibition and prevention of torture and other cruel, inhuman or degrading treatment or punishment and carrying out research into human rights and, where appropriate, taking part in the execution of such programmes and research in schools, universities and professional circles.”²⁷⁸

Furthermore, the SPT, in line with Art. 10 of the Convention against Torture, considers examining the curricula of education institutions as part of the NPM work in order

“to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention.”²⁷⁹

Since this could also encompass prosecutors and judges, it is a further supports the position that NPMs should not only engage or contribute to trainings themselves but even reflect on the curricula and consider where recommendations for improvements can be made – always in the framework of the NPMs’ mandate and existing international standards.

Consequently, NPMs should contemplate, whether the participation in trainings for the judiciary (and other stakeholders) could be a fruitful way to increase the impact of its work. Trainings can constitute a useful instrument not only to raise awareness about its own work, but also to build a more cooperative relationship with relevant actors.

Judges as members of NPMs – an opportunity for engagement

A number of NPMs also have judges or former judges that are members of the NPM itself or are members of advisory organs to the NPM.²⁸⁰ In the Swedish Ombuds institution, which the NPM is a part of, approximately 90% are judges that have practised in courts. When these staff members serve as judges again after their time with the Ombuds institution/NPM, knowledge will be carried with them and judges can take the knowledge and experience with them. However, it seems that up to this point, the fact that the NPM itself or advisory structures include (former) members of the judiciary does not translate to outreach with the judiciary by NPMs in the EU. An example of how judges who are part of the NPM advisory structure could support the NPM’s work, from beyond the EU is Brazil, where Judges were members of the National Committee to Prevent and Combat Torture, which closely works with the Brazilian NPM and specifically helped to establish a dialogue between the NPM and judicial authorities in the country.²⁸¹

This also gave rise to the Association of Brazilian Magistrates to participate and cooperate directly with the NPM in one of the states. Regarding his own involvement and how it benefitted his work as a judge, one of the judges commented that *“being a member of the national committee has undoubtedly had a positive impact on my work as a judge. I was able to listen to claims, grievances and suggestions from civil society on improving the public policy on combating torture in the country, including with regard to magistrates.”²⁸²*

278 SPT, Assessment Tool for NPMs, para. 9f.

279 SPT Self Assessment Tool, para. 9g.

280 Austria, France, Germany, Netherlands, Sweden and Portugal.

281 APT, Putting prevention into practice- 10 years on: the Optional Protocol to the UN Convention against Torture, Chapter on Brazilian NPM.

282 Ibidem.

A need to strengthen the coordination with judges conducting prison visits

In many EU Member States judges have a mandate to visit places of detention. The extent to which mandates are applied in practice differ from Member State to Member State, from a supervisory function within prisons, or with regard to specific cases. So far, there is virtually no coordination between such supervisory judges and NPMs.

Most NPMs stated, that the visits are strictly separate and there is no form of coordination or exchange of information. This means, that some NPMs are also not aware whether judges even undertake visits. Other NPMs suggested that it would be extremely useful if judges used their mandate to conduct prison visits more often.

Several NPMs have stated, that increased coordination or cooperation would be useful. There are also limited examples of exchange. The Italian NPM contacts the responsible magistrates overseeing detention (*magistrati di sorveglianza*) to learn of their point of view relating to conditions of detention in a particular prison, to receive information about possible problematic issues and draft joint action plans to resolve problems. The French NPM, while not coordinating with judges who undertake visits, has proposed to the Ministry of Justice to help consider providing a toolbox for judges, that when they undertake visits to places of detention, they have a guidance document that they can follow.

The Polish NPM in an attempt to reach out to judges sends its visiting report to the judge responsible for the place of detention after every visit. They also ask the director of each place of detention to see the last protocol of the judges' visit. The NPM has so far not received an answer from judges who have received the report and twice judges even put into their report that they disagree with the NPM. While this outreach has not yet lead to any fruitful exchange between the two visiting bodies, the practice of outreach certainly serves as a good example of how judges could be approached by NPMs.

In the authors' view where judges are mandated to conduct prison visits this provides for a good opportunity to coordinate and exchange information with NPMs. NPMs should consider how this opportunity could be better seized to strengthen the prevention of ill-treatment and overall engagement with the judiciary. Where appropriate, the information from visits could be shared, problematic areas and systemic failures identified and addressed. NPMs and Judges with a mandate to conduct prison visits could share experiences, concerns, identify good practices, and provide for the potential of follow up. Such coordination would not necessarily have to touch upon specific or individual cases, where there are concerns regarding confidentiality and independence, but rather raise broader issues with a view to effectively improving conditions and eradicating ill-treatment.

The SPT Assessment Tool for NPMs stipulates, that NPMs,

“should have clear guidelines for reporting individual cases of deliberate ill-treatment and requesting inquiries, as well as for maintaining the confidentiality of the detainee concerned and any other source of relevant information and protecting such persons against reprisals.”²⁸³

It was also emphasised during the NPM workshop in this project that individuals concerned would have to consent to this step, keeping in mind the “do no harm” principle as an overarching tenet of the NPM’s work.

Most NPMs refer individual cases where they suspect a criminal offence to the judiciary, with many NPMs underlining their legal obligation to inform the prosecution of cases involving penal offences or serious violations of human rights.²⁸⁴ The Italian NPM pointed out in case of a possible Art. 3 ECHR violation against persons deprived of their liberty, it would inform the authority in charge to stop the violation, forward the case to the judicial authority in charge as well as to the relevant Minister. The French NPM also underlined that in the case of grave human rights violations of persons deprived of their liberty, these are communicated without delay to the responsible authorities. If the CGLPL believes it to be necessary, it also makes these findings public immediately, including the response received by the authorities. In case of presumed criminal offences, the French NPM reports these directly to the public *prosecutor (Procureur de la République)*. Since 2008, the NPM has made use of this procedure thirteen times.²⁸⁵

283 SPT Assessment Tool for NPMs, para. 29.

284 Data from the survey performed on NPMs in this project.

285 The Swedish and Luxembourgish NPMs also have these functions. The Swedish Ombudsperson even has a mandate to prosecute, although in so far as the NPM is concerned, this has not yet been utilized.

2.3. NPM CONTRIBUTIONS TO COURT PROCEEDINGS

NPMs and their work that they do are generally less well known to judges than the CPT reports or the judgments of the ECtHR, although several positive examples of courts using information produced by NPMs for their judgments exist. Different examples of the judiciary using information produced by NPMs during the course of their work would include citing reports in judgments, providing specific information on request, or NPM staff giving evidence in court. Some of these examples were subject to intense discussions, as will be outlined in more detail below. There was an example of an NPM participating in strategic litigation, which demonstrates the potential remit of the work of NPMs.

NPM reports as a source of information: From expert opinions to expert evidence

The question of acting as a witness or as an expert in court was one of the most contentious issues during the workshop held in the framework of the project. In order for reports to be used by other stakeholders, such as the judiciary, they need to be available to the public. While the publication and dissemination of annual reports is an obligation under Article 23 OPCAT, there is no express rule regarding visiting reports. The SPT clarified in its Assessment Tool for NPMs, that NPMs should *publish “its opinions, findings and other relevant information in order to increase public awareness, especially through education and by making use of a broad range of media”*²⁸⁶ and, specifically that,

*“Visit reports, including recommendations, should, in principle, be published. Exceptions may exist where the national preventive mechanism considers it inappropriate to do so or where there is a legal impediment. Annual reports must be published and should include, in addition to recommendations for change, the outcome of the dialogue with authorities, i.e., follow-up on recommendations mentioned in previous annual reports. The mechanism may also publish thematic reports.”*²⁸⁷

Finally, the SPT elaborates, that each NPM should have a policy on publishing reports or parts of it, *“including the main findings and recommendations,”* as well as a policy on preparing and publishing thematic reports.²⁸⁸ The APT confirmed that in their view that publishing reports is key to ensure transparency and accountability.²⁸⁹ In an interview with the APT, it was also noted that there is nothing in the OPCAT that says that the report can or should not be published and at least the fact of the visit should be reported online.²⁹⁰ The revised UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) in its Rule 85 stipulate that,

“due consideration shall be given to making the reports of external inspections publicly available, excluding any personal data on prisoners unless they have given their explicit consent.”

During the course of the NPM workshop it agreed that where possible, reports should be made available to the public.²⁹¹ It follows that any reports on prisons that could be available to the public, could also form part of court proceedings, once there is no breach of confidentiality. The SPT Guidelines suggests that State should publish and widely disseminate the annual reports of the NPMs,

286 SPT Assessment Tool for NPMs, para. 9b.

287 SPT Assessment Tool for NPMs, para. 35.

288 Ibidem, para. 42c and 42d.

289 APT and IHHR, *Implementation Manual* (2010) 244.

290 Interview with Barbara Bernath and Eva Csörgö, APT, 3.11. 2016.

291 It will be discussed in chapter 4.2.2 below which NPMs publish what kind of information, as this is a highly relevant point for cross-border proceedings.

and that once transmitted to the SPT, that they would arrange for the publication of the report on the SPT website.

