

Internal and external dimensions of trust in Europe's area of criminal justice

VALSAMIS MITSILEGAS

*Professor of European Criminal Law, Director of the Criminal Justice Centre,
Head of the Department of Law, Queen Mary University of London*

Introduction

European integration in the field of security and criminal law has been largely based on the establishment of mechanisms of inter-state cooperation. Inter-state cooperation has both an internal and an external dimension.¹ The internal dimension consists of the establishment of mechanisms of inter-state cooperation via the application of the principle of mutual recognition in the field of criminal law, ensuring that cooperation takes place on the basis of limited formality, automaticity and speed. The external dimension consists of the establishment of cooperation mechanisms most notably at the level of transatlantic counter-terrorism cooperation, ensuring the transfer of a wide range of personal data from the European Union to the United States. At both levels of cooperation, the place of mutual trust is central. Cooperation mechanisms are based on mutual trust based on presumptions of compliance of the parties to cooperation arrangements with fundamental rights. However, this model of cooperation based on presumed trust is being increasingly challenged on fundamental rights grounds, most notably after the entry into force of the Lisbon Treaty and the constitutionalisation of the Charter of Fundamental Rights it entailed. The aim

¹ The article is a revised and extended version of V. Mitsilegas, 'Judicial concepts of trust in Europe's multi-level security governance'. From *Melloni* to *Schrems* via Opinion 2/13' in *EUCRIM –The European Criminal Law Associations' Forum*, Max Planck Institute for Foreign and International Law, no 3, 2015, pp. 90-95.

of this article is to map the evolution of the relationship between mutual trust and the protection of fundamental rights post-Lisbon, by focusing on the evolution of the case-law of the Court of Justice in the field. The article will address three distinct but interrelated dimensions of this relationship: the EU-Member State dimension; the EU/ECHR dimension; and the EU/US, transatlantic dimension. The conclusion will aim to cast light on key findings, trends and inconsistencies in the Court's case-law and assess the significance of these seminal rulings on the future of mutual trust the protection of fundamental rights in Europe's area of criminal justice.

EU Law and National Constitutions: *Melloni*

The Court of Justice examined the relationship between EU law and national constitutional law in the context of the operation of the principle of mutual recognition in criminal matters in the case of *Melloni*.² In *Melloni*, the Court effectively confirmed the primacy of EU third pillar law (the European Arrest Warrant Framework Decision as amended by the Framework Decision on judgments in absentia, interpreted in the light of the Charter) over national constitutional law providing a higher level of fundamental rights protection. In order to reach this far-reaching conclusion, the Court followed a three-step approach. The first step for the Court was to demarcate the scope of the Framework Decision on the European Arrest Warrant as amended by the Framework Decision on judgments in absentia (and in particular Article 4a(1) thereof) in order to establish the extent of the limits of mutual recognition in such cases. The Court adopted a teleological interpretation of the European Arrest Warrant Framework Decision and stressed that under the latter Member States are in principle obliged to act upon a European Arrest Warrant.³ This reasoning backed up literal interpretation of Article 4a(1), confirming that that provision restricts the opportunities for refusing to execute a European Arrest Warrant.⁴ That inter-

² Case C-399/11, *Melloni*, judgment of 26.2.2013.

³ Paragraphs 36-38.

⁴ Paragraph 41.

pretation is confirmed according to the Court by the mutual recognition objectives of EU law.⁵ The second step was to examine the compatibility of the above system with fundamental rights and in particular the right to an effective judicial remedy and the right to fair trial set out in Articles 47 and 48(2) of the Charter. By reference to the case-law of the European Court of Human Rights,⁶ the Court of Justice found that the right of an accused person to appear in person at his trial is not absolute but can be waived.⁷ The Court further stated that the objective of the Framework Decision on judgments in absentia was to enhance procedural rights whilst improving mutual recognition of judicial decisions between Member States⁸ and found Article 4a(1) compatible with the Charter.

Having asserted the compatibility of the relevant provision with the Charter, the third step for the Court was to rule on the relationship between secondary EU law in question with national constitutional law which provided a higher level of protection. The Court rejected an interpretation of Article 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.⁹ That interpretation of Article 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules *which are fully in compliance with the Charter* where they infringe the fundamental rights guaranteed by that State's constitution.¹⁰ Article 53 of the Charter provides freedom to national authorities to apply national human rights standards provided that the level of protection

⁵ Paragraph 43.

⁶ *Medenica v. Switzerland*, Application no. 20491/92; *Sejdovic v. Italy*, Application no. 56581/00; *Haralampiev v. Bulgaria*, Application no. 29648/03.

