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The Court of Justice of the EU as a Human Rights Adjudicator in the Area of Freedom, Security and Justice

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Abstract

In Opinion 2/13 on the EU accession to the European Convention on Human Rights (ECHR), the Court of Justice of the European Union (CJEU) ruled that the EU could not accede to the ECHR under the terms of the negotiated Accession Agreement. The Opinion blocks accession for the time being and precludes external scrutiny of EU acts by the European Court of Human Rights (ECtHR). This paper outlines the relevant parts of Opinion 2/13 and takes a closer look at some of the Court's recent fundamental rights judgments in the Area of Freedom Security and Justice (AFSJ), drawing comparisons with the case law of the ECtHR. In particular, it examines how the CJEU performs in this human rights-sensitive area and questions whether it is wise, given the Court's specific role and function in the EU legal system, its style of reasoning and lack of engagement with fundamental rights arguments, to have the Court of Justice act as the EU's core human rights adjudicator.

List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
EAW FD	European Arrest Warrant Framework Decision
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FIDE	Fédération Internationale pour le Droit Européen or International Federation for European Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees or United Nations Refugee Agency

Keywords

Fundamental Rights; European Union; Court of Justice of the European Union; Area of Freedom Security and Justice, European Court of Human Rights; Opinion 2/13; Mutual Trust

Introduction

For a long time, the role of the Court of Justice of the EU (hereinafter, 'CJEU' or 'Court') in the field of European fundamental rights[1] has been relatively modest.[2] The Court achieved important results over the years by recognising fundamental rights as general principles of EU law and reviewing the compatibility of European and national measures against those principles, but the number of cases involving substantive human rights claims remained low in the first decades.[3] In addition, the Court was often criticised for not being 'fundamental rights minded', 'not taking rights seriously', and for using the 'rights talk' merely to defend supremacy of EU law.[4]

In recent years, however, the role of the CJEU in the human rights sphere has expanded significantly. There are at least two reasons for this development. First, the CJEU has been increasingly dealing with human rights cases as a consequence of the continued expansion of the scope of EU law and policy in areas which are very important from a human rights perspective, such as asylum and immigration law, criminal law and data protection. Secondly, the available tools have changed: where in the early days the Court had to operate on the basis of general principles, constitutional traditions and indirectly the ECHR, the heart of EU fundamental rights law today is the Charter, the EU's own bill of rights, which however is closely tied in with the ECHR and national constitutions. While the Court's jurisdiction in the field of fundamental rights developed considerably in the pre-Charter period too,[5] it became more prominent after the Treaty of Lisbon entered into force. The Court has picked up on the increased human rights salience of EU law and has placed the Charter at the heart of its fundamental rights adjudication. As a result, it has asserted a primary role for itself in interpreting the Charter and in determining the appropriate level of fundamental rights protection in the EU.[6] Most recently, it has done so in Opinion 2/13,[7] firmly rejecting the draft Accession Agreement and thus ultimately the EU's accession to the ECHR.

[1] The term 'fundamental rights' is used interchangeably in this paper with the term 'human rights'.
[2] See for instance de Witte, Bruno, "The Past and Future Role of the European Court of Justice in the protection of Human Rights", in Alston Philip, Bustelo Mara and Heenan James (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), 859.
[3] The exceptions are, *inter alia*, in the field of non-discrimination and equal treatment law.
[4] Coppel, Jason, and O'Neill, Aidan, "The European Court of Justice: taking rights seriously?", (1992) 29 *Common Market Law Review* 4, 669.
[5] See for the development of the Court's jurisprudence in the pre-Charter period Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* ECLI:EU:C:2003:333; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614; Joined Cases C-402/05 and 415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461.
[6] See eg Case C-399/11 *Melloni* ECLI:EU:C:2013:107 and C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280.
[7] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.

Yet, the Court has not yet established its credentials as a human rights court. While the Court has made important achievements in the post-Lisbon period in the field of human rights protection,[8] and the criticism does not apply to all areas of EU law, some of its recent decisions in the Area of Freedom Security and Justice (AFSJ) have raised substantial criticism and show inconsistencies with the case law of the European Court of Human Rights (hereinafter, 'ECtHR' or 'Strasbourg Court'). The most topical illustration of the tension is the case law concerning the application of the principle of mutual trust and recognition, which is also explicitly addressed in Opinion 2/13.

This paper takes a closer look at some of the Court's most recent decisions in this human right-sensitive area, including *Radu, Melloni, Aranyosi and Căldăraru*, *N.S.*, *Abdullahi* and *C.K. and Others*[9] and draws comparisons with the case law of the ECtHR. More specifically, it examines how the Court performs in the context of fundamental rights protection and questions whether it is wise, given the Court's specific role and function in the EU legal system, its style of reasoning and the lack of engagement with fundamental rights arguments, to have the Court of Justice act as the EU's core human rights adjudicator.

I. The CJEU's autonomous approach

The CJEU has evolved from being a court concerned primarily with economic matters, to one with a much broader range of jurisdiction, which now also includes protecting fundamental rights in a wide-ranging policy fields. For many years the Court has referred to other international treaties and bodies when dealing with human rights cases, most notably the ECHR, which over the years acquired 'special significance'.[10] This however started to change once the Charter became legally binding in late 2009. The Court very quickly adopted a new autonomous approach in its human rights case law, interpreting provisions of the Charter in isolation from the jurisprudence emerging from the ECtHR, but also from other human rights instruments.[11]

[8] The most recent example, and one in which the Court has even been criticised for providing too much protection, is data privacy rights. See Joined Cases C-293/12 and 594/12 *Digital Rights Ireland ltd and Seitlinger and others* ECLI:EU:C:2014:238, and C-131/12 *Google Spain* ECLI:EU:C:2014:317. For a discussion on the achievements and challenges in the CJEU's protection of data privacy rights see Fabbrini, Federico, "The EU Charter of Fundamental Rights and the Rights to Data Privacy: The Court of Justice as a Human Rights Court" in de Vries Sybe, Bernitz Ulf and Weatherill Stephen (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015) 261. Another well-known example is the field of non-discrimination.