In thirteen out of twenty-four jurisdictions NPMs publications have been used in court proceedings

Thirteen out of twenty-four NPMs surveyed in this project, confirmed that one of their reports, opinions or articles had been used in court proceeding, whether national or regional.²⁹²

The Cypriot NPM has on two occasions provided reports to plaintiffs for use before the ECtHR in cases regarding maltreatment or material conditions in police detention. The NPM at the time was making a routine visit and the detainee lodged a complaint two years later, and subsequently requested a copy of the report for the proceedings. The decision is currently pending before the ECtHR.

NPM reports do not only provide judges with useful information, but can contribute considerably to binding decisions being issued by the judiciary that might support and confirm recommendations that the NPM has previously issued. Awareness of judges of the role and work of NPMs can therefore not only benefit judges to issue judgments based on reliable information, but might directly enhance the effectiveness of NPM's own work.

Providing specific information on request of the judiciary

During the course of workshops, NPMs raised concerns as to whether communicating with a judge in relation to a specific case could potentially impact upon their independence. NPMs mostly did not foresee any difficulties with sharing information that was already in the public domain, on foot of a request. However, several NPMs raised concerns regarding for information that was not yet published, and how it could potentially impact upon their own independence if they would not be able to freely decide whether to provide this information. Addressing this concern, one NPM noted that the independence of the NPM should not be determined by the request itself, but rather by the manner in which the NPM responds to such a request.²⁹³

The Polish NPM confirmed this approach "When a judge asks about a particular prison that we have visited, we can send our opinion. In any case we are independent", meaning independence does not hinge on the provision of information relating to the work of an NPM. The NPM should always act in line with its mandate to prevent torture and ill-treatment.

The SPT underlined that it was up to the NPMs to decide whether they provide information that might not yet be public.²⁹⁴ However, it was suggested, that there might need to be good reasons to hold information back, such as security or confidentiality.

292 The Czech NPM's reports were used by the Constitutional Court and administrative courts regarding conditions of detention and treatment of detainees in detention facilities for foreign nationals. Czech civil courts used the NPM's reports regarding conditions of detention and treatment of prisoners, particularly the search of prisoners and the use of restraints, and the ECtHR has referred to NPM reports addressing the use of handcuffs in prisons, strip searches in prisons and detention conditions of foreign nationals, the ECtHR has relied upon a report prepared by the Czech NPM. The French NPM's reports were referred by the ECtHR in four cases. In one of them, the NPM was cited with regard to its positions taken from the Annual Report 2012 on elderly and disabled people in prison as well as extracts from the visiting reports relating to specific detention centres. In all of these cases, the ECtHR appears to have consulted the reports directly from the NPM's website, without having contacted them. Furthermore, on a national level, the French NPM's visiting reports were used by administrative judges in cases of persons deprived of their liberty who were complaining about conditions of detention. Reports by the Polish and the Greek NPM were equally cited by the ECtHR in the case of *Milka v Poland case 814322/12*. See also ECtHR, *Becos v. Greece*.

293 Portuguese NPM, Vienna Workshop June 2016.

294 Interview with Mari Amos Interview, SPT 30 August 2016.

In light of this approach, several NPMs stated, that if it were to serve the rights of the detainee as well as their mandate to prevent ill-treatment, while at the same time preserving the principle of confidentiality, they would be open to sharing information. The Croatian NPM for example shared its unpublished visiting reports on a specific prison with different courts, as well as the representative of Croatia at the ECtHR asked the Croatian NPM on request. The information provided did not include any personal data.

A quarter of NPMs have been consulted by judges to provide information

Approximately a quarter of all NPMs in the EU, including the NPMs of Czech Republic, Estonia, Germany, Poland, Romania, Slovenia have indicated, that they had been consulted by a judge who sought information regarding detention conditions in a specific place of detention in which they were monitoring.²⁹⁵ While some address requests on a case-by-case approach²⁹⁶, the Polish NPM has internal guidelines what do and the approach is also published in its annual report. If the NPM decides to give information it first removes any personal information, like names or other sensitive information.

Another example of providing information to the judiciary per request would be to conduct visits specifically on foot of a request of the judiciary. There does not seem to be one example of this within the EU, and in light of the NPMs' independence it would be expected, that NPMs would mostly find this problematic and not fulfil such a request. An example of this however may be taken from an experience from a non-EU NPM, the Costa Rican NPM, which had received a request by the Constitutional Centre to conduct a visit to a certain place of detention.²⁹⁷ The NPM at the time decided that the visit would serve its own strategic interests and therefore undertook it. In contrast to this experience, the Polish NPM stated, that it would not undertake a prison visit on foot of a request in order to preserve its own independence.

One can conclude that while NPMs can never be compelled to provide information, as it would infringe on their independence, NPMs should take decisions on whether to provide information on request always with the objective to prevent ill-treatment. It might be useful if the NPM sets up specific guidelines about how to deal with such requests.

295 The Romanian NPM was requested by the High Court of Cassation to inform the judge whether inquiries with regard to a specific police station where the concerned person was being detained, had been conducted and what these revealed. The Romanian NPM was also contacted by prosecutors who sought information regarding centres for children. The Estonian Chancellor of Justice is sometimes requested by judges about findings from inspection visits in order to resolve court cases.

296 Interview with Spanish NPM, 13 September 2016.

297 Interview with APT 3 November 2016.

NPMs giving evidence in court – a risk to independence, or effective fulfilment of the mandate?

Article 21(2) OPCAT states that, “Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.”

Furthermore, the SPT Guidelines on national preventive mechanisms of 2010 notes, that “the NPM should ensure that any confidential information acquired in the course of its work is fully protected.”²⁹⁸

There cannot be any doubt but that confidentiality is paramount, and a crucial component of the effective workings of the NPM, and any attempt to penetrate the cloak of privilege would endanger those that the NPMs seek to protect and undermine their position. However, not all information obtained during the course of visits can be considered confidential. The SPT’s Compilation of SPT Advice in response to NPM requests also noted that “the obligation of confidentiality should not be construed as preventing NPMs from disseminating information provided that such information does not include personal data, unless there is express consent.”²⁹⁹

Many discussions at the NPM workshop held in this project centred around the question of providing an oral testimony in court. Several NPMs voiced their concerns in this regard, citing their mandate, independence and confidentiality as possible grounds for refusal.

Not all NPMs shared these concerns and a number of NPMs³⁰⁰ have already provided testimony or expert opinion in a court case in their own country. The Finnish NPM clarifies that it is not called to testify before court, but that in principle giving evidence is not a problem, as this approach is not in any way infringing their independence.³⁰¹ The NPM shared one case of a suspected offence by a police officer, in which a colleague from the NPM acted as a witness. The representative of the Spanish NPM recently gave evidence at the pre-trial stage in the case of an inmate that alleged ill-treatment and had previously been visited by the NPM. The Czech NPM acted as *amicus curiae* in a case before the Constitutional Court.

Some NPMs however were sceptical about whether they could and should provide evidence in court. The European NPM Newsletter referred to an attempt to subpoena the Norwegian NPM as part of a civil case. In refusing to attend court as a witness, the NPM referred to a similar position taken by a French NPM, and expressed concerns that,

“If a party who has been present during a visit by a national preventive mechanism can demand that the mechanism give evidence regarding the findings made during the visit, that would place great pressure on the integrity of the mechanism in question and its ability to fulfil its mandate and remain independent.”³⁰²

298 Paragraph 37 of the SPT Guidelines CAT/OP/12/5

299 Part II Paragraph 5 Advance unedited version of Compilation of SPT Advice in response to NPM requests.

300 Croatia, Czech Republic, Finland, Poland and Spain.

301 Interview with Finnish NPM, 7 October 2016.

302 See page 9 of The European NPM Newsletter Issue no. 72-73 January to February 2016.

The Cypriot NPM pointed out that the Ombudsperson's and thus the NPM's staff members cannot be called to give testimony in cases which they have researched and/or monitored in this capacity. It does not provide evidence in courts, except for already public reports.³⁰³ Interestingly, this practice very much diverges from the practice of the Finnish NPM, although the laws seem similar.

There are those NPMs that give evidence and expert opinions if they are summoned, such as the Spanish, Swedish or Greek NPM. In Sweden there is a general obligation to testify for whoever is called to do so (expressed in the Code on Judicial Procedure). This means that if an NPM staff member would be called as a witness to give evidence on e.g. conditions in a place of detention that the NPM has visited, he or she would appear in court. The Greek NPM explained that it would not intervene for an individual against public officials, but that they only give general reports and opinions, for example highlighting the situation of LGBTIs in detention. The Spanish NPM would decide on a case-by-case basis, if the request comes from one of the detainees.

In the interview conducted with Mari Amos, SPT member, she stated, that NPMs themselves should decide whether to give evidence or not.³⁰⁴ The APT supported this view stating that it would be for the NPM to decide, and highlighting that it would be possible, particularly regarding systemic concerns, but that it might also be connected to certain risks, especially with regard to disclosing information.³⁰⁵

In the authors views, giving evidence in Court and guaranteeing privilege are not mutually exclusive. Arguably, while refusing to give evidence may be an option, it should not be the automatic or immediate response, but on a case by case approach, keeping mind that all should be done to fulfil the NPM mandate of preventing torture while respecting confidentiality. There are a number of ways to ensure that a court can hear of potential human rights concerns while ensuring that the principle of confidentiality is not breached. For example cases or evidence can be heard *in camera*, or with reporting restrictions. Documents can be handed into Court for the question of privilege to be considered and decided upon by the Judge. Furthermore, redacted reports to remove sensitive information can be produced. All of these possibilities should be considered by the NPM before taking a decision on whether or not to give evidence.