⁷ Paragraph 49.

⁸ Paragraph 51.

⁹ Paragraphs 56-57.

¹⁰ Paragraph 58. Emphasis added.

provided for by the Charter, as interpreted by the Court, and the *primacy, unity and effectiveness* of EU law are not thereby compromised.¹¹ In the present case, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.¹² The Framework Decision on judgments in absentia is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights and reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant.¹³ Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, *would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.*¹⁴

In *Melloni*, once again the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust.¹⁵ Secondary pre-Lisbon third pillar law whose primary aim is to facilitate mu-

¹¹ Paragraph 60. Emphasis added.

¹² Paragraph 61.

¹³ Paragraph 62.

¹⁴ Paragraph 63. Emphasis added.

¹⁵ For a full analysis, see V. Mitsilegas, 'The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal Justice' *New Journal of European Criminal Law*, 6(4), 2015, whereupon sections 2 and 3 of this article are based.

tual recognition has primacy over national constitutional law which provides a high protection of fundamental rights. In reaching this conclusion, the Court has interpreted fundamental rights in a restrictive manner. It has emphasised the importance of the Framework Decision on judgments in absentia for the effective operation of mutual recognition, a Framework Decision which as the Court admitted restricts the opportunities for refusing to execute a European Arrest Warrant. This aim sits uneasily with the Court's assertion that the in absentia Framework Decision also aims to protect the procedural rights of the individual. By privileging the teleology of mutual recognition and upholding the text of the Framework Decision on judgments in absentia and the subsequently amended Framework Decision on the European Arrest Warrant- via the adoption also of a literal interpretation- over the protection of fundamental rights, the Court has shown a great – and arguably undue – degree of deference to the European legislator.¹⁶ The Court's reasoning also seems to deprive of national executing authorities of any discretion to examine the compatibility of the execution of a European Arrest Warrant with fundamental rights in a wide range of cases involving in absentia rulings.¹⁷ This deferential approach may be explained by the fact that the Court was asked to examine the human rights implications of measures which have been subject to harmonisation at EU level, with the Court arguing that the Framework Decision reflects a consensus among EU Member States with regard to the protection of the individual in cases of in absentia rulings within the broader system of mutual recognition.¹⁸ The Court's deferential ap-

¹⁶ L. F. M. Besselink, 'The parameters of constitutional conflict after Melloni' *European Law Review*, 2014, 39(4), 531-552, p. 542; A. Torres Pérez, 'Melloni in three acts: from dialogue to monologue' *European Constitutional Law Review*, 2014, 10, 308-331, 317-318.

¹⁷ See also the Opinion of AG Bot, who linked national discretion to refuse surrender with the perceived danger of forum shopping by the defendant – para. 103.

¹⁸ See also the Opinion of AG Bot, according to whom the Court cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection (paragraph 84) and that the consensus between Member

proach gives undue weight to what are essentially intergovernmental choices (the choices of Member States adopting a third pillar measure without the involvement of the European Parliament), which sit even more uneasily in the post-Lisbon, post-Charter era. The emphasis of the Court of the need to uphold the validity of harmonised EU secondary law over primary constitutional law on human rights (at both national and EU level) constitutes a grave challenge for human rights protection.¹⁹ It further reveals in the context of EU criminal law a strong focus by the Court on the need to uphold the validity of a system of quasi-automatic mutual recognition in criminal matters which will enhance inter-state cooperation and law enforcement effectiveness across the EU.

EU Law and the ECHR: Opinion 2/13

The Court's emphasis on the centrality of mutual trust as a factor privileging the achievement of law enforcement objectives via mutual recognition over the protection of fundamental rights has been reiterated beyond EU criminal law in the broader context of the accession of the European Union to the European Convention of Human Rights. Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust, stating that

it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional cir-

States leaves no room for the application of divergent national levels of protection (para. 126).

¹⁹ According to Besselink, attaching this importance to secondary legislation as 'harmonisation of EU fundamental rights' risks erasing the difference between the primary law nature of fundamental rights and secondary law as the subject of these rights. Besselink, *op. cit.*, p. 542.

cumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law

and adding that, when implementing EU law,

the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.²⁰

From the perspective of the relationship between EU criminal law and fundamental rights, this passage is striking. The passage follows a series of comments on the role of Article 53 of the Charter in preserving the autonomy of EU law, with the Court citing the *Melloni* requirement for upholding the primacy, unity and effectiveness of EU law.²¹ The Court then puts forward a rather extreme view of presumed mutual trust leading to automatic mutual recognition. It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights. The Court defies mutual trust and endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust, instead of endorsing a model of a Union whereby cooperation on the basis of mutual trust must be underpinned by an effective protection of fundamental rights. The Court asserts boldly that mutual trust is not only a principle, but also a principle of fundamental importance in EU law. However, this assertion seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition which meets

²⁰ Opinion 2/13, paras 191-192.