[9] Case C-396/11 *Radu* EU:C:2013:39; C-399/11 *Stefano Melloni v. Ministerio Fiscal* EU:C:2013:107; Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198; Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department* EU:C:2011:865; C-394/12 *Shamso Abdullahi v. Bundesasylamt* EU:C:2013:813; Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:127.

[10] See eg cases C-29/69 *Stauder* ECR 419 para 7; C-274/99 *Connolly v. European Commission* ECR 1-1611 para 37; C-283/05 *ASML* ECR I-12041 para 26; C-305/05 *Orde des barreaux francophones et germanophone and Others* ECR I-5305 para 29.

[11] On this point see eg Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon" (2011) 11 *Human Rights Law Review* 4; de Búrca, Gráinne, "The EU, the European Court of Justice and the International Legal Order after Kadi" (2009) 1 *Harvard International Law Journal* 51.

According to De Búrca,[12] who conducted a study on the number of references to the Charter of Fundamental Rights by the Court of Justice since it gained binding legal force in late 2009 until the end of 2012, there has been a remarkable lack of reference on the part of the Court to other relevant sources of human rights law and jurisprudence in that period, notably to the ECHR and the ECtHR case law. She determined that out of 122 cases in which the Charter was mentioned, the CJEU referred to a Convention provision in only 20, with only 10 judgments "*involving some mention or discussion of ECtHR case law*".[13] Moreover, any references to other international human rights treaties and to the common constitutional traditions of the Member States have been basically absent from the CJEU's case law.[14] The trend seems to have continued in the period after 2012.[15]

This is quite remarkable considering that a study on the number of references by the CJEU to the ECHR before the Charter became legally binding (from 1998 to 2005) revealed that the references to the ECHR have been increasing constantly throughout those years, and that the ECHR had in fact become the main rights instrument in in the CJEU's jurisprudence. [16]

While the strong focus on the Charter by the Court is not problematic in itself, such a sharp decline in references to the ECHR is quite striking. After all, the two catalogues of human rights can hardly be seen in isolation from each other since Article 52(3) of the Charter establishes a close link between the two documents in providing that Charter rights which 'correspond' to rights guaranteed by the Convention should be given 'the same meaning and scope' as the relevant Convention rights. This provision gives a special status to (at least part of) the ECHR part in EU law, as a matter of EU law.[17] Since the ECtHR determines the meaning and scope of the ECHR rights pursuant to Article 32 ECHR, it must be assumed that Article 52(3) of the Charter intends to give the same status to the case law of the Strasbourg Court in EU law, where it functions as a minimum standard. The assumption is not unwarranted in my view; Article 52(3)

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[12] de Búrca, Gráinne, "After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?" (2013) 20 *Maastricht Journal of European and Comparative Law* 168.

[13] Ibid, para 175.

[14] An exception is the Geneva Convention Relating to the status of Refugees of 1951 which has been cited quite often and the Convention on the Rights of the Child in cases dealing with expulsion for child sexual offences. See also Rosas, Allan "Five Years of Charter Case Law: Some Observations", in de Vries Sybe, Bernitz Ulf and Weatherill Stephen (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015) 11.

[15] For analysis and further references see Lambrecht, Sarah and Rauchegger, Clara, 'European Union: The EU's Attitude to the ECHR' in Popelier Patricia, Lambrecht Sarah and Lemmens Koen (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Antwerp: Intersentia, 2016); Glas, Lize and Krommendijk, Jasper, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' 17 *Human Rights Law Review* 2 (forthcoming 2017).

[16] SCHEECK Laurent, "Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', Garnet Working Paper no. 23/07, available at http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/2307.pdf (online on 27 September 2016).

[17] See eg Lenaerts, Koen, and de Smijter, Eddy, "The charter and the role of the European courts" (2001) 8 *Maastricht Journal of European and Comparative Law* 1, 90; Weiss, Wolfgang, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon" (2011) 7 *European Constitutional Law Review* 64, 81. For a different perspective see Lock, Tobias, *The European Court of Justice and International Courts* (Oxford: Oxford University Press, 2015) 180-184.

is only meaningful if it commits the CJEU to take account of the Strasbourg case law. Moreover, the Explanation on Article 52(3)[18] explicitly refers to the case law of the ECtHR stating that the meaning and scope of the ECHR rights are determined not only by the text of those instruments, but also by the case law of the ECtHR. Moreover, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR. While the Explanations relating to the Charter do not have the same legal status as the Charter they are an interpretive tool and, in accordance with Article 52(7) of the Charter, "*shall be given due regard by the Courts of the Union and the Member States' when interpreting the Charter*".

The aim of the drafters of the Treaties and the Charter was thus to promote legal certainty in the multi-layered European fundamental rights context and to bring the two systems, i.e. the EU and the ECHR, closer together. The CJEU, however, has interpreted Article 52(3) of the Charter differently.[19] It held that whilst Article 52(3) of the Charter indeed provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law as long as the EU has not acceded to it. An examination of the validity of EU law must therefore be undertaken "*solely in the light of the fundamental rights guaranteed by the Charter*".[20] As for the Explanations, the Court acknowledged that the Explanations relating to Article 52 of the Charter indicate that paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR but insisted that the consistency should be achieved "*without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union*".[21] This growing insistence in Luxembourg on the isolation and self-sufficiency of EU law is problematic as it creates a false impression that the EU and the ECHR systems are not interconnected.[22] It also creates a certain level of competition between the two European Courts.[23] While one would thus expect the cross-referencing to increase after Lisbon, we are witnessing the opposite.[24]

It is true that the fact that the CJEU is not referring to the ECHR or the ECtHR's case law does not necessarily mean that the Court does not take it into account. At the same time, however, the CJEU has a