Participating in strategic litigation

The French NPM was the only one to provide an example of being involved in strategic litigation. In May 2016, two cases were initiated at the ECtHR and both cases involved overcrowding. While the case itself is led by the French NGO "Observatoire international des prisons" aiming at a pilot judgment, the French NPM jointly with the NHRI (Commission nationale consultative des droits de l'homme) submitted an *amicus curia* to the Court, to provide information regarding the overcrowding of these prisons and in France in general.

There is room to further explore the potential of such areas of engagement, and there are other similar examples of NPMs acting as *amicus curiae* in cases, as discussed in further detail in the following chapter. Of course there are practical limitations including resources and overburdening NPMs that must be taken into account, but where possible for the effective operation of the NPM mandate, avenues of engagement that serve to enhance the work of NPMs should be pursued.

303 The Cypriot NPM also shared the relevant legal provision, Art. 12 (2) Commission for Administration Law: "The Commissioner or any member of the staff of his Office may not be called to testify before a Court or in any proceedings of a legal nature in respect of any matter that has come to this knowledge in the exercise of his duties."

304 Interview with Mari Amos, 30 August 2016.

305 Interview with APT, 3 November 2016.

To this end, the SPT, in its Assessment Tools for NPMs confirms that NPMs should establish a strategy for cooperation with other national and international actors.³⁰⁶ In line with the Paris Principles, the SPT suggests that engagement should encompass “a wide range of national actors.”³⁰⁷ It furthermore adds, that NPMs should be “creative” in finding solutions and partnerships should be formed to “raise awareness of the obligations of the States parties among decision makers and the general public in order to encourage and facilitate change in legislation, policies made by authorities, general attitudes, and conditions and practices in places of detention.”³⁰⁸

306 SPT, Assessment Tool for NPMs, para. 43, 17.

307 Ibidem.

308 SPT Assessment Tool, para. 17.

CHAPTER 3. METHODS AND MODES OF ENGAGEMENT THAT CAN CONTRIBUTE TO THE PREVENTION OF ILL-TREATMENT IN CROSS-BORDER PROCEEDINGS

The previous chapters considered generally the relationship between the judiciary and NPMs and how engagement can positively contribute to improving conditions of detention by directly contributing to the dignified treatment of detainees and at the same time strengthen mutual trust across the EU.

Chapter 3 will to examine the possible role of NPMs directly in the context of transfer proceedings. For this purpose, the CJEU's *Aranyosi and Căldăraru* judgment will constitute a key development.

3.1. NPMs ADDRESSING THE CHALLENGES OF FRAMEWORK DECISIONS ON DETENTION

The potential role of NPMs in addressing fundamental rights challenges linked to the implementation of the Framework Decisions on detention is tied to the question of how aware NPMs are of EU law. No NPM claimed as part of the surveys that they had a very good knowledge of EU instruments, but two NPMs (Italy and Lithuania) stated, that they systematically refer to EU regulations in their reports and recommendations. A third of the NPMs stated that they possess some knowledge with a quarter of all EU NPMs having little or no knowledge at all. Most NPMs have however used EU law in their recommendations.³⁰⁹ During the interviews however it became evident that where EU law is applied in the work of NPMs, it is largely in the context of asylum and migration law and less in the field of criminal justice.

There are different aspects of how the application of the Framework Decisions on detention could potentially be relevant to the NPM's mandate. Firstly, if the application or non-application of an FD systematically influences conditions of detention, for example through the issuing of a large number of EAWs or the non-application of alternatives to detention, such as the ESO. Several NPMs also were already contacted by individuals affected by transfer proceedings.

For most NPMs the question as to whether cross-border proceedings with a potential influence on the situation of detention would fall within their mandate was uncharted territory. A number of NPMs also highlighted that more expertise would be useful in order to fully assess this issue. Several NPMs shared concerns about the prevention of ill-treatment in connection with the implementation of the EAW and other Framework Decisions. One NPM was of the view that stronger guarantees would be needed to ensure the presence of a lawyer from the first moment of arrest and during interrogation for example.

Another challenge that was pointed out was the fact that it is more difficult to gather evidence on possible inhuman treatment when relating to a prisoner abroad. At the same time, this is also mentioned as a good opportunity for NPMs to establish themselves as credible, detailed and up-to-date sources of information.

The Finnish NPM considers transfer cases as within its mandate and has received complaints on transfers from Finland to Estonia. It further felt that if the application of any of the Framework Decisions on detention was influencing the situation of detention in the country and that there were

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In the survey performed on NPMs in this project, 15 NPMs answered that they refer to EU law in their reports, two of them even systematically. Only 5 of them never mention EU law.

problems regarding conditions of detention or treatment of detainees, the NPM would take it up.

The NPM in Cyprus was of the view that the question of transfer and the impact on the prevention of ill-treatment was a relevant topic for their consideration, and without doubt a part of their mandate. In light of it being a relatively new area, it has not been fully addressed yet, and recommendations to authorities have not been made to date, but this is something that they intend to work on in the future.

3.2. THE POTENTIAL IN USING NPM REPORTS IN CROSS-BORDER TRANSFER CASES

As outlined above, the provision of reliable information on conditions of detention in the country to which the person is supposed to be transferred to might constitute a challenge, as ECtHR judgments and CPT reports might be quite old and lacking specific enough information. In the analysis of the replies to the Commission's Green Paper on Detention, several EU Member States "*underlined the practical issue of finding up-to-date information concerning the prison conditions and criminal justice systems of other Member States.*"³¹⁰ Several judges and representatives of Ministries of Justice interviewed in the framework of this project confirmed that it was difficult to obtain information regarding conditions of detention in other EU Member States, especially information that is reliable and up to date.³¹¹ Many of the judges and Ministry of Justice representatives commented that NPM reports could be particularly useful when taking decisions on whether an individual's surrender might possibly violate Article 3 ECHR.

The CJEU in its judgment on *Aranyosi and Caldărăru* found that in order to make an informed decision, the executing States needs to receive,

*"information that is objective, reliable, specific and properly updated on detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systematic or generalised, or which may affect certain groups of people, or [...] certain places of detention."*³¹²

Furthermore, the CJEU stipulates that the information required in order to assess the situation should be provided by,

*"[...] inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN."*³¹³

The authors of this report are of the view that with the reference to reports "*under the aegis of the UN*" the Court acknowledges the role of NPMs as institutions being established following OPCAT as a UN treaty. There exists a great culture of complementarity amongst the mechanisms outlined by the Court. The NPMs, however, have several distinct advantages over the other monitoring bodies referred to by the CJEU, which will be further considered.

310 See Analysis of the Replies to the Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention, p. 8. Countries and actors having this concern at the time were CZ, DK, LV, RO, NL, as well as the Council for the Administration of Criminal Justice and Protection of juveniles.

311 Interview with Judge Ingrid Haussman, 5 October 2016. Interview with Barbara Göth-Flemmich and Andrea Rohner, Austrian Ministry of Justice, 28 October 2016.

312 Ibidem, para. 89.

313 Ibidem.

Comprehensive and up to date information through regular visits

Unlike the mechanisms of the Council of Europe and the UN, NPMs are in a position to carry out regular visits to places of detention. The CPT for example undertakes an average of 10 regular visits per year in countries of the Council of Europe – averaging a visit every three to four years per country.³¹⁴ This comparison becomes even more stark when compared with the United Nations bodies.

In this regard, the SPT visits approximately six to eight countries each year globally, whereas the UN Special Rapporteur on Torture conducts around three visits per year.³¹⁵ Obtaining current and relevant information from such reports dating back sometimes several years is problematic, and as a result, unlikely to be considered as reliable by an executing judge.

The same can be said for the case law of the ECtHR, whereby the details and facts contained within the judgment may date back a number of years. Moreover, the information contained therein principally refers to circumstances pertaining to an individual case and do not necessarily provide a reliable statement on the general situation in the country. Although with its new pilot procedure, the Court also publishes more general statements on the situation of detention in a State Party, as in the case of *Varga and Others v. Hungary* of 2015.³¹⁶

Additionally, NPMs have unique insight into detention facilities in their country. Their broad mandate, giving them access to all places of detention, allows them to have a comprehensive overview of the prevailing conditions. They are best placed to provide information which would otherwise be very difficult to access. International mechanisms have a limited timeframe which results often in only obtaining a selected view of the situation.

Reliable and objective information through independent monitoring

Furthermore, the independence of NPMs as enshrined in the OPCAT and the Paris Principles, allows for their findings to be considered in principle as objective and reliable. This data, published in the form of annual, thematic, ad-hoc or visiting reports, usually describes in a precise manner detention conditions.

In order for the issuing authority to be able to inform the executing authority of existing national or international monitoring mechanisms, it will have to be aware of the NPM and be familiar with its work in their own country.

314 See the official CPT website, available at: www.cpt.coe.int/en/visits.htm.

315 See the website of the OHCHR, available at www2.ohchr.org.

316 *Varga and Others v. Hungary*, Appl. Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015).