²¹ Para. 188.

the requirements of legal certainty. It is further clear that, although mutual trust is viewed by the Court as inextricably linked with the establishment of an area without internal borders (at the heart of whose is the free movement principle and the rights of EU citizens), the Court perceives mutual trust as limited to trust 'between the Member States' – the citizen or affected individual by the exercise of state enforcement power under mutual recognition is markedly absent from the Court's reasoning. This approach leads to the uncritical acceptance of presumed trust across the European Union: not only are Member States not allowed to demand a higher national protection of fundamental rights than the one provided by EU law (thus echoing *Melloni*), but also, and remarkably, Member States are not allowed to check (save in exceptional circumstances) whether fundamental rights have been observed in other Member States in *specific* cases. This finding is striking as it disregards a number of developments in secondary EU criminal law aiming to grant executing authorities the opportunity to check whether execution of a judicial decision by authorities of another Member State would comply with fundamental rights.²² It also represents a fundamental philosophical and substantive difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts.

This difference has been highlighted in the Strasbourg ruling in *Tarakhel*,²³ a case involving transfers of asylum seekers under the Dublin

²² The post-Lisbon Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution: where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter (Article 11(1)(f)). Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L130, 1.5.2014, p.1.

²³ *Tarakhel v. Switzerland*, Application no. 29217/12. For comments, see H. La-bayle, 'Droit d'asile et confiance mutuelle: regards croisés de la jurisprudence Européenne' *Cahiers de Droit Européen*, 50(3), 2014, 501-534; and C. Costello and M. Mouzourakis, 'Reflections on reading *Tarakhel*: is "how bad is bad enough" good enough?' *A&MR* 2014, nr 10, 404-411.

system, where the Court stressed the obligation of states to carry out a *thorough and individualised examination* of the fundamental rights situation of the person concerned.²⁴ The requirement of the European Court of Human Rights for states to conduct an individualised examination of the human rights implications of a removal to another state goes beyond the 'exceptional circumstances' requirement set out the Luxembourg Court in Opinion 2/13 and quoting both Dublin and European Arrest Warrant case-law.²⁵ The Court of Justice has limited inter-state cooperation only on the basis of a high threshold of the existence of systemic deficiencies in EU Member States. This threshold was set out in the case of *N.S.*²⁶ which followed the ruling of the Strasbourg Court in the case of *MSS v Belgium and Greece*,²⁷ where the Strasbourg Court found for the first time that the presumption of respect of fundamental rights in the intra-EU inter-state cooperation mechanism set out in the Dublin Regulation was rebuttable. In *NS*, the Court of Justice translated *MSS* in the Union legal order via the introduction of a high threshold of systemic deficiency which has since been translated in EU secondary law via the adoption of the so-called Dublin III Regulation.²⁸ However, in *Tarakhel* the Strasbourg Court goes a step further. Rather than requiring a general finding of systemic deficiency in order to examine the compatibility of a state action with fundamental rights, the Strasbourg Court reminds us that the presumption of compliance with fundamental rights is rebuttable²⁹ and that effective protection of fundamental rights always requires an assessment of the impact of a decision on the rights of the specific individual in the specific case before

²⁴ Para. 104, emphasis added.

²⁵ Opinion 2/13, para. 191.

²⁶ Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011. For a commentary, see Mitsilegas, *op. cit.* (*The Limits of Mutual Trust*).

²⁷ *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application No 30696/09.

²⁸ Regulation (EU) No 604, OJ L180/31, 29.6.2013, Article 3(2).