[18] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/20.
[19] One of the few cases where the CJEU explicitly addressed Article 52(3) of the Charter and the Explanations to the Charter is C-601/15 PPU *J.N. v. Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84.
[20] C-601/15 PPU *J.N. v. Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84, para 45. See also cases C-571/10 *Kamberaj* ECLI:EU:C:2012:233 and C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.
[21] Ibid, para 47.
[22] On this point see Polakiewicz, Jorg, "The EU's Accession to the European Convention on Human Rights – A Matter of Coherence and Consistency", in Morano-Foadi Sonia and Vickers Lucy (eds.), *Fundamental Rights in the EU: A Matter for Two Courts* (Oxford: Hart Publishing, 2015). See also Douglas-Scott, Sionaidh, "The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon" in de Vries Sybe, Bernitz Ulf and Weatherill Stephen (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015) 21.
[23] Gerards, Janneke, "Who Decides on Fundamental Rights Issues in Europe? Towards a Mechanism to Coordinate the Roles and the National Courts, the ECJ and the ECtHR", in de Vries Sybe, Bernitz Ulf and Weatherill Stephen (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart Publishing, 2015) 47.
[24] This has been generally the trend in the case law of the CJEU. Note, however, that there are some very recent exceptions. For a different take on Article 52(3) and the case law of the ECtHR see Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:127, paras 67-68.

particular responsibility in this regard. It is one of the two European Courts that sets standards of human rights protection at European level, and the effects of its case law (and its approach therein) goes far beyond the Court itself.[25] It would be important both for the Member States and their courts, as well as for individuals and legal certainty in general to see that the Court strives for coherence.

II. Opinion 2/13

The CJEU's Opinion 2/13 is possibly the most extreme example of the new autonomous approach adopted by the Court in recent years.[26] In the Opinion, the Court firmly rejects the draft Accession Agreement for five main reasons. Some of them are rather technical and other more substantial.[27] Opinion 2/13 is not only problematic for its outcome but also for its language and underlying tone. In the Opinion, the CJEU depicts the EU legal order as normatively self-sufficient and does not give any recognition to the ECHR legal system.[28] Article 6(2) of the Treaty on the European Union (TEU), which makes accession to the ECHR a legal obligation, and which should have been the starting point of the Court's assessment, is barely mentioned. Article 52(3) of the Charter - the key provision explaining the relationship between the Charter and the Convention - is not mentioned once. This section is limited to a brief discussion on the Court's view on the notion of autonomy of EU law and the importance of the principle of mutual trust, both of which are explicitly addressed in the first objection.

The Court starts off by stating that fundamental rights are at the heart of the EU constitutional structure. However, the Court then states, referring to *Internationale Handelsgesellschaft*[29] and *Kadi*,[30] that the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires

[25] Callewaert, Johan, *The accession of the European Union to the European Convention on Human Rights* (Strasbourg, Council of Europe Publishing, 2014).

[26] Most authors have been very critical of the CJEU's approach in Opinion 2/13. See, to name just a few, Spaventa, Eleanor, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13" (2015) 22 *Maastricht Journal of European and Comparative Law* 35; Peers, Steve, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", (2015) 16 *German Law Journal* 213; de Witte, Bruno, and Imamović, Šejla, "Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court" (2015) 40 *European Law Review* 5, 683; Gragl, Paul, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR" in Benedek Wolfgang, Benoit Rohmer Florence, Kettemann Matthias, Kneihs Benjamin and Nowak Manfred (eds), *European Yearbook on Human Rights 2015* (Vienna: Neuer Wissenschaftlicher Verlag, 2015).

[27] For extensive analysis of Opinion 2/13 and different arguments see IMAMOVIĆ Šejla, CLAES Monica and DE WITTE Bruno (eds), "The EU Fundamental Rights Landscape After Opinion 2/13", Maastricht Faculty of Law Working Paper 2016/3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799100 (online on 20 April 2017).

[28] Halleskov Storgaard, Louise, "EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR", (2015) 15 *Human Rights Law Review* 485, 521.

[29] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.

[30] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union* EU:C:2008:461.

that the interpretation of those fundamental rights is ensured "*within the framework of the structure and objectives of the EU*".[31]

The Court does not really explain what is meant by 'interpreting fundamental rights within the framework of the structure and objectives of the EU'. Does it mean that EU fundamental rights should be interpreted and protected to the extent its constitutional structure and objectives allow for? This seems to be the case indeed since the Court, after having listed what it considers to be essential elements of the EU constitutional framework, notably the principle of primacy, uniformity, effectiveness and mutual trust, clearly states that "*Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above*".[32]

The principle of mutual trust, being one of those essential elements of the EU constitutional structure, is also addressed under the same heading 'The specific characteristics and the autonomy of EU law'.[33] The Court grants this principle a constitutional rank, observing that it is of 'fundamental importance' for the EU as it allows for the creation and maintenance of an area without internal borders. Drawing on its previous rulings in the *N.S.* and *Abdullahi* cases,[34] the Court reiterates that the principle of mutual trust requires EU Member States to presume that fundamental rights have been observed by other Member States, save for 'exceptional circumstances'.[35]

The Court then continues:

> *"In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."*[36]

Consequently therefore, national authorities, in order to preserve the autonomy of EU law and the principle of mutual trust, may be under a duty not to perform a fundamental rights scrutiny, or to limit such scrutiny to the most extreme of violations. This kind of mutual trust is highly problematic, not only because it will be very difficult to accommodate it in the new accession agreement but also because it seeks to remove the

[31] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, para 170.
[32] Ibid, para 177.
[33] Ibid, paras 191-195.
[34] Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*; C-394/12 *Shamso Abdullahi v. Bundesasylamt.*
[35] Ibid, paras 191 and 192.
[36] Ibid, para 194.

minimum standard of fundamental rights protection provided for in the ECHR in areas which are prone to fundamental rights violations such as common asylum system and the area of criminal law.[37]