3.3. THE CHALLENGE IN USING NPM REPORTS IN CROSS-BORDER PROCEEDINGS

In order for judges to be able to inform themselves, and others of the conditions and the existing monitoring mechanisms as elaborated upon by the CJEU in *Aranyosi* and *Caldărăru*, judicial authorities must from the outset, be aware of NPMs' existence. Furthermore, in order to effectively use NPM reports as a basis to take decisions on transfer cases, the reports must be of good quality, they must be accessible and in the public domain

Quality of reports

Whether judges are willing to rely on the information contained in NPM reports, depends on trust and confidence in NPMs' work and the information they collect. Building that trust and establishing NPMs as a reliable source does not only depend on creating more solid awareness regarding the mandate of NPMs, but equally also on the quality of the reports.

At the workshop for NPMs conducted in the framework of this project, participants commented that NPM reports across the EU vary significantly, and the option of standardising reports was considered. The SPT during the workshops confirmed that standardisation in principle would be useful, but that one template for all across the EU would not be realistic. The APT suggested that if standards would be elaborated, then the bare minimum should be defined because the length and type of visits both within countries, and as between them, can vary significantly.³¹⁷ NPMs mostly however felt that good practice examples of reports would be useful.³¹⁸

Obviously, standardisation of reports is far from being the only key aspect regarding good quality reports; rather the NPM's work needs to be substantial and reliable in the first place. One Ministry of Justice representative underlined that it would be good if there was greater complementarity instead of competition between the reports of the different monitoring mechanisms, referring particularly to the CPT and NPMs.³¹⁹

Publicity of reports

In keeping with the OPCAT, annual reports by NPMs are required to be made public and according to the SPT, visit report, including recommendations, should in principle be published as well. Almost all NPMs in the EU publish annual reports.³²⁰ This means, that judicial authorities who would like to get a general overview about detention conditions in one country, should mostly be able to access this information across the EU.

The situation is different with visiting reports, whereby most NPMs in the EU publish them (see Figure 1 below), but not all NPMs do. During the course of the final conference, the former Special Rapporteur on torture, Manfred Nowak noted that it would be important for NPMs to be fully transparent, and publish visiting reports. As will be outlined in the subsequent section on accessibility, many NPMs that publish visit reports, do not do so in English. Many NPMs also publish information about places of detention in their annual report – this is however not as detailed as it would be in the visit report. Furthermore, it might prove burdensome for judges to go through NPMs' annual reports in order to gather information about specific places of detention. The chart set out below helps to provide an overview of the availability of reports in the public domain.

317 Interview with APT representatives, 3.11.2016.

318 Also see Chapter 6.1, Role of the SPT below.

319 Interview with Barbara Göth-Flemmich and Andrea Rohner, Austrian MoJ, 28.10.2016.

320 The Maltese NPM does not publish its annual reports. The Luxembourgish NPM has stopped producing annual reports, but publishes its visit reports.

Figure 11	ANNUAL REPORTS					VISIT REPORTS			
	Annual report produced and public:			Language of publication		PUBLICITY			Available in English
	<div style="text-align: center;"> Yes No </div>								
	2015	2014	2013 or earlier	Report fully available in English	Partially available in English, e.g. summary	YES	PAR-TIAL	NO	
Austria				X			321		X ³²²
Belgium	No NPM established ³²³								
Bulgaria				X			324		
Croatia				X					
Cyprus									
Czech Rep.				X					X
Denmark				X					
Estonia				X					
Finland					X				
France				X					X
Germany				X					X
Greece				X					X
Hungary				X			325		

321 The Austrian NPM publishes a list of recommendations, which do not concern only one institution, but are of a systemic nature. Selected individual cases are discussed on the NPM's website (<http://volksanwaltschaft.gv.at/#!kommissionsbe-suche>) in more detail – in such cases, the institution visited and the time of the visit is mentioned. In its annual reports, some of the places of deprivation of liberty are mentioned in connection with

322 The list of recommendations published by the Austrian NPM is available in English. Information on the Commissions and their visits is available in German at the moment and will soon be translated into English. See written communication with the Austrian NPM, 1 March 2017.

323 At the time of writing, Belgium had signed the OPCAT on the 24th October 2005 but has not yet ratified it.

324 The Bulgarian NPM on its website publishes the list of institutions to be visited. In its annual report, it lists recommendations for each of the institutions visited.

325 The Hungarian NPM publishes note in English on the first visit report to a place of detention, also on the follow-up reports. The complete reports are not available in English, only a summary of the reports.

Ireland	No NPM established ³²⁶									
Italy	The Italian NPM has been operational since March ³²⁷									
Latvia	No NPM established ³²⁸									
Lithuania				X						
Luxemburg										
Malta										
Netherlands				X						
Poland					X ³²⁹					
Portugal				X						
Romania	The Romanian NPM was established in 2015.				X ³³⁰					
Slovakia	No NPM established ³³¹									
Slovenia				X						
Spain				X ³³²						
Sweden										
United Kingdom	Jan-Mar ³³³			X						X

326 At the time of writing, Ireland had signed the OPCAT on the 2nd October 2007 but not yet ratified it. Although there is no NPM, the Office of the Inspector of Prisons, a statutory, independent office established under the Prisons Act, 2007 has carried out regular inspections of the 13 Prisons and prepares and presents comprehensive reports on each institution inspected as well as an Annual Report to the Minister for Justice.

327 The first annual report of the Italian NPM will be published in March 2017 and will be fully available in English.

328 At the time of writing, Latvia is not a signatory to the OPCAT.

329 The 2013 annual report is translated into English, not the 2014 and 2015 reports.

330 A summary of the Annual Report 2015 and a summary of the Special Report on the conditions of detention in prisons and remand centres are available in English on the Romanian NPM's website.

331 At the time of writing, Slovakia is not a signatory to the OPCAT.

332 The 2015 Spanish Annual report is so far only published in Spanish. All other reports were also published in English.

333 The UK NPM annual report for 2015 covers January-March 2015.

NON-EU NPMs									
Albania				X					
Georgia				X					X
Macedonia				X ³³⁴					
Moldova									
Montenegro					X ³³⁵				
Norway				X					X
Serbia				X					X
Switzerland					X ³³⁶				
Ukraine				X					

334 The 2015 Macedonian Annual report is so far only published in Macedonian. All other annual reports were also published in English.

335 The NPM of Montenegro so far published its 2013 Annual Report in English

336 The 2015 Annual Report of the Swiss NPM is published in English, prior reports are available in French.

Accessibility of reports

As can be seen from Figure 1 above, most NPMs publish their annual reports fully or partially in English. They are therefore easily accessible if one knows where to look for them, which might be a bit more difficult. This is not the case for the vast majority of visiting reports, whereby if they are public at all, they are only available in the national languages and not in English. While it would be useful to have these reports in English in order to easily consider and rely upon them as a basis for taking decisions in transfer cases, this does not seem to be realistic due to resource implications this would have for NPMs.

Accessibility also depends on how easily these reports can be retrieved online. While the SPT website currently compiles the annual reports, not all NPMs seem to share their reports on time with the SPT, which is why some annual reports are currently missing. Furthermore, the website does not contain the visiting reports of NPMs.³³⁷ Judges and Ministry of Justice representatives underlined the challenge they would face when searching for reports by NPMs. Several stakeholders therefore suggested that a central database for NPM reports would be beneficial. FRA informed the authors of this report, that they are in the process of starting discussions on a search tool, establishing a metasearch of existing databases, which could also include reports on conditions of detentions in EU Member States.³³⁸

Obtaining of information on individual risks

As referred to above, the executing judicial authority in the context of EAW proceedings must be satisfied that it has objective, reliable, accurate and up-to-date information on deficiencies in the prison system. According to the CJEU, once in possession of information showing the existence of a general and systemic risk of ill-treatment, judges must verify whether there are serious and proven grounds to believe that the individual concerned will be under threat. The CJEU is clear on the fact that a generalised situation of ill-treatment in a country, due to, for example, endemic overcrowding or poor sanitary conditions, does not constitute a reason to refuse the execution of an EAW. Thus the executing State is obliged to check whether under concrete circumstances and because of reasons that are confirmed by facts, the person, after transfer to the issuing State, will be subject to a serious risk of inhuman or degrading treatment in this Member State.³³⁹

The judicial authority in the executing State must thus perform an individual analysis, and, to this end, request further information from the judiciary of the issuing State regarding the conditions in which the person would be kept.³⁴⁰ Judges must also inform the executing State of *“the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.”*³⁴¹

The CJEU places an onus on the executing authorities to seek out from the issuing authority information, not only on the material conditions of the prison in which the individual will be detained, but evidence of a specific risk that the individual would face on surrender. A challenge in this regard is that in many States it does not seem to be possible for authorities to inform the executing State with any degree of certainty, precisely which prison the individual will be transferred to upon surrender.

337 See website of the SPT. Available: <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/AnnualreportsreceivedfromNPM.aspx> (3 November 2016).

338 Interview with Jonas Grimheden, FRA, 24.10.2016. Also see Chapter 6.4 below.

339 See Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Caldărăru*, [2016] paras. 94 et seq.

340 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Caldărăru* [2016] paras. 95.

341 *Ibidem*, para. 96.

This will make it difficult to perform an analysis on the evidence of specific risks, as the situation in prisons and for specific groups might differ across the country. It remains to be seen whether *Aranjosi II* to some extent can resolve this issue.