²⁹ Para. 103.

the Court.³⁰ In *Tarakhel*, this reasoning has resulted in a finding of 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.³¹ The Strasbourg Court's approach on the judicial examination of state compliance with fundamental rights in systems of inter-state cooperation in *Tarakhel* is strikingly at odds with the approach of the Court of Justice in the European Arrest Warrant case-law and in particular in Opinion 2/13. The willingness of the Court of Justice to sacrifice an individualised case-by-case assessment of the human rights implications of the execution of a mutual recognition order in the name of uncritical presumed mutual trust is a clear challenge for the effective protection of fundamental rights in the European Union and runs the risk of resulting into a lower protection of fundamental rights in systems of inter-state cooperation within the EU compared to the level of protection provided by the Strasbourg Court in ECHR cases. This difference in approaches raises the real prospect of a conflict between ECHR and EU law, especially in cases of inter-state cooperation between EU Member States under the principle of mutual recognition. Eeckhout has commented that Opinion 2/13 confirms a radical pluralist conception of the relationship between EU law and the ECHR.³² In the case of mutual recognition, this 'outward-looking', external pluralist approach which can be seen as an attempt to preserve the autonomy of Union law is combined with the parallel strengthening of an internal, intra-EU pluralist approach which stresses the importance of mutual trust, which is elevated by the Court to a funda-

³⁰ 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. D. Halberstam, "It's the autonomy, stupid!" A modest defense of Opinion 2/13 on EU Accession to the ECHR, and the way forward', Michigan Law School, *Public Law and Legal Theory Research Paper Series*, Paper No. 432, February 2015. p. 27.

³¹ Para. 115.

³² P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue-Autonomy or Autarchy?*, Jean Monnet Working Paper 01/15, p.36.

mental principle of EU law. Both internal and external pluralist approaches undermine the position of the individual in Europe's area of criminal justice by limiting the judicial avenues of examination of the fundamental rights implications of quasi-automatic mutual recognition on a case-by-case basis.

EU Law and National Fundamental Rights Protection: Aranyosi and Căldăraru

The Court of Justice had the opportunity to examine directly the relationship between fundamental rights, mutual recognition and mutual trust in the joined cases of Aranyosi and Căldăraru³³ both referred for a preliminary ruling by the Higher Regional Court of Bremen. The first case involved the execution of two EAWs issued against Mr. Aranyosi, who was wanted for prosecution in Hungary in relation to the offences of forced entry and theft. In the case of Mr Căldăraru, a European Arrest Warrant issued by Romanian authorities was pending against him concerning the execution of a sentence of 1 year and 8 months imposed on him for driving without a licence. As such, the cases in question did not concern serious offences and the cases involved both prosecution and conviction Warrants. A significant feature of the cases is that both Hungary and Romania have been condemned by the ECtHR for violation of Article 3 ECHR due to detention conditions in their jurisdictions. In *Varga and Others v. Hungary*,³⁴ the ECtHR found Hungary to be in breach of Article 3 ECHR due to inhuman conditions of detention as exemplified by practices of imprisoning applicants in cells that were too small and overcrowded. This case was treated as a pilot one after no less than 450 similar cases were brought before the Strasbourg Court in this respect. As for the case of Mr Căldăraru, the referring Court referred to a series of judgments issued on 10 June 2014, declaring viola-

³³ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* (Grand Chamber, 5 April 2016).

³⁴ *Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015.

tion of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers.³⁵ Consequently, the referring court considered that specific evidence suggested that the conditions of detention to which Mr Aranyosi and Mr Căldăraru would be subjected, if he were to be surrendered to the Hungarian and Romanian authorities respectively, would not satisfy the minimum standards required by international law. In this respect, it took note of the findings in two reports issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Against this background, two questions were referred to the Court: whether Article 1(3) of the EAW Framework Decision should be interpreted as meaning that extradition for the purposes of prosecution is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned or whether the executing Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant; and whether Articles 5 and 6(1) of the EAW Framework Decision must be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or whether assurances in this regard remain subject to the domestic rules of competence in the issuing Member State.

The Grand Chamber addressed the questions in a six-step approach. The first step was to reiterate the central importance of mutual recognition as highlighted in previous judgments. The European Arrest Warrant Framework Decision has been designed to replace the multilateral system of extradition with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, based on the principle of

³⁵ ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurențiu Marin v. Romania*, No 79857/12, and *Constantin Aurelian Burlacu v. Romania*, No 51318/12.

mutual recognition.³⁶ This new simplified and more effective system for the surrender of persons facilitates and accelerates judicial cooperation with a view to contributing to the objective of establishing an AFSJ, founded on the high level of confidence which should exist between the Member States.³⁷ The protection of fundamental rights is key in this respect as the principle of mutual recognition is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing such protection in an equivalent and effective manner.³⁸ Furthermore, the principle of mutual trust requires considering all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.³⁹ Although EAWs must in principle be given effect and an executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed in Articles 3 and 4 of the Framework Decision, recital 10 states that the implementation of the mechanism of the EAW as such may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU.⁴⁰

Secondly, the Grand Chamber highlighted that limitations to the principles of mutual recognition and mutual trust between Member States could be made 'in exceptional circumstances',⁴¹ as proclaimed in Opinion 2/2013,⁴² and observed that the EAW Framework Decision was not meant to have the effect of modifying the obligation to respect fundamental rights encompassed in the EUCFR.⁴³ The Court found that Article 4 EUCFR, concerning the prohibition on inhuman or degrading treatment or punishment, is binding on EU Member States in-

³⁶ Para. 75.