Interestingly, the Opinion was released only a few weeks after the ECtHR's *Tarakhel* ruling,[38] in which the Strasbourg Court condemned the automatic application of the EU Dublin Regulation holding that a real risk of ill-treatment in the receiving state precludes removal of the asylum-seeker, irrespective of the source of risk being systemic or individualised. This seems to have been a reaction to the CJEU's *N.S.* and *Abdullahi* decisions, in which the Luxembourg Court ruled that an asylum-seeker could only challenge the decision by pleading systemic deficiencies in the asylum procedure and reception conditions in the Member State deemed responsible for the asylum application.[39] Although the CJEU does not refer to the *Tarakhel* case in Opinion 2/13, some commentators have suggested that it has played a role in the Court's reasoning.[40]

While the Opinion contains several objections that will be difficult to overcome, the mutual trust objection is particularly challenging because it goes to the heart of the Convention system. One has to wonder if it would even be possible to accommodate the principle of mutual trust and recognition as interpreted and applied by the CJEU in the ECHR system, without affecting the core of the Convention system. Such a one-sided interpretation of this principle is in fact problematic from an EU law perspective too, but not for the reasons indicated by the CJEU. The respect for fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy.[41] It is also a core principle of national legal systems. Mutual trust and recognition, on the other hand, is merely a principle used to facilitate judicial cooperation among the Member States. This is not to say that fundamental rights are absolute or cannot be balanced, but the way the Court has done it in Opinion 2/13 and in some of its fundamental rights cases points to the Court's misunderstanding and misconception of the role and place of fundamental rights in the EU.

[37] Spaventa, Eleanor, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13" (2015) 22 *Maastricht Journal of European and Comparative Law* 35, 19; de Witte, Bruno, and Imamović, Šejla, "Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court" (2015) 40 *European Law Review* 5, 683.
[38] ECtHR, *Tarakhel v. Switzerland*, Judgment of 4 November 2014, Application No. 29217/12.
[39] These decisions are discussed in more detail in the following section.
[40] Peers, Steve, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", (2015) 16 *German Law Journal* 213; Halleskov Storgaard, Louise, "EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR", (2015) 15 *Human Rights Law Review* 485.
[41] As emphasised during Cologne European Council (1999), Presidency Conclusions, Annex IV.

III. Recognition, Trust and Fundamental Rights

The principle of mutual recognition has its roots in the EU internal market law[42] but it has gained major importance more recently in the Area of Freedoms, Security and Justice (AFSJ). As stated earlier, the principle is used to facilitate the recognition of decisions of courts from other Member States with a minimum of procedure and formality.[43] The 'Conclusions of the Tampere Council' emphasised the importance of this principle as a cornerstone for effective cooperation between the Member States.[44]

The Treaty of Lisbon explicitly acknowledges the principle of mutual recognition,[45] but it does not mention mutual trust. However, already in the Hague Program, adopted in 2005, the European Council noted that in order for the principle of mutual recognition to become effective, mutual trust must first be strengthened "*by progressively developing a European judicial culture based on the diversity of legal systems and unity through European law*".[46]

In recent years, the CJEU began to speak of 'mutual trust' rather than 'mutual recognition' in its judgments, giving it a rank of a constitutional principle and extending its effects beyond the field of judicial cooperation in the AFSJ.[47] The two concepts are sometimes used interchangeably,[48] but mostly the former is indeed seen as a precondition (for the effective operation) of the latter.[49] According to the Court, mutual trust requires Member States to trust each other's compliance with EU law and, in particular, with EU fundamental rights. That trust is grounded on and justified by their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law, as provided in Article 2 TEU.[50]

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[42] See eg the case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42 (on the free movement of goods, also known as *Cassis de Dijon* case) which was the first explicit expression of a duty of mutual recognition in which the Court of Justice stated that "there is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State" (Case C-120/78 [1979] ECR 649, para 14). See also COM (1985) 310 White Paper from the Commission to the European Council - Completing the Internal Market, p 17.

[43] LENAERTS Koen, "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice", The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf (online on 28 September 2016).

[44] Tampere European Council 15-16 October 1999, Presidency Conclusions.

[45] It is expressly mentioned in Arts. 67 TFEU, 70 TFEU, 81 TFEU, and 82 TFEU.

[46] The Hague Programme: Strengthening Freedom, Security, and Justice in the EU, [2005] OJ C53/01, 3.2.

[47] See eg Case C-195/08 *Rinau* EU:C:2008:406 relating to the interpretation of the Brussels II *bis* Regulation.

[48] Opinion of AG Sharpston in C-467/04 *Gasparini and Others* ECR I-9199 fn 87.

[49] LENAERTS Koen, "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice", The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, available at https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf (online on 28 September 2016).

[50] Opinion 2/13 (CJEU, 18 December 2014), para 168.

A. Dublin case law

The Dublin system[51] was designed in order to coordinate asylum applications and allocate responsibility for asylum seekers in the Member States.[52] Its main purpose is to create a mechanism that swiftly assigns responsibility for processing an individual asylum application to a single Member State. The goal of such system is to assure quick access for those in need, but also to discourage abuses of the system where asylum seekers would submit applications in several countries. The responsibility for a particular asylum seeker is allocated on the basis of criteria guiding Member State's decision on where individuals should have their application examined. The most commonly used criterion by states is the 'first point of entry' - the Member State responsible for examining an individual's asylum application is the one that he or she first entered.[53]

The Dublin system is not a mutual recognition instrument but it does operate on the principle of mutual trust, i.e. on the presumption that all states respect the rights of asylum seekers in accordance with European and international law. In the context of the Dublin Regulation, mutual trust relates to the examination of the request for asylum by the responsible Member State as well as the treatment of the asylum seeker during this examination. Such mutual trust is additionally based on the presumption that all Member States respect the principle of *non-refoulement* and can thus be considered as safe countries for third-country nationals.[54]

For quite some time the EU Member States have been invoking the principle of mutual trust as a justification for the Dublin transfers of asylum seekers to EU states with questionable records of human rights compliance.[55] Recently, however, this presumption of fundamental rights compliance has come under strain through the intervention of the ECtHR.