3.4. WAYS FOR NPMS TO PROVIDE SPECIFIC INFORMATION IN CROSS-BORDER CASES

Having considered how NPMS generally respond to specific requests on a national level, this Study will look to the role of NPMS in providing their expertise in the context of cross-border proceedings. As yet there are few such examples, four NPMS have to date been requested by plaintiffs detained in another state, or their lawyers, to write an expert opinion.³⁴²

On the basis of an individual complaint in the context of EAW proceedings regarding a surrender to Lithuania, the Slovenian NPM (pursuant to its Ombudsman mandate), acted as *amicus curiae* before the court in Slovenia in a case deciding upon the lawfulness of the surrender. The Slovenian Ombudsman submitted, that despite the fact that the implementing legislation in Slovenia does not explicitly include the risk of being subjected to torture, inhuman or degrading treatment in the issuing State as refusal ground, the prohibition of torture and ill-treatment is part of *jus cogens* norms under international law.³⁴³ It furthermore provided the court with specified relevant extracts from the ECtHR judgments relating to Lithuania, CPT reports and references from a number of annual reports of the Lithuanian Seimas Ombudsman. The Ombudsman emphasised that it,

“Did not propose to the competent court how to decide (to the benefit of the complainant or otherwise), but merely provided some of the most relevant documentation to aid the court when discussing the violation of the prohibition of torture claimed by the complainant and when making a decision.”³⁴⁴

At first instance, the Slovenian Court rejected the applicants claim, and allowed the surrender. On appeal, the decision was overturned and returned the matter to the court of first instance on the grounds that the Court in its initial decision did not consider the submissions of the Ombudsman, it held that,

“the complainant and his attorney had claimed with justification that the court of first instance had failed to provide its position with regard to the documentation provided in the Ombudsman’s letter.”³⁴⁵

In a separate case, also from Slovenia, the Legal Information Centre for NGOs, an NGO that is part of the NPM, was contacted by a UK law firm that sought information on prison conditions in Slovenia in the case of their client, who was to be surrendered to Slovenia. The NGO then provided the law firm with findings of various national and international monitoring bodies, including the NPM reports on prison conditions. The document was issued as a legal analysis and opinion.

The Croatian NPM gave an example of an opinion it provided in a transfer case before Croatia’s accession to the EU. In that case, a Turkish national with refugee status in Germany was arrested in Croatia and accused in Turkey of committing terrorist acts. The NPM at the time wrote to the Ministry of Justice advocating that an extradition would be in breach of Art. 3 ECHR.

342 Bulgaria, Czech Republic, France, Luxembourg

343 See 2015 Annual Report of Slovenian NPM, 69-70. Available: http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/vcp_lp_2015_eng.pdf

344 Ibidem.

345 Ibidem.

One of the French NPM reports was referred to in a case before Westminster Magistrate Court, which resulted in a refusal to extradite an individual to Guadeloupe on account of the conditions of detention violating Art. 3.

3.5. MONITORING ASSURANCES: BEYOND NPMS' MANDATE, YET RELEVANT TO THE PREVENTION OF ILL-TREATMENT

The decision to execute an EAW is taken by the executing State once it has reason to believe that the surrender will not lead to any breach of the prohibition of torture and ill-treatment and that the person will be treated in conformity with fundamental rights. If the issuing State has given assurances that the person will be treated in accordance with Art. 3, as in the case of extraditions to non-EU States, the question arises whether, and by whom, the compliance with these assurances would be monitored.

Relying on assurances can clearly be problematic as they rest on trust and are not enforceable. As the former UN Special Rapporteur on Torture emphasised, assurances are not legally binding and often do not provide for sanctions in case they are violated.³⁴⁶ Their fulfilment solely depends on the willingness of the authorities. In the vast number of EAWs, it can be expected that these assurances are fulfilled. However, in States displaying systemic and generalised failures of conditions of detention, if the executing State nevertheless decides to execute the EAW on foot of assurances that the individual would not be victim of ill-treatment, it would be essential to carry out monitoring to ensure that the situation is, and remains satisfactory.

Whether the judicial authorities of the executing State can ask for assurances was raised during the hearing before the CJEU in *Aranyosi/Caldărăru*. While the referring German Court argued for the right of the court of the executing State to seek guarantees, most countries as well as the Commission objected, arguing that the concerns of the court should be resolved in a dialogue between the two Member States.³⁴⁷

The CJEU is silent in its judgment on the potential monitoring of assurances in EAW cases. It therefore seems to be the responsibility of each Member State to establish its modalities. The ECtHR however has pronounced itself on several occasions on the issue of diplomatic assurances against refoulement and found that,

“assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”³⁴⁸

346 UN Special Rapporteur on Torture, Report to the Commission on Human Rights, UN Doc. E/CN.4/2006/6, 23 December 2005, para. 31.

347 For a summary of the discussions during the hearing see: Henning Bang Fuglsang Madsen Sørensen, 'Mutual trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant' (EU Law Analyses, 18 February 2016) available at www.eulawanalysis.blogspot.co.at/2016/02/mutual-trust-blind-trust-or-general.html.

348 *Othman (Abu Qatada) v The United Kingdom*, Appl. No. 8139/09 (ECtHR, 17 January 2012) para. 187.

In this context, the ECtHR assesses the quality of assurances given and whether in light of the receiving State's practices they can be relied upon depending on a number of factors.³⁴⁹ One of these factors mentioned in the case *Othman v. UK* is "...whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms." In this case the Memorandum of Understanding between the UK and Jordan actually nominated an independent visiting body to report to the executing State.³⁵⁰

A judge from Germany, noted the practical concerns with monitoring assurances. Her practice was to request diplomatic access as part of the assurances. The difficulty that arose, which stems from the fact that these assurances are not legally binding, was that where the assurances are not fulfilled, there is little or no recourse for that individual. The implications for future cases one can assume would be that the assurances would not be accepted, but that still means that the individual surrendered remains subjected to ill-treatment.³⁵¹

From the NPM perspective, during the project, it was discussed, whether NPMs see monitoring of assurances as part of their function. There was clear consensus among NPMs that this would go beyond the NPM's mandate in terms independence, their focus on systemic issues and a general lack of resources that would be needed for such a task.

One expert however shared the view that NPMs generally react to topical issues raised by the media and undertake ad-hoc visits based on these developments. The argument was put forward that a request to monitor an assurance is not completely different from an ad-hoc visit, as in neither case, is there an obligation to conduct the visit. However, some NPMs cautioned that a refusal following on from such a request might either put the NPM under pressure or conclusions could be drawn from a refusal to undertake the visit that the situation is not so bad so as to warrant concern.

While the majority of NPMs agreed, that monitoring assurances would not be an option for them, the Slovenian NPM stated that it could check the situation of the surrendered person as Ombudsman, should indications of unacceptable circumstances arise. As foreign nationals constitute a vulnerable group in detention, several NPMs are alert to this issue.³⁵² It is under this category that those surrendered would receive attention from an NPM during the course of its visits. One NPM confirmed that heretofore, specific attention was not paid to persons transferred from another state but that they were contemplating including these groups as part of their visits going forward.

Therefore, while there was consensus among NPMs that monitoring of assurances would not be for NPMs to address, it was considered that they should pay attention to foreign nationals in detention as one of the groups in a position of particular vulnerability.

349 Ibidem, para. 189: (i) whether the terms of the assurances have been disclosed to the Court; (ii) whether the assurances are specific or are general and vague; (iii) who has given the assurances and whether that person can bind the receiving State; (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them; (v) whether the assurances concerns treatment which is legal or illegal in the receiving State; (vi) whether they have been given by a Contracting State; (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances; (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms; (x) whether the applicant has previously been ill-treated in the receiving State; (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

350 Ibidem, para. 77.

351 Interview with Ingrid Haussmann, 5th October 2016.

352 The Lithuanian, Polish and Finnish NPM all explained, that they do consider the situation of persons that were surrendered from another EU state during their visits. Although not specifically monitoring persons who were surrendered, and the conditions of surrender agreed, but that inmates with or of another nationality, would form part of 'vulnerable groups' that NPMs pays specific attention to when conducting their visits.

3.6. PROMOTING THE PREVENTION OF ILL-TREATMENT IN EU LEGISLATION

Article 19 OPCAT clearly stipulates that NPMs shall “submit proposals and observations concerning existing or draft legislation”. The SPT, in its Analytical Tool additionally confirms that NPMs’ mandates comprise of giving recommendations and providing reports on matters relevant to detainees. Paragraph 9(c),

“In addition to conducting visits, the mandate of a national preventive mechanism should include the following activities: Submitting proposals and observations concerning existing or draft legislation and relevant human rights action plans, and submitting to the Government, the parliament and any other competent body on an advisory basis, either at the request of the authorities concerned or through the exercise of the mechanism’s powers under the Optional Protocol, opinions, recommendations, proposals and reports on any matters concerning the situation of detainees and any other issues within the mandate of the mechanism.”³⁵³

In the authors view, this should equally be applicable to EU legislation. In a previous project conducted by the Ludwig Boltzmann Institute of Human Rights, it was concluded that the majority of NPMs in the EU have almost no direct lines of communication with EU institutions and that keeping track of relevant EU legislation for NPMs is a challenge.³⁵⁴ This was pointed out to be equally true for the SPT.