³⁷ Para. 76.

³⁸ Para. 77.

³⁹ Opinion 2/13. EU:C:2014:2454. See para 78 of the judgment.

⁴⁰ Para. 81.

⁴¹ Para. 82.

⁴² Opinion 2/13, para 191.

⁴³ Para. 83.

cluding their courts and absolute in nature in that it is closely linked to respect for human dignity as enshrined in Article 1 of the EUCFR.⁴⁴ This is further confirmed by Article 3 ECHR, to which Article 4 EUCFR corresponds.⁴⁵ The aforementioned articles 'enshrine one of the fundamental values of the Union and its Member States', which explains why in any circumstances, including cases of terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned.⁴⁶

Having highlighted the centrality of the fundamental rights at stake, then the Court went on to provide guidelines as to how an executing judicial authority must proceed when assessing risks of inhuman or degrading treatments. First, a general assessment of the risk must take place. Where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 EUCFR, then it is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a EAW.⁴⁷ The Court was cautious to expressly mention that the consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.⁴⁸ To that end, the national court may rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and 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. Sources may include judgments of international courts, such

⁴⁴ Paras 84-5.

⁴⁵ Para. 86.

⁴⁶ Para. 87.

⁴⁷ Para. 88.

⁴⁸ *Ibid.*

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.⁴⁹ According to the Grand Chamber, national authorities are under a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected.⁵⁰

However, a finding by the executing judicial authority that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State does not automatically signify that the execution of the EAW must be refused.⁵¹ Therefore, in addition to a general assessment of the risk, it will also be necessary for the executing judicial authority proceed to a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.⁵² This is because the mere existence of evidence 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, with respect to detention conditions in the issuing Member State does not necessarily mean that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.⁵³ As a result, in observing respect for Article 4 EUCFR, the national executing authority is bound to determine whether, in the particular cir-

⁴⁹ Para. 89.

⁵⁰ Para. 90.

⁵¹ Para. 91.

⁵² Para. 92.

⁵³ Para. 93.

cumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment.⁵⁴

In order to make such a specific assessment communication between the issuing and executing judicial authorities must be established in accordance with Article 15(2) of the EAW Framework Decision. A request must be made as a matter of urgency regarding all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.⁵⁵ Such request may also relate to 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.⁵⁶ A time limit for the receipt of the supplementary information may be fixed, which must be adjusted to the particularities of each case, in order to allow the issuing authority the time required to collect the information, if necessary by seeking assistance to that end from the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision.⁵⁷ However, the time frame must equally respect time limits set in Article 17 of that Framework Decision. The issuing judicial authority is obliged to provide that information to the executing judicial authority.

By analogy to the judgment in *Lanigan*,⁵⁸ the Court found that if on the basis of the information provided the executing judicial authority finds that there exists a real risk of inhuman or degrading treatment for the individual in respect of whom the EAW was issued, then the exe-

⁵⁴ Para. 94.

⁵⁵ Para. 95.

⁵⁶ Para. 96.

⁵⁷ Para. 97.

⁵⁸ C-237/15 PPU *Lanigan*, EU:C:2015:474, paragraph 38

cution is postponed, but it cannot be abandoned.⁵⁹ Eurojust must be informed in accordance with Article 17(7) of the EAW Framework Decision, giving reasons for the delay. Additionally, in cases of repeated delays on the part of another Member State in the execution of EAWs for reasons related to the overcrowding prisons, the Council must be informed with a view to an evaluation, at Member State level, of the implementation of the Framework Decision.⁶⁰ As for the fate of the individual concerned in the executing Member State, the Court found that its judicial authority may decide to hold the person concerned in custody in accordance with Article 6 EUCFR, only in so far as the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and in so far as, the duration of the detention is not excessive. In such cases, respect for the presumption of innocence as guaranteed by Article 48 EUCFR must be ensured,⁶¹ as well as the principle of proportionality as enshrined in Article 52(1) EUCFR, so that the issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time.⁶² If the detention must be brought to an end, based on Articles 12 and 17(5) of the EAW Framework Decision, the provisional release of the person concerned must be accompanied by any measures deemed necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the EAW has been.⁶³

If, however, the information received by the issuing Member State permits to discount the existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing Member State, the executing judicial authority must adopt, within the time limits prescribed by the EAW Framework Decision, its decision on the execution of the EAW, without prejudice to the opportunity

⁵⁹ Para. 98.