The first time the ECtHR pronounced itself on the matter was in *M.S.S. v. Belgium and Greece*,[56] delivered by the Grand Chamber in January 2011. The case concerned expulsion of an Afghan asylum seeker to Greece by Belgium in application of the Dublin II Regulation.

The Strasbourg Court reiterated that Dublin transfers are subject to its review and that the *Bosphorus* presumption of equivalent protection[57] is not applicable in this type of cases, since the transfers are never

[51] The Dublin system was initially based on the Dublin Convention, negotiated by the (then) European Community in 1990. The Dublin Regulation (known as Dublin II) replaced the Convention in 2003 and remained in force until 2013. After the revisions the new Dublin Regulation 604/2013 came into force in January 2014 and is known as Dublin III Regulation.
[52] The Regulation applies to all 28 EU member states and 4 non-EU countries (Norway, Iceland, Switzerland and Liechtenstein), bound by its provisions on the basis of bilateral agreements.
[53] For a detailed and critical report on the Dublin System see Fratzke, Susan, "*Not Adding Up: The Fading Promise of Europe's Dublin System*" (Brussels: Migration Policy Institute Europe, 2015).
[54] Preamble Dublin II Regulation, recital 2. Preamble Dublin III Regulation, recital 3.
[55] In the Netherlands, for example, the authorities have relied strongly on the presumption of fundamental rights compliance by other EU member states in the context of the Dublin transfers. They had decided to suspend returns to Greece only pending the *MSS* case. See conclusions of the Workshop on Migration and Human Rights in Europe at http://www.icj.org/wp-content/uploads/2012/06/Non-refoulement-Europe-summary-of-the-workshop-event-2011-.pdf (online on 28 September 2016).
[56] ECtHR, *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, Application no. 30696/09.

mandated. It is in fact quite the opposite: under the 'sovereignty clause' or 'discretionary clause' contained respectively in Article 3(2) of the Dublin II Regulation and Article 17(1) of its recast, each Member State may decide to examine an asylum application lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Regulation. This means that Member States may refrain from transferring an asylum seeker to the Member State responsible for examining the application and examine the application themselves, but that discretion is limited in the case law of the CJEU.[58]

The ECtHR accepted, in principle, that the presumption of fundamental rights compliance is embedded in the principle of mutual trust, but it determined that its application is not unconditional. The presumption could be rebutted if there were substantial grounds for believing that a person whose return is being ordered would face a real risk of treatment contrary to the Convention in the receiving country.[59]

The ECtHR found Greece to be in breach of Article 3 ECHR both in terms of the risk of return to Afghanistan and the poor detention and living conditions. The evidence of these violations was found in numerous reports by NGOs and other international bodies such as the UN High Commissioner for Refugees (UNHCR). In addition, the Court ruled that Belgium, by transferring the applicant asylum seeker to Greece, had violated the *non-refoulement* principle in Article 3 of the ECHR because of the poor living conditions in Greece. In the Court's view, the Belgian authorities at the time of the transfer "*knew or ought to have known*" the deficiencies of the asylum procedure in Greece.[60]

Accordingly, the assumption that all EU Member States respect fundamental rights - and that automatic transfer of asylum seekers absolves a sending state of responsibility for the procedure applied and the living conditions in the receiving state – was no longer applicable. By ruling Belgium's decision to apply the Regulation and not to exercise its discretion under Article 3(2) unlawful the ECtHR's judgment interrupted the system of transfers under the Dublin II Regulation.

The CJEU seemingly followed the direction of the Strasbourg Court in its *N.S.* ruling,[61] which also involved return of asylum seekers in the application of the Dublin II Regulation. N.S. was an Afghan national who lodged an asylum application in the UK but was going to be returned to Greece, the Member State responsible for examining his applications pursuant to the Regulation. Subsequently, N.S. requested the Secretary of State to exercise his discretion under Article 3(2) of Dublin II and accept responsibility for his

[57] ECtHR, *Bosphorus v. Ireland*, Judgment of 30 June 2005, Application no. 45036/98.
[58] So far, the possibility is given when (1) there are substantial grounds for believing that there are systemic flaws in the asylum procedure of the Member State responsible for examining the application (*N.S.*, *Abduallahi*) and when (2) there are substantial grounds for believing that the transfer itself would result in a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter (*C.K. and Others*). These cases are discussed further below.
[59] ECtHR, *M.S.S. v. Belgium and Greece* paras 344-369.
[60] Ibid, para 358.
[61] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department.*

asylum application on the ground that there was a risk that his fundamental rights under EU law, the ECHR and the Geneva Convention would be breached if he was returned to Greece.[62] Following an appeal, the UK Court of Appeal referred a number of questions for preliminary ruling to the Court of Justice. The proceedings in the *N.S.* case were joined with the case of *M.E. and Others* concerning the proposed transfer of asylum seekers to Greece from the Republic of Ireland. The central issue for the Court of Justice was to determine whether a Member State (be it the UK, Ireland or otherwise) is obliged to exercise its discretion under Article 3(2) of the Dublin II Regulation and take responsibility for an asylum claim, if the transfer to the responsible state would involve a risk of human rights violations.

The CJEU ruled that although the Common European Asylum System (CEAS) is based on mutual trust and the presumption of compliance by other Member States with Union law and, in particular, fundamental rights, such a presumption is not conclusive.[63] The Court acknowledged that "*it is not […] inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights*". However, the Court further added *"[…], it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003".*[64] Consequently, Member States may be required not only to presume compliance, but also to avoid checking in certain cases whether fundamental rights guaranteed by the EU have actually been observed, and carry on with the transfer.[65]

The CJEU did recognise, reiterating the wording of the ECtHR in the *M.S.S.* judgment, that if there are "*substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision*".[66] Nevertheless, the CJEU was careful not to condemn the Dublin system as a whole and made it clear that this should remain an exceptional case – making the threshold of incompatibility with fundamental rights very high.