As there are numerous and ongoing legal developments in the area of justice and home affairs which will directly impact upon the criminal justice sector of all EU MS, NPMs would be ideally placed to provide comments to legislative developments also on an EU level. There was input by the NPMs of France, Spain and the UK to the Commission’s Green Paper of Detention and the Hungarian NPM also commented and reviewed the draft law implementing the FD EAW and the FD TOP, as they considered this task as part of the NPM mandate. However, beyond these sparse examples, involvement in legal consultations seems to be virtually absent.

It is thus suggested that NPMs provide greater input to legislative developments on an EU level. This would obviously at the same time require involvement from the side of the Commission as well as awareness regarding relevant legal developments among NPMs. As many NPMs struggle with limited resources and might be reluctant to take on additional tasks, it might be useful to cooperate with other stakeholders in such an endeavour. The German NPM for example suggested that a cooperation with universities and research institutes could be useful in that regard.³⁵⁵

353 SPT, Analytical assessment tool for National Preventive Mechanisms, para. 9c, 25.1.2016. Available http://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf (3 November 2016).

354 See Birk et al, Enhancing Impact of National Preventive Mechanisms, p. 79.

355 Birk et al., p. 63.

3.7. HOW ENHANCED ENGAGEMENT BETWEEN JUDICIARY AND NPMs CONTRIBUTES TO THE PREVENTION OF ILL-TREATMENT: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Currently the link between NPMs and judiciary remains weak. So too is the NPMs knowledge of concrete EU law measures, States' implementation and the active use of Framework Decisions on detention that seek to ameliorate the situation for detainees across the EU. The APT reflecting on potential engagement, noted that *"it is important to build the bridges between judges and NPMs, so that judges are aware about the existence and reports of NPMs."*³⁵⁶

Indeed, both sides could benefit from increased engagement between the judiciary and NPMs. This engagement would not only be beneficial to foster the rule of law in each Member State, but at the same time also to support the implementation of the principles of mutual recognition and mutual trust on an EU level.

The CJEU appropriately highlighted that NPMs can play a crucial role throughout transfer procedures. By increased engagement with the judiciary of their own country or of the executing State, NPMs should be in a position to establish themselves as an *"objective, reliable, specific and properly updated"* source of information, supporting judges and contributing to the uniform application of fundamental rights across the EU in the context of EAWs as required by the CJEU.

Quality, publicity and accessibility of NPM reports are important prerequisites, be it in the national or in a cross-border context. They also serve to promote awareness of the NPM and its mandate as well as to establish the NPM as trustworthy and competent sources of information on conditions of detention.

While there are many other relevant actors, ranging from civil society to the media, NPMs should consider, what policy they want to adopt with regard to the judiciary. There exist a number of different relevant entry points to engage with each other in a mutually beneficial manner. Many NPMs, and some despite a restricted mandate, have found ways to build relationships and manoeuvre in this framework in order to work on achieving their mandate of preventing torture and ill-treatment. Each NPM should thus reflect upon how they would like to approach specific questions of coordination or requests for information and what seems to be most appropriate in the specific context – always with the clear objective of preventing torture and ill treatment.

Sharing reports with judicial actors would be a useful start to raise awareness of the activities of NPM's and their mandate. NPMs and judges could additionally take part or create in personal forums of exchange, informally or formally, in order to be able to discuss issues of joint concern and to strengthen awareness of each other's role.

Trainings, particularly with regard to the functioning of the NPMs mandate, but also on other subjects, can also be useful to increase the NPM's visibility as well as to explain the rationale behind the recommendations it makes and to build a more cooperative relationship with relevant actors, such as prosecutors and judges. NPMs who have former judges as members could take advantage of this expertise when contemplating, on a strategic level, how best NPMs could address the subject of engagement with the judiciary.

While independence and principles of confidentiality are crucial components of the mandate of NPMs they should be used as important tools, key for the successful fulfilment of their mandate

356 Interview with Barbara Bernath, Eva Csergő, APT, 3.11.2016.

and not principles that hinder the prevention of ill-treatment. This being so, NPMs should consider how best to deploy their reports and ensure that the recommendations contained therein do not get lost, but are read, considered, implemented and applied in practice by judges, and all relevant stakeholders.

RECOMMENDATIONS

- Interaction between judges and NPMs in relation to prison conditions on a national level is mutually beneficial and should be increased. This engagement could be through formal and informal channels, e.g. through information sharing, dissemination of visiting reports, exchange of information regarding joint issues of concern (particularly with regard to judges mandated to monitor detention facilities.) While many felt during the course of the project that joint visits would be inappropriate, sharing good practices and common challenges could be useful.
- Increased awareness by judges of the existence of NPMs, their mandate and the reports they produce. As currently awareness is not very well established and relationships are rather weak more needs to be done to establish formal and informal links between judges and NPMs, ideally through institutional exchange, such as trainings and conferences, and ensuring that judges are made aware of the visiting or annual reports.
- NPMs should establish themselves as reliable sources, through the quality of their reports and should ensure that reports, annual and visiting reports are made available on their websites, and disseminated widely, including to judges and judicial schools. NPMs could integrate RSS-feeds in the part of their website dealing with reporting and invite focal points among the judiciary, judges and other relevant stakeholders to subscribe to these feeds and thereby contribute to wider dissemination.
- The annual reports should be made available in English, or at a minimum, a summary of the reports.
- Trainings, particularly with regard to the functioning of the NPM mandate, but also on other subjects regarding ill-treatment or torture prevention, can serve to increase the NPM's visibility. Trainings and discussions also give an opportunity for NPMs to further explain the rationale behind the recommendations it makes and to build a more cooperative relationship with relevant actors, such as prosecutors and judge.
- NPMs should develop a strategy for enhancing the engagement with the judiciary for the prevention of ill-treatment, setting out the parameters of their respective roles and the limits to engagement, and ensuring that independence and confidentiality are always guaranteed. To this end, the question of attending court or being compelled to attend court and give evidence could be explored, and the scope of the information that can be provide outlined. The development of guidelines could be supported by the SPT.
- NPMs should strengthen their understanding of EU law to improve NPM awareness of EU law as a prerequisite to comment on laws and generally play a more active role in the implementation of EU law. NPMs could raise awareness of EU instruments, and work with the media and the public in order to ensure that the issues surrounding pre-trial detention, overcrowding, the risks to Article 3 ECHR, as well as the benefits of alternatives to detention are understood. At the same time, the EU should consult with a broad range of stakeholders, including the SPT, CPT, and NPMs and ensure that relevant expertise is taken on board when elaborating new legal instruments.

- **NPMs should develop a strategy on how to address the effect of EU law on the prevention of ill-treatment in their domestic context – both responding to potential challenges as well as using EU law as an instrument to enhance the impact of their work**

CHAPTER 4. THE ROLE OF INTERNATIONAL BODIES

The UN Subcommittee on the Prevention of torture has indicated that NPMs should consider forming partnerships with national and international actors in order to raise awareness of the obligations of States so as to facilitate change.³⁵⁷ In addition to strengthening the engagement between NPMs and Judges *inter se*, both actors could look to international bodies for the role that they play in the context of mutual recognition and the fundamental rights compliant implementation.

4.1. THE SUBCOMMITTEE ON PREVENTION OF TORTURE (SPT)

The UN Subcommittee on Prevention of Torture (SPT) was established pursuant to the OPCAT. In addition to its preventive functions, Article 11 of the OPCAT provides that the SPT shall advise on the establishment of NPMs, and to provide ongoing technical assistance in order to strengthen the capacities of NPMs.

In this regard the SPT has prepared guidelines on NPMs.³⁵⁸ In January 2016, the SPT published an analytical assessment tool for NPMs, paragraph 5 of which notes that *“upon request from a State party and/or a national preventive mechanisms the Subcommittee will offer further advice and assistance to the mechanism in the evaluation of its needs and the means necessary to strengthen the protection of person deprived of their liberty against torture and ill-treatment.”*³⁵⁹

In particular the analytical tool specifically refers to instances when the NPM should establish a strategy for cooperation with international actors including the SPT in the follow up of cases of suspected, or documented cases of torture, and particular in relation to the issue of reprisals.³⁶⁰

Developing guidelines on engagement

During the course of workshops with NPMs in Vienna, the question of the SPT providing guidelines to ensure high quality NPM reports was raised. After the workshops, and as part of targeted interviews, NPMs were asked whether they felt that SPT guidelines on reporting could be beneficial for them. This was met with mixed response. The SPT felt that at this stage it was not necessary, while the APT raised the practical concern that reports vary between one day visiting reports and two week visiting reports, and that while minimum reporting guidelines could be elaborated upon, it would be difficult to see how guidelines could be applied in the case of reports generally.

Several NPMs found that it could be useful to have a basic structure to tailor reports,³⁶¹ guidelines or best practice models on reporting. Some NPMs were of the view that exchange with other NPMs on practices would be of greater benefit. The vast majority of NPMs³⁶² stated that it would be useful to have SPT guidelines on the relationship between judiciary and NPMs. A document such as that could address the possible engagement without interfering with the independence of the judiciary

357 SPT, Analytical assessment tool for National Preventive Mechanisms, para. 9c, 25.1.2016. Available: http://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf (3 November 2016 para 17

358 Guidelines on national preventive mechanisms (CAT/OP/12/5) 15th -19th November 2010.

359 SPT, Analytical assessment tool for National Preventive Mechanisms, para. 9c, 25.1.2016. Available: http://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf (3 November 2016).