⁶⁰ Para. 99.

⁶¹ Para. 100.

⁶² Para. 101.

⁶³ Para. 102.

of the individual concerned, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that Member State.⁶⁴

In its final step, the Grand Chamber grudgingly accepts that until obtaining supplementing information that would discount the existence of a risk of inhuman or degrading treatment, a decision on the surrender must be postponed, but if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.⁶⁵

The importance of the judgment cannot be underestimated. This is the first time that the Court of Justice has explicitly accepted that a EAW may not be executed on human rights grounds. The Grand Chamber held, albeit reluctantly, that such a possibility exists and provided detailed guidance on the consecutive steps that the executing judicial authority must undertake before reaching its decision on the outcome of the European Arrest Warrant procedure. The Court was mindful to give detailed guidance and flexibility to the executing judicial authority in allowing it to rely on wide range of sources of evidence⁶⁶ to determine both the general fundamental rights problem of the issuing Member and the risk of human rights violations in the specific case.⁶⁷ In the present case, the evidence was strong, as it comprised of judgments pronounced by the Strasbourg Court and opinions of an expert body. Furthermore, in comparison to other judgments, *Aranyosi and Căldăraru* contains no reference to the high threshold of 'systemic' deficiencies, as mentioned in *NS and ME*,⁶⁸ where it opined that transfers of asylum seekers to another EU Member State must not take place where

⁶⁴ Para. 103.

⁶⁵ Para. 104.

⁶⁶ Para. 89.

⁶⁷ Para. 98.

⁶⁸ Joined Cases C-411/10 and C-493/10, *N. S. and M. E.*, judgment of 21 December 2011.

the individual may be subject to inhuman or degrading treatment due to systemic deficiencies at the national level. As in the case of *Tarakhel*,⁶⁹ the Grand Chamber has stressed the need that national authorities carry out of a thorough and individualised examination of the circumstances of each case. The obligation to conduct an individualised assessment seems however here to be oriented towards the exhaustion of available means before the execution of a European Arrest Warrant is refused. It is noteworthy that the Court's approach differs significantly from the Opinion of Advocate General Bot, whose reasoning relied heavily on the application of the principle of proportionality in the execution of European Arrest Warrants.⁷⁰ It is also significant to note that the Grand Chamber is silent as regards the role of assurances in the surrender process, a question which was raised specifically by the referring court. This matter is of considerable practical importance particularly since in certain Member States, such as the UK and Germany, national courts have demanded assurances in relation to the detention conditions in certain issuing Member State and have even refused surrender in cases where they were not satisfied with the specific guarantees provided.⁷¹ However, the emphasis on assurances (which can be

⁶⁹ *Tarakhel v. Switzerland*, Application no. 29217/12.

⁷⁰ Paras 137-182.

⁷¹ High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19; High Court of England and Wales, Queens Bench Division decision of 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin); High Court of England and Wales Queens Bench Division of 30 July 2014, *Razvan-Flaviu Florea v Romania* [2014] EWJC 2528 (Admin), *Vasilev v Bulgaria*, App 10302/05, *Ilija v Greece* [2015] EWHC 547 (Admin) See also *GS & Ors v Central District of Pest Hungary & Ors*, Court of Appeal – Administrative Court, 21 January 2016, [2016] EWHC 64 (Admin); OLG Stuttgart, Beschl. V. 21 April 2016-1 Ausl. 321/15, BeckRS 2016, 08585, OLG Dusseldorf, Beschl. V. 14 December 2015, Az. III-3 AR 15/15. In other cases, the UK courts have been much more reluctant to refuse execution on the basis of prison conditions. For example, see *Arunas Aleksynas and others v Minister of Justice, Republic of Lithuania, Prosecutor General, Republic of Lithuania* [2014] EWHC 437, *Tomas Matijauskas v Ministry of Justice of the Republic of Lithuania* [2014] EWHC 672 (Admin); *Kirpliukas v Republic of Lithuania* [2014] EWHC

seen as a traditional public international law mechanism in extradition cases) may detract from the need for Member States to be scrutinised on and address the deficiencies in the protection of fundamental rights in their national legal orders. While the Court in *Aranyosi* and *Caldararu* only grudgingly accepted the termination of the procedure in cases of fundamental rights violations, the significance of the ruling lies in placing the scrutiny of the fundamental rights situation in the issuing state at the heart of the system.