The CJEU further clarified its position in the *Puid* and *Abdullahi* judgments,[67] both delivered late in 2013. The Court determined that an asylum-seeker could *only* challenge that decision by "*pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum […] which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the*

[62] Ibid, para 40.
[63] Ibid, para104.
[64] Ibid, para 82.
[65] See eg Gauci, Jean-Pierre, Giuffré, Mariagiulia, and Tsourdi, Lilian, *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Leiden: Brill Nijhoff, 2015).
[66] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, para 86.
[67] C-4/11 *Bundesrepublik Deutschland v. Kaveh Puid* EU:C:2013:740; C-394/12 *Shamso Abdullahi v. Bundesasylamt.*

meaning of Article 4 of the Charter."[68] This leaves the interpretation of the term 'systemic deficiencies' open as it remains unclear if it is a synonym for the 'Greek' systemic deficiencies, or if other (less grave) deficiencies in the asylum systems of Member States can be considered 'systemic'. While the CJEU refrained from stating explicitly that *only* risks stemming from systemic deficiencies could preclude a transfer in its *N.S.* judgment, it clearly did so in the *Abdullahi* decision.[69]

The CJEU's approach in the Dublin cases shows that the Court is indeed 'not a human rights court', as famously remarked by its (then) President Skouris during the FIDE conference 2014. While the former President probably meant to say not *only* or *primarily* a human rights court, the Dublin cases (as well as some of the cases on the European Arrest Warrant discussed below) show that its role as a human rights adjudicator is indeed problematic.

In November 2014, the ECtHR increased its standard of protection in the *Tarakhel* judgment, requiring countries to undertake a "*thorough and individualised examination of the situation of the person concerned*" in the context of transfers under the Dublin II Regulation.[70] It held that real risk of ill-treatment in the receiving state precludes removal of the individual, irrespective of the source of risk being systemic or individualised. In future Dublin cases therefore, the national authorities will have to carefully examine all the facts of the case, including any individual characteristics that might make an asylum seeker more vulnerable.

After much perseverance, the CJEU decided to follow suit.[71] In *C.K. and Others*, the Court ruled that pleading systemic deficiencies was not the only ground that could be invoked by the applicants in order to challenge their transfer and demonstrate that the transfer would expose them to a real risk of inhuman or degrading treatment. The Court argued that the change in its approach stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to Dublin II.[72] Nevertheless, the Court also clarified that this is applicable in very exceptional situations "*such as that at issue in the main proceedings*" and, moreover, that this interpretation fully respects the principle of mutual trust "*since it ensures that the exceptional situations are duly taken into account by the Member State*".[73] Therefore, the ruling seems to be quite 'case specific' and it remains to be seen whether it will prove a significant step forward in finding better balance between mutual trust and fundamental rights, and ensuring consistency with the ECHR.

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[68] C-394/12 *Shamso Abdullahi v. Bundesasylamt*, para 60. See also Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department*, paras 94 and 106.
[69] C-394/12 *Shamso Abdullahi v. Bundesasylamt*, para 60.
[70] ECtHR, *Tarakhel v. Switzerland*, para 104.
[71] Case C-578/16 PPU *C.K. and Others v. Republika Slovenija* ECLI:EU:C:2017:127. In addition, the Court also adopted a more fundamental rights-friendly approach in a number of cases concerning procedural rights of asylum seekers by giving them a wider right to challenge errors in carrying out of the Dublin III procedures or in the application of its criteria. See eg C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2016:409 and C-155/15 *Karim v. Migrationsverket* ECLI:EU:C:2016:410.
[72] Case C-578/16 PPU *C.K. and Others v. Republika Slovenija*, paras 62-63 and 94.
[73] Ibid, paras 88 and 95.

B. European Arrest Warrant

A similar development can be tracked in the application of other instruments based on the principle of mutual trust in the AFSJ, such as the European Arrest Warrant Framework Decision (EAW FD). In essence, the EAW FD provides a simple and speedy procedure designed to surrender people between EU states for the purpose of conducting a criminal prosecution or executing a custodial sentence. In the *Radu* case,[74] the CJEU was asked, *inter alia*, to clarify whether the executing judicial authority can refuse to execute the EAW if the execution would lead to infringements of the requested person's fundamental rights. The Court reformulated the questions posed by the Romanian court and limited its decision to answering whether issuing a EAW obliges Member State authorities to give the suspect the opportunity to be heard.

The Court held that such an obligation "*would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice*" and that "*the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system*".[75] Accordingly, the executing judicial authorities cannot refuse to execute a EAW on the ground that the requested person was not heard in the issuing Member States before that arrest warrant was issued.

It is notable that the Court narrowed down the questions posed in order to avoid addressing the inherent tension between the effectiveness of the EAW mechanism and the protection of fundamental rights.[76] Once again, the Court placed great emphasis on the efficiency of the mechanism but conveniently forgot to refer to Article 1(3) of the EAW FD, which specifically provides that the decision is not to have the effect of modifying the obligation to respect fundamental rights.[77]

Contrary to the Court, Advocate General (AG) Sharpston did refer to Article 1(3) of the EAW FD in her Opinion,[78] as well as recitals 10, 12, 13 and 14, pointing out that human rights may be taken into account when deciding not to execute a warrant. The AG further clarified that "*to interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude*".[79] Moreover, she referred to the AG Cruz

[74] Case C-396/11 *Ministerul Public – Parchetul de pe lângă ˇCurtea de Apel Constanta v Ciprian Vasile Radu* EU:C:2013:39.
[75] Ibid, para 41.
[76] See, generally, Meijers Committee, *The Principle of Mutual Trust in European Asylum, Immigration and Criminal Law: Reconciling Trust and Fundamental Rights*, available at http://dare.ubvu.vu.nl/bitstream/handle/1871/49623/PrincipleMutualTrust.pdf;jsessionid=DFD321E1D2A49B1BB8A03CD24C3810A1?sequence=1 (online on 30 September 2016).
[77] "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."
[78] Opinion of Advocate General Sharpston in C-396/11 *Ministerul Public – Parchetul de pe lângă ˇCurtea de Apel Constanta v Ciprian Vasile Radu*, delivered on 18 October 2012.
[79] Ibid, para 70.