360 Ibidem para 43.

361 Interview conducted with Slovenian NPM (31.8.2016) and Portuguese NPM (7.9.2016), Interview conducted with Spanish-NPM (14.9.2016)

362 With the exception of two NPMs.

and NPMs and raising awareness of the benefits of interactions.³⁶³ More specifically it could address the role, if any, of NPMs in providing reports for court proceedings and how to formulate recommendations directed to the judiciary.³⁶⁴ Arising from the workshops conducted with NPMs, and as part of recommendations directed at the SPT and formulated during the workshops, NPMs suggested that the SPT invite judges to consider and look to the reports of NPMs, and establish guidelines for the formal dialogue with relevant stakeholders, considered above, and finally that after visits the SPT could take steps to promote that NPMs attend briefing visits with authorities.

In the view of the authors, the SPT should consider how to provide orientation to NPMs on making their reports more available and useful to other actors, notably the judiciary. This could be achieved by providing general guidance on reporting and dissemination as more specifically guidance on engagement with the judiciary in full respect of the mutual independence. Moreover, the SPT could consider how to strengthen its engagement with the judiciary as an important actor in the prevention of torture and ill-treatment. In this regard it could specifically take up the issue of judicial cooperation in cross-border proceedings outlined in part one of the Study.

4.2. THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE (CPT)

CPT findings as an important reference

The CPT, established under the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" consists of a multidisciplinary team with a mandate to carry out periodic and ad hoc visits of places of detention across the 47 members of the Council of Europe. The CPT member Anton Van Kalmthout referred to the NPMs as 'natural partners' of the CPT, and considered that the main task to work on was how to ensure that NPMs gain similar credibility going forward. Many of the NPMs indicated that they referred to and incorporated in their reports the findings of the CPT.³⁶⁵

Furthermore, during the course of surveys conducted with judges in the context of this Study, over 45% of those surveyed stated that they had used CPT reports in the context of EAW deliberations. Clearly with regard to the use of CPT reports in the context of Article 3 ECHR, as well as the consideration of mutual recognition instruments, both judges and NPMs place significant weight on the findings of the CPT. Indeed, in the *Aranyosi and Căldăraru* decision, in addition to national monitoring mechanisms, the CJEU referred to 'reports and other documents produced by bodies of the Council of Europe'.³⁶⁶

The same paragraph also notes that judges considering the question of a surrender, should be relying upon information that is objective, reliable, specific and properly updated on the detention conditions.³⁶⁷ This raises the issue that many judges felt that CPT reports required supplementing. With a mandate covering 47 countries, it follows that aside from the ad hoc visits, CPT visits, conducted approximately every four years, could not be as up to date and reflect the latest developments.

Strengthening the cooperation with NPMs and the judiciary during country visits

NPMs reflected on how improved cooperation with the international community could strengthen the impact of their mandate. To this end, and as part of an outcome document created during the

363 Interview conducted with Portuguese NPM

364 France.

365 Sweden, Croatian, Luxembourg, Slovenia

366 Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Căldăraru* [2016] at paragraph 89

367 *Ibidem* at para 89.

course of an NPM dedicated workshop in Vienna, NPMs called for better communication between CPT and NPMs in particular prior to visits. To this end, it was suggested that CPT members should contact the local NPMs as part of the preparation when conducting visits.

The CPT, during its own visits, regularly meets with prosecutors and judges, as it considers their role crucial in the prevention of torture and ill-treatment.³⁶⁸ One subject that is regularly discussed with them would be the investigations into allegations of torture and ill-treatment. The CPT also issues formal recommendations in this regard.³⁶⁹ Furthermore, if the CPT for example was to document cases of ill-treatment during its visit, it would bring these to the attention of the authorities immediately and concretely recommend what action should be taken. Other recommendations are on ordering a forensic examination for victims of ill-treatment or standards stipulated by the ECtHR regarding promptness and thoroughness of investigations into alleged cases of torture and ill-treatment.

Another issue the CPT regularly takes up with the judiciary, is the role of supervisory judges who enjoy a particular mandate monitoring the conditions of detention. According to the CPT, while the law is very often comprehensive and potentially useful, in practice oversight is not always effectively implemented in this context.

Throughout the Study, it was clear that both judges and NPMs look to CPT reports as credible sources of detention conditions. NPM reports however have the distinct advantage of bearing information from repeated and regular visits with localised knowledge of the situation, and the ability to react quickly and visit a place of detention as is required. CPT members have a broader more global perspective which can help inform the NPMs of best practices that they have encountered in other countries faced with similar challenges. With all of this in mind, more could be done to facilitate regular contact between NPMs and CPT, before visits, to exchange information and after visits to advise on recommendations and practices that could be shared emanating from a broader source of examples. Exchange between NPMs and the CPT could also relate to advising on format and structuring reports to ensure that a high standard and quality reports are produced.

4.3. EU AGENCY FOR FUNDAMENTAL RIGHTS

In 2007 the European Union established the EU Agency for Fundamental Rights (FRA), an independent EU body to provide independent, evidence-based assistance and expertise on fundamental rights to EU institutions and Member States. In November 2016, FRA published its report on "*Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*"³⁷⁰ which deals with the FD TOP, FD ESO and the FD PAS as well as fundamental rights concerns and opportunities related to these instruments. In contrast to the present Study, the FRA report looks beyond the prevention of ill-treatment and also considers the respect for private and family life as well as the right to a fair trial. Furthermore, the report contains a series of interesting best practice examples as well as recommendations to foster the fundamental rights compliant implementation and application of the different Framework Decisions.

FRA will continue working on criminal justice matters in 2017 and is currently planning to contribute to making "information on detention conditions (as well as on alternatives) in all EU Member States,

368 Interview with Hugh Chetwynd, CPT Secretariat, 11 November 2016.

369 See for example CPT Report on Greece, visit from 14/04/2015 - 23/04/2015, para. 24: The CPT recommends that these procedural obligations be strictly observed by police officers, prosecutors and judges and, to this end, it would like to be informed of the steps taken to ensure that this is the case. Available: <http://www.cpt.coe.int/documents/grc/2016-04inf-eng.pdf>.

370 The Report is available via <http://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border>.

drawing on existing international, European, and national monitoring reports³⁷¹ more accessible. FRA are due to start consultations on how a user-friendly tool, that would support judicial authorities when looking for information in their decision on a surrender, might look like.

Throughout interviews, workshops and conferences, there was a recurring theme as to what was needed on the ground for better fundamental rights based implementation of the Framework Decisions on detention. These included easily accessible information as to contact points within EU Member States, greater information on prison and detention conditions, and guidance on the practical application of the Framework Decisions and the exact steps that should be taken to ensure that procedures are carried out without delay. Further clarity has also been sought on the type of information that is required before a surrender, and *Aranyosi II* should provide some more detail in terms of the level of detail relating to prison conditions required in the case of a surrender sought for the purpose of investigating an alleged offence.

The existing network of organisations discussed above are best placed to help Member States navigate the implementation of EU Framework Decisions and to foster dialogue between relevant actors. In particular, the EU could consider establishing annual working meetings with CPT and SPT and other actors to discuss common issues.

4.4. EUROJUST

Eurojust was created with a view to establishing a judicial cooperation unit in a bid to enhance solidarity and cross-border cooperation. A precursor to the current Eurojust, Pro-Eurojust was established in 2000. Much like the development of the EAW resulting from the attacks on September 11th 2001, the fight against terrorism and borderless crime saw the development of Eurojust as a unit dedicated to judicial cooperation and coordination. It has continued to grow and develop, engaging also with non EU actors.

Recital 1 of Council Decision setting up Eurojust notes that “It is necessary to improve judicial cooperation between the Member States further, in particular in combating forms of serious crime often perpetrated by transnational organisations.”³⁷² To this end, Article 32 of Council Decision 202/187 provides specifically that Eurojust may also make proposals for the improvement of judicial cooperation in criminal matters.

In essence, Eurojust works to coordinate and assist national investigations and prosecutions, to improve cooperation between national authorities through the support of mutual recognition instruments.³⁷³ The support in cases of cross-border criminal procedures is of particular use when disputes or issues surrounding jurisdiction arise, and Eurojust can intervene to settle disputes.³⁷⁴ Eurojust works to facilitate the execution of EAWs and the exchange of information between national authorities, clarify legal requirements, advise on the drafting of EAWs, and reporting on breaches of time limits.³⁷⁵ Article 7, as amended by the 2009 Council Decision, elaborates on the role of Eurojust in the support of judicial cooperation amongst EU Member States. It provides that:

371 The quote refers to one of FRA’s recommendations to provide such information to Member States. See FRA, Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers, FRA Opinion 4, p. 12.

372 Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime available at <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/Eurojust%20Decision%20%28Council%20Decision%202002-187-JHA%29/Eurojust-Council-Decision-2002-187-JHA-EN.pdf>.

373 Peers, EU justice and Home Affairs 2016, page 254.

374 Ibidem. at page 255.

375 Council of the European Union, Report on Eurojust’s casework in the field on the European Arrest Warrant 26 May 2014 at page 3.

“Notwithstanding the provisions contained in any instruments adopted by the European Union regarding judicial cooperation, a competent authority may report to Eurojust recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition”³⁷⁶

Article 3(1)(b) of the Eurojust Council Decision, provides that,

“In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 of the EJD in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition.”