EU Law and the Transatlantic Security Agenda: Schrems

The relationship between mutual trust and the protection of fundamental rights in the context of the establishment of transatlantic co-operation was tested by the Court in the case of *Schrems*.⁷²In *Schrems*, the Court of Justice annulled the Commission adequacy Decision finding that the level of the protection of personal data provided by the United States was adequate for the purposes of the EU-US safe harbour agreement. In assessing the validity of the adequacy Decision, the Court of Justice began by providing a definition of the meaning of adequacy in EU law and by identifying the means of its assessment. The first step for the Court was to look at the wording of Article 25(6) of Directive 95/46 on data protection, which provides the legal basis for the adoption by the European Commission of adequacy decisions concerning the transfer of personal data to third countries. The Court stressed that Article 25(6) requires that a third country 'ensures' an adequate level of protection by reason of its domestic law or its international commitments, adding that according to the same provision, the adequacy of the protection ensured by the third country is assessed 'for the protection of the private lives and basic freedoms and rights of in-

2794 (Admin); *Volynec, Bruzas, Basev v Vilnius City 1st District Court Lithuania, Vilnius City Courts Nos 2 and 1 Lithuania, Lithuanian Judicial Authority* [2014] EWHC 2332 (Admin); *Vilkauskas v District Court Vilnius City Lithuania* [2014] EWHC 2669 (Admin).

⁷² Case C-362/14, judgment of 6 October 2015.

dividuals'.⁷³ The Court thus linked expressly Article 25(6) with obligations stemming from the EU Charter of Fundamental Rights: Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and *is intended to ensure that the high level of that protection continues where personal data is transferred to a third country*.⁷⁴ The Court thus affirms a continuum of data protection when EU law authorises the transfer of personal data to third countries and places emphasis on the positive obligation of ensuring a high level of data protection when such transfer takes place. The Court recognises that the word 'adequate' does not require a third country to ensure a level of protection identical to that guaranteed in the EU legal order. However, the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is *essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter.⁷⁵ The Court explained that if there were no such requirement, the objective of ensuring a high level of data protection would be disregarded, and this high level of data protection could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.⁷⁶ The Court has thus introduced a high threshold of protection of fundamental rights in third countries: not only must third countries ensure a high level of data protection when they receive personal data from the EU, but they must provide a level of protection which, while not identical, is essentially equivalent to the level of data protection which is guaranteed by EU law.

But how will equivalence be assessed in this context? The Court of Justice emphasised that it is clear from the express wording of Arti-

⁷³ Para. 70. Emphasis added.

⁷⁴ Para. 72. Emphasis added.

⁷⁵ Para. 73. Emphasis added.

⁷⁶ *Ibid.*

cle 25(6) of Directive 95/46 that *it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection*. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless *prove, in practice, effective* in order to ensure protection essentially equivalent to that guaranteed within the European Union.⁷⁷ This finding is extremely important not only because it confirms the responsibilities of third countries to ensure a high level of protection but also in requiring data protection to be effective in practice. The emphasis on ascertaining the effectiveness of the protection of fundamental rights in practice reflects strongly the approach of the European Court of Human Rights on the subject. While differences in the means of protection between the EU and third countries may not, as such, negate such protection, third countries are still under an obligation to ensure the provision of a high level of data protection, essentially equivalent to that of the EU, in practice. This approach places a number of duties on the European Commission when assessing adequacy. The Commission is obliged to assess both *the content* of the applicable rules in the third country resulting from its domestic law or international commitments *and the practice* designed to ensure compliance with those rules.⁷⁸ Moreover, and in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted an adequacy decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that

⁷⁷ Para. 74. Emphasis added.

⁷⁸ Para. 75. Emphasis added.

regard.⁷⁹ In this context, account must also be taken of the circumstances that have arisen after that decision's adoption.⁸⁰ The important role played by the protection of personal data in the light of the fundamental right to respect for private life and, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection reduce the Commission's discretion as to the adequacy of the level of protection ensured by a third country and require a strict review of the requirements stemming from Article 25 of Directive 95/46, read in the light of the Charter.⁸¹ The Court's conceptualisation of adequacy has thus led to the requirement of the introduction of a rigorous and periodical adequacy assessment by the European Commission, an assessment which must focus on whether a level of data protection essentially equivalent to the one provided by the European Union is ensured by third countries.