Villalón's Opinion in the *I.B.* case[80] where he pointed out that although mutual recognition is an instrument for strengthening the AFSJ, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area.[81] In her view, therefore, the competent judicial authority of the Member States executing a EAW "*can refuse the request for surrender […], where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process*".[82]

The CJEU maintained the same line of reasoning in its *Melloni* judgment,[83] which was rendered a few weeks later. Once again, the grounds for refusal of a EAW listed in Articles 3 and 4 of the Framework Decision were regarded as exhaustive.[84] Furthermore, the Court stressed that a Member States cannot make use of Article 53 of the Charter[85] to refuse the surrender of a person for the reason that the standard of protection of the right to a fair trial in its national constitution is higher than the one established in the national legislation of the issuing Member States. According to the Court, the possibility of invoking Article 53 in order to refuse the execution of a EAW would undermine 'the principle of primacy of EU law' and 'the principles of mutual trust and recognition' guaranteed by the uniform level of fundamental rights protection defined in the EAW FD.[86]

While the outcomes in *Radu* and *Melloni* may not be wrong as such, the Court's reasoning in both cases is deficient and lacks proper engagement with fundamental rights concerns of the national courts. The analysis of both Dublin and EAW cases suggests that the Court is willing to limit, time and again, the effects of fundamental rights protection for the sake of preserving the efficiency of (certain mechanisms of) EU law.[87]

In the most recent joined cases of *Aranyosi* and *Căldăraru*,[88] the Court was faced yet again with the same critical question: is there an overarching obligation on national courts and other authorities to ensure compliance with EU fundamental rights whenever they apply EU law and thus also the EAW? The facts of the case are as follows.

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[80] Opinion of Advocate General Cruz Villalón in Case C-306/09 *I.B. v Conseil des ministres* ECRI-10341, delivered on 6 July 2010.
[81] Opinion of Advocate General Sharpston in C-396/11 *Radu*, para 71.
[82] Ibid, para 108.
[83] C-399/11 *Stefano Melloni v. Ministerio Fiscal* EU:C:2013:107. For a critical assessment of the case see, among others, Torres Pérez , Aida, "*Melloni* in Three Acts: From Dialogue to Monologue" (2014) 10 *European Constitutional Law Review* 2; De Boer, Nik, "Addressing Rights Divergences under the Charter: Melloni" (2013) 50 *Common Market Law Review* 4.
[84] Article 3 FD lists the circumstances under which a Member State must refuse a surrender and Article 4 under which it may do so.
[85] Article 53 of the Charter entitled 'Level of protection' states as follows: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".
[86] C-399/11 *Stefano Melloni v. Ministerio* Fiscal, paras 58 and 63.
[87] On this point see Callewaert, Johan, "To accede or not to accede: European protection of fundamental rights at the crossroads", *European journal of Human Rights*, 2014/4.
[88] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198.

Mr Aranyosi, a Hungarian national accused of committing a burglary, was arrested in Germany following a EAW issued by Hungary. Mr Aranyosi resisted the surrender, referring to reports from the Committee on the Prevention of Torture and the case law from the European Court of the Human Rights, which documented a massive over-crowding in Hungarian prisons to an extent that could be considered a violation of Article 3 of the ECHR (which corresponds to Article 4 of the EU Charter of Fundamental Rights).

Mr Căldăraru was arrested in Germany following a Romanian EAW, after he was convicted *in absentia* to eight months in prison by a court in Romania for driving without a driver's license. The defendant resisted the surrender, arguing that he will be subjected to inhuman and degrading treatment due to the awful detention conditions in the Romanian prisons. He too relied on the case law of the Strasbourg Court in order to support his claim. Indeed, the ECtHR found very recently that both Romania and Hungary had infringed fundamental rights due to the poor detention conditions.[89]

Since Căldăraru was detained in Germany from the moment of his arrest, his case has been dealt with under the urgent preliminary ruling procedure provided by the Court's Rules of Procedure. Nevertheless, the Court decided to join the two cases, as they concerned essentially the same issue and were submitted by the same *Hanseatisches Oberlandesgericht* in Bremen, Germany.

By its questions, the referring court asked the CJEU whether, in the light of the provisions of Article 1(3) of the Framework Decision, the judicial authority executing a EAW is required to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence where that person is likely to be detained, in the issuing Member States, in physical conditions which infringe his fundamental rights and, if so, on what terms and in accordance with what procedural requirements.[90]

The key issue for the CJEU was thus to ascertain whether the responsible executing authority can refuse execution of a EAW and if so, under which conditions. In its judgment from 5 April 2015, the CJEU started off as it did in the previous EAW cases, providing that the EAW system is based on the principle of mutual recognition, which itself is founded on the mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, and particularly in the Charter. Furthermore, referring to its Opinion 2/13, the Court stated that both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow for an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires each of those states, save in

[89] ECtHR, *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, judgment of 10 March 2015. *Oprea and Others v. Romania*, Application nos. 54966/09, 57682/10, 20499/11, 41587/11, 27583/12, 75692/12, 76944/12, 77474/12, 9985/13, 16490/13, 29530/13, 37810/13, 40759/13, 55842/13, 56837/13, 62797/13, 64858/13, 65996/13, 66101/13 and 15822/14, judgment of 18 June 2015.
[90] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft* Bremen, para 74.

exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.[91]

However, the Court then did something it had not done before. It continued its assessment referring to recital 10 and Article 1(3) of the FD which provide, respectively, that the implementation of the mechanism of the EAW as such may be suspended in the event of serious and persistent breach of the principles referred to in Article 2 TEU, and that the FD is not to have the effect of modifying the obligation to respect fundamental rights.[92]

Furthermore, the Court focused specifically on Article 4 of the Charter stating that the absolute prohibition of inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member States where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned.