Eurojust also gathers information on the fundamental rights aspects of the implementation of EAWs, particular with regard to convictions in absentia, and the right to a retrial where the individual was not notified of the trial. As part of this information, as noted in the CJEU decision of *Aranyosi and Căldăraru*, where the executing authority looks to postpone the execution of an EAW, they are required to notify Eurojust.³⁷⁷

The Commission has also tasked Eurojust with holding expert meetings to facilitate the practical application of FD TOP, as well as to provide guiding materials for judicial authorities. Furthermore, as outlined already, the Commission has requested Eurojust to collect data on the practical application of FD TOP.

Just as SPT and CPT can offer practical guidance to NPM on the fulfilment of their mandate, and can advise on aspects such as institutional exchange including between NPMs and judges, so too can judges seek support from Eurojust on the implementation of mutual recognition instruments. Member States should be ready to engage with Eurojust both to allow for efficient information gathering, but also in terms of providing guidance in relation to problematic or challenging areas.

4.5. THE EUROPEAN COMMISSION

It is appropriate to close this study with a discussion on the role of the European Commission, as the body central to the operation and use of Framework Decisions on detention, and one that is committed to their fundamental rights compliant implementation.

Through strategies such as strengthening the role of Eurojust in cross-border criminal proceedings, the European Commission has had the opportunity, following on from the entry into force of the Lisbon Treaty on the 1st December 2009, to enhance the role of criminal justice in the EU. This provided for increased areas of competence relating to criminal procedural as well as substantive legal measures. Article 82 (1) of the Treaty on the Functioning of the European Union (TFEU) on foot of the Lisbon Treaty provides that:

376 Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime Available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20\(Council%20Decision%202009-426-JHA\)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/New%20Eurojust%20Decision%20(Council%20Decision%202009-426-JHA)/Eurojust-Council-Decision-2009-426-JHA-EN.pdf).

377 See Article 17(7) of the Framework Decision and Joined Cases C-404/15, *Aranyosi* and C-659/15 PPU, *Căldăraru* [2016] para 99.

“Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decision and shall include the approximation of the laws and regulations of the Member States...”

The importance of developing EU wide criminal justice measures stems from the lack of internal borders within the EU coupled with the cross-border dimension of crimes. In order for such measures to be effective they must be consistent and uniform across the 28 EU MS while at the same time respecting the particular systems and cultures attributed to the individual Member States. The European Commission communication *Towards an EU Criminal Policies: Ensuring the effective implementation of EU policies through criminal law*, speaks to the importance of coherence and consistency.³⁷⁸

In closing this discussion on international cooperation, it is worth considering the starting point of this Study, by championing the virtues of consistent and uniform application of criminal justice measures across the EU. Such application remains dependent on the principle of mutual trust and recognition, the cornerstone of judicial cooperation. To this end, the European Commission seeks to promote and ensure the implementation of mutual recognition instruments. This has been carried out by a number of different measures, including the introduction of procedural rights packages which enforce mutual trusts through established minimum standards across the EU. The Commission engages with working groups and other bodies to collate data on the implementation experiences across the EU. For example, working with Europris to gather statistics on the FD TOP, or CEP regarding the FD PAS.

The European Commission also supports training on the FD on detention directed at all stakeholders, and continues focus on the development of materials for training and handbooks for practical use relating to each of the FD on detention. There is currently a handbook being prepared relating to FD TOP and FD PAS, and in recognition of the importance of alternatives to detention and addressing the use of pre-trial detention, the coming year will see a focus on implementing specific trainings in that area. Furthermore, with a view to enhancing cooperation between NPMs across the EU, the European Commission in conjunction with the Council of Europe are also working on a joint project considering how NPMs can contribute to the effective implementation of EU law, specifically, mutual recognition instruments. An initial meeting is due to be held in March, to elaborate on the concept note, and in April 2017 there will be kick off meeting for the EU NPM Network. In addition to training tools and manuals, the European Commission also works on infringement proceedings. As discussed in Part 1 of this Study, the Commission remains aware of the ongoing problems regarding the full implementation of all the FD on detention. To this end, the Commission are at the early preliminary stages of infringement proceedings and are in communication with Member States regarding shortcomings to implementation.

During the course of the final conference, the European Commission representative outlined the role of the Commission in the context of supporting and enhancing mutual recognition instruments. In addition to the Green paper on pre-trial detention, which sought to consider the extent to which detention impacted on mutual trust, and consequently judicial cooperation. The Commission through consultations with stakeholders found that most Member States were not in favour of further legislations, but rather that the EU should first focus on existing laws and their transposition. The Commission funds a number of key organisations, including Europris, which is an expert group on Framework Decisions, and CEP which engages with probation issues.

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Towards an EU Criminal Policies: Ensuring the effective implementation of EU policies through criminal law page 3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0573:FIN:EN:PDF>.

In 2014, the European Parliament requested that the European Commission reopen the EAW to address fundamental rights issues. The EC considered that it would not be wise to reopen this instrument at this particular time but instead work to implement the other Framework Decisions on detention which could address the fundamental rights concerns directly.

The EC supported training programmes on the practical application of the Framework Decisions on detention, in particular the FD ESO and FD PAS targeted at judges, practitioners, NPMs and other relevant bodies including Ministries, will ensure a more cohesive application of EU law across Europe. It would also serve to strengthen mutual trust and the fundamental rights consistent approach to mutual recognition instruments. Furthermore, as highlighted during interviews, one of the difficulties identified during the practical application of FD ESO relates to the lack of procedural guidance. In this regard, we would recommend handbooks on the practical application of the FD ESO but also FD PAS that should be widely disseminated to Member States, as well as judicial schools, and all relevant stakeholders, including probation services. These handbooks should be available also online, with details of EU Member States contact points.

CONCLUDING THOUGHTS

The Study considers the challenges and chances to the prevention of ill-treatment in the context of the practical application of the FD EAW and the Framework Decisions on detention. In doing so, it outlines how NPMs and their commitment to the prevention of torture and ill-treatment, together with the Judiciary as the decision makers that give life to mutual recognition instruments, can play an essential role to the prevention of ill-treatment, both nationally and in a cross-border context.

Existing challenges to ill-treatment primarily relate to *non-refoulement* in the application of the EAW and FD TOP. The authors endeavoured to demonstrate that the future of mutual trust is not in its automatic acceptance, but in the recognition that despite the best efforts of Member States, there can be shortcomings that must be addressed, and not ignored. With this in mind, national courts have increasingly refused surrenders on account of potential Article 3 ECHR /Article 4 CFREU violations. The CJEU in its landmark decision of *Aranyosi and Caldărăru*, has confirmed that surrenders must not violate the prohibition of torture and ill-treatment. At the same time, chances to prevent ill-treatment can be found through the increased application of the FD ESO and FD PAS, which so far have underused. Although figures suggest that Member States that have been using FD ESO, are increasingly employing its use.

Overall, throughout the interviews, workshops and conferences undertaken during the context of this project, there were recurring themes as to what was needed on the ground for better fundamental rights based implementation of the Framework Decisions on detention and FD EAW. These included easily accessible information as to contact points within EU Member States, greater information on prison and detention conditions across the EU, and guidance on the practical application of the Framework Decisions and the exact steps that should be taken to ensure that procedures are carried out without delay. Further clarity has also been sought on the type of information that is required before a surrender, and *Aranyosi II* should provide some more detail in terms of the level of information to be obtained in the case of a surrender for the purpose of investigating an alleged offence. Member States should also consider and reflect upon the good practices that already exist, and see how best to endorse and emulate these efforts across the EU.

NPMs could contribute by raising awareness of the issues surrounding the chances and challenges to ill-treatment in the national context, in connection with the Framework Decisions on detention and the EAW. Their reports could serve to fill the gap on the lack of information on prison conditions needed for a decision pertaining to cross-border transfers. At the same time, increased awareness among the judiciary of NPM reports would also contribute to the NPM's mandate of preventing ill-treatment in the domestic context. Reports not only provide judges with useful information on prison conditions, but any national or international judgments building on NPM reports might considerably support the impact of the NPM's recommendations. For this endeavour, awareness of judges regarding the role and work of NPMs would however have to be strengthened, as would NPMs' knowledge of EU law and related developments.

Dissemination of NPM reports, including to the judiciary, in order to foster awareness of their mandate, activities and most importantly, recommendations, would certainly be an important first step towards engagement. Thereafter information seminars or trainings particularly with regard to the functioning of the NPM mandate, but also on developments relevant to detention conditions, could be useful to foster the relationship between NPMs and members of the Judiciary, and provide the foundations for information sharing.

The existing networks within the international community are best placed to help Member States navigate the implementation of EU Framework Decisions and to foster dialogue between relevant actors. The SPT, the EU Commission, and the EU Agency for Fundamental Rights all provide support, assistance and information and play a key role in this regard.

Additional training, dissemination of handbooks, preparation of guidance documents, visible online contact points, as well as easily accessible and comprehensive information on detention conditions within the EU, are tangible measures that if adopted would strengthen the application of the EU Framework Decisions on detention and the EAW. Such measures would enhance their Article 3 ECHR compliant implementation and application, to enable the prevention of ill-treatment, and in doing so, ensure the future of mutual trust among Member States.

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