On the basis of these general principles, the Court went on to assess the validity of the specific adequacy decision by the European Commission. The Court annulled the decision finding that it constituted interference with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States⁸² and that the decision did not meet the necessity test. The Court was based in this context largely on its ruling in the case of *Digital Rights Ireland*⁸³ and reiterated that legislation is not limited to what is strictly necessary where it authorises, *on a generalised basis*, storage of *all the personal data of all the persons* whose data has been transferred from the European Union to the United States *without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subse-*

⁷⁹ Para. 76.

⁸⁰ Para. 77.

⁸¹ Para. 78.

⁸² Paras 87-91.

⁸³ *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

quent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail.⁸⁴ Legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.⁸⁵ In this manner, the Court of Justice stresses that generalised, mass and unlimited surveillance is contrary to privacy and data protection. The Court's findings are thus also applicable to other instances of generalised surveillance sanctioned by EU law, including surveillance currently permitted under systems of transatlantic counter-terrorism cooperation under the EU-US PNR and TFTP Agreements, both of which involve generalised, indiscriminate surveillance.

Conclusion

At first sight, the difference in the Court's approach to the relationship between mutual trust and fundamental rights in the internal and external dimension of Europe's area of criminal justice appears striking. In the internal dimension, the Court of Justice seems to have adopted an uncritical acceptance of the pursuance of the enforcement aims of the system of mutual recognition in criminal matters in the European Union. In this system, mutual trust operates largely to serve the enforcement objectives of the issuing Member State. Mutual trust is presumed, and the space for a critical examination of compliance with fundamental rights of other EU Member States or of the impact of the operation of mutual recognition on the rights of affected individuals is extremely limited. This enforcement paradigm takes precedence over the protection of fundamental rights, even if the latter are protected on a higher level by national constitutions. Member States should not in

⁸⁴ Para. 93. Emphasis added. *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paras 57 to 61.

⁸⁵ Para. 94.

principle examine the fundamental rights situation in other EU Member States and they should not expect that these states provide a higher level of fundamental rights protection than that provided by EU law. The uncritical acceptance of the centrality of mutual trust and its elevation – notwithstanding the inherent subjectivity of the concept – into a fundamental principle of EU law – poses significant challenges to the European Union's claims of providing effective protection of fundamental rights. It is strikingly at odds with the approach of the European Court of Human Rights, which stresses the need for an individual examination of the impact of state action on fundamental rights on a case-by-case basis and focuses on the requirement for states to ensure the effective protection of fundamental rights on the ground. In its recent ruling in *Aranyosi*, the Court of Justice seems to have responded to this criticism by allowing more space for the examination of the fundamental rights consequences of surrender and the scrutiny of fundamental rights compliance of the issuing Member State.

The approach of the Strasbourg Court has similarities with the line taken by the Court of Justice in *Schrems* as regards the external dimension of EU action. In *Schrems*, the Court stressed the need for essentially equivalent fundamental rights standards to apply when data is transferred to third countries and demanded detailed, rigorous scrutiny by EU institutions (the Commission in this case) of whether third countries meet the high EU fundamental rights standards. The difference in the Court's approach may be explained by a double standard of mutual trust, with EU Member States enjoying a significantly higher level of trust than third countries. This difference may also be explained by the nature of the legislation in question. In the cases concerning internal EU law, the protection of fundamental rights is seen as a limit to the cooperative system established under mutual recognition – with the Court's priority being to ensure the effectiveness of EU enforcement law. The outcome may be different in cases where the Court is called to ensure the effectiveness of EU law which protects the individual, such as in cases concerning the interpretation of EU measures on the rights of the suspect and accused in criminal proceedings, where

effectiveness may lead to a higher level of fundamental rights protection by the Court.⁸⁶ A similar outcome can be discerned in *Schrems*, where the Court upheld EU standards involving the rights of individuals- the Court defended what it deems to be a high level of fundamental rights protection in the Union's external action. Recent developments in the Court's case-law in *Aranyosi* are a welcome step in enhancing the role of fundamental rights in ascertaining mutual trust in inter-state co-operation. *Aranyosi* appears to be an inspiration for the Court in re-affirming the need for the protection of fundamental rights in the Union's external action, this time as regards extradition requests by third countries (and in the particular case Russia).⁸⁷ The Court has thus established a continuum projecting compliance with EU fundamental rights norms as a necessary pre-condition of inter-state co-operation and mutual trust both inside and outside Europe's area of criminal justice.

⁸⁶ The potential of procedural rights legislation to change the balance between security and the protection of fundamental rights in the European Union is examined in detail in V. Mitsilegas, *EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe*. Hart, 2016.

⁸⁷ See Case C-182/15, *Petruhhin*, judgment of 6 September 2016, paragraphs 56-59.