This statement is however immediately qualified by the following one where the Court explained that if a risk derives from the general detention conditions in the Member States concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. It is thus necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he or she will be detained.[93]

In order to be able to assess the existence of that risk in relation to the individual concerned, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention, which the issuing judicial authority is obliged to provide. If, in the light of the information provided or any other information available to it, the authority responsible for the execution of the warrant finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until additional information is obtained on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period of time, that authority must decide whether the surrender procedure should be brought to an end.[94]

The CJEU deviates in its judgment from the Opinion of Advocate General Bot who concluded that EU law, and in particular the EAW FD, provides no basis for Germany to refuse to execute the arrest warrants. Instead, AG Bot assigned the responsibility to the Hungarian and Romanian authorities: they should be the

[91] Ibid, paras 77-78.
[92] Ibid, paras 81-84.
[93] Ibid, paras 91-94.
[94] Ibid, paras 95-104.

ones to consider whether or not a EAW should be issued in the first place. In cases where the warrants had been issued already, the issuing countries (i.e. Hungary and Romania) should then undertake all necessary measures to guarantee protection of fundamental rights in the individual case, and not the executing state.

It is interesting to refer back to Opinion 2/13 in the context of the discussion on *Aranyosi* and *Căldăraru*, and consider whether this decision is compatible with Opinion 2/13. In the Opinion, the Court insisted that EU Member States should not second-guess what other states are doing 'save for exceptional circumstances' and now the Court states that they actually should check if other states observe fundamental rights and request additional information. It is puzzling, to say the least, to have a Grand Chamber judgment not so long after a Full Court Opinion, and have the two documents contradict each other on this very important point.

While the CJEU's decision in *Aranyosi* and *Căldăraru* is generally perceived as a welcome development,[95] and is indeed a step in the right direction, the Court did not fully address – or resolve – the inherent clash between the efficiency of the EAW mechanism and fundamental rights, and many open questions remain.

First of all, the Court did not overrule its previous case law. This case is inherently different as it deals with a separate and specific human rights issue, which is also something that is not dealt within the EAW FD itself. The question that comes to mind is whether the exception only applies to infringements of Article 4 of the Charter and if so, how should national courts deal with other - less fundamental - fundamental rights claims. Secondly, finding that there is a real risk of inhuman and degrading treatment for the person concerned does not in itself mean that they can refuse execution of a warrant. Rather, it means that the national court should request additional information from the authorities of the issuing state and make further assessment. This, however, is a very difficult task, and one that different national courts may fulfil in very different ways. It is hard to know when the assurances provided by the authorities of the issuing state are sufficient without any indication or criteria on the basis of which national courts can ultimately make the decision. It is therefore not surprising that the same German court decided to request a second preliminary ruling in *Aranyosi II*,[96] asking further clarification.

The CJEU's rather dogmatic approach in both Dublin and EAW cases is not surprising either; the Court was not meant to perform the function of a human rights adjudicator. The latter is especially challenging in the AFSJ, since it operates on the basis of mutual trust and thus relies on the commitment to rather than observance of fundamental rights by the Member States. However, while the principle of mutual trust is fundamental in ensuring the integrity and efficiency of the common asylum system and the EAW mechanism, the underlying assumption that all EU Member States ensure respect for fundamental rights is simply not realistic. In 2015 alone, the ECtHR found a violation of one of the most fundamental human right (the

[95] See, for instance, the blog post https://www.fairtrials.org/tag/pre-trial-detention-2/ (online on 29 September 2016).
[96] C-496/16 *Aranyosi* n.y.r.

prohibition of torture and inhuman and degrading treatment)[97] 71 times by EU Member States.[98] The Court can no longer ignore this situation and its position in it, and should take further steps in order to find better balance between the effectiveness of the systems and mechanisms operating in the AFSJ and the protection of fundamental rights.

Conclusion

The Court of Justice has developed its human rights jurisprudence significantly in recent years. In doing so, the Court has used almost exclusively the Charter of Fundamental Rights as the reference text for its assessment. This development is not problematic in itself, but certain trends that are apparent in the Court's case law ever since, coupled with the exclusive focus on the Charter, seem to be cause for concern.

One of those trends is the sharp decline in references to the ECHR and the ECtHR's case law over the past few years. While compliance with the ECHR is not measured by the number of references to it, it is important to prevent that such development leads to a perception of fragmented and divided fundamental rights protection in Europe. This is exactly what the Treaty of Lisbon aimed to prevent by introducing Article 52(3) in the Charter as well as Article 6(2) in the TEU. Moreover, by disregarding other human rights mechanisms, the CJEU is missing the opportunity to develop further its expertise in the field of fundamental rights, and to strengthen the legitimacy of its decisions in the eyes of European citizens.

Another worrying trend in the case law of the CJEU is unpredictability in its judgments, particularly relating to the level of protection afforded under EU law. While the Court has made significant advancements in human rights protection in some areas, and the criticism does not apply to the whole of EU law, other areas are much less protected. Particularly problematic are the cases in the human rights-sensitive AFSJ where the principle of mutual trust and recognition comes into play.

The analysis of the Dublin and the EAW cases, and the brief reflection on Opinion 2/13, have shown that the Court does not always engage with fundamental rights arguments sufficiently or adequately, and that it is inconsistent in its approach. Moreover, the comparisons with the relevant decisions of the Strasbourg Court point to some structural differences in the approaches of the two European Courts, which ultimately may result in conflicting jurisprudence.

[97] Article 3 ECHR and Article 4 EU Charter of Fundamental Rights.
[98] See violations by Article and Respondent State 2015 at http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf (online on 30 September 2016).

All this does not do much to commend the Court of Justice in its role of a human rights adjudicator, which has become an inevitable part of its function in the EU legal system. While the Court has made steps in the right direction, further steps are needed in order to achieve better balance between the effectiveness of EU law and the protection of fundamental rights. Allowing for fundamental rights exceptions and in this way undermining effectiveness of EU law mechanisms may, paradoxically, result in strengthening it in the long run.