Eur J Crim Policy Res
DOI 10.1007/s10610-016-9305-2

Balancing Between Human Rights Assumptions and Actual Fundamental Human Rights Safeguards in Building an Area of Freedom, Security and Justice: a Cosmopolitan Perspective

Rebecca Deruiter[1] · **Gert Vermeulen**[1]

Abstract Rhetoric often claims that the European Union (EU), in issues related to Justice and Home Affairs, has to be united in its diversity. As such, the asylum and judicial systems of the Member States are initially perceived as equally *good*. By applying the cosmopolitan theory on two fields of interstate cooperation, asylum and judicial cooperation in criminal matters, the article explores how cosmopolitan the EU is in these fields, with a specific focus on material detention conditions. For cosmopolitanism to work, it has to be grounded in commonly shared norms, which enable the EU to regulate its dealings with the *otherness* of the Member States. The crucial role of the European Court of Human Rights and the Court of Justice of the European Union in placing boundaries on the equal *goodness* of the Member States' asylum and judicial systems is analysed. This judicial reality in which cosmopolitan norms are established and protected is discussed, together with the political realities dominating policy debates in order to build an Area of Freedom, Security and Justice.

Keywords Asylum · Cosmopolitanism · Detention conditions · European Union · Judicial cooperation in criminal matters

Introduction

For the European Union (EU), the Area of Freedom, Security and Justice (AFSJ), which includes policy domains related to citizenship, immigration, asylum, borders, and judicial and police

✉ Rebecca Deruiter
Rebecca.Deruiter@ugent.be

Gert Vermeulen
Gert.Vermeulen@ugent.be

[1] Institute for International Research on Criminal Policy (IRCP), Ghent University, Universiteitstraat 4, 9000 Ghent, Belgium

Published online: 15 February 2016

cooperation, is one of the key political priorities. In the last two decades, the EU has become increasingly active in developing a Common European Asylum system (CEAS) and facilitating judicial cooperation in criminal matters, although these domains are regarded as politically sensitive issues touching upon key areas of national sovereignty. The Union has continuously developed the AFSJ based on the assumption that there is mutual trust between the Member States. In order to build the AFSJ, the Member States should be *united in diversity*. As such, the asylum and judicial systems of the Member States are initially considered as equally *good*.

By applying the cosmopolitan theory to two fields of interstate cooperation, i.e. asylum and judicial cooperation in criminal matters, the article explores how cosmopolitan the EU is in these fields, with a specific focus on material detention conditions. The first part of this article describes the concept of cosmopolitanism, followed by an analysis of the main EU instruments regulating interstate cooperation in the area of asylum and judicial cooperation in criminal matters. The subsequent part explains in further detail how automaticity and mutual trust have been interpreted by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The last section discusses this judicial reality which is in sharp contrast with the political realities dominating policy debates in the areas of asylum and judicial cooperation in criminal matters. Throughout these sections, the article examines the compatibility of the proclaimed *unity in diversity* cosmopolitan rhetoric with EU policies in the two aforementioned areas. The focus in this article is on material detention conditions as a key factor in limiting the equal *goodness* of all EU Member States as portrayed in the *unity in diversity* rhetoric. Furthermore, cosmopolitanism is not discussed from the perspective of the individual, but from the action of the EU as both a moral and a political project.

The Concept of Cosmopolitanism

Cosmopolitanism has been discussed extensively and is still a prominent topic within the social sciences and humanities (Vertovec and Cohen 2002; Delanty 2005; Fine 2006; Beck and Grande 2007; Calhoun 2008; Levy et al. 2011; Krossa and Robertson 2012). Despite being a prominent topic in the social sciences, few criminologists apply it in current research (Van Swaaningen 2007; Franko Aas 2013). Furthermore, within criminological research, the EU framework is fairly underdeveloped or dominantly analysed from a legal perspective. This article encourages this gap to be addressed by applying the cosmopolitan theory to the EU framework on two fields of interstate cooperation: asylum and judicial cooperation in criminal matters. Also in order to counter methodological nationalism in social sciences, the article will solely focus on the EU framework.[1]

Cosmopolitanism can be a philosophy, a social attitude, a cultural perspective or a type of politics. In the field of international relations and politics, cosmopolitanism is especially relevant to assess the actions of states and the design of international institutions. Drawing from academic literature, cosmopolitanism is understood as a moral outlook that overcomes normative divisions between one's own people and *others* (Van Hooft 2009; Cicchelli 2014). Furthermore, cosmopolitanism is a normative concept which includes a paradigm shift: an

[1] A substantive part of research in the area of criminology seems to be guilty to what Beck (2006) defines as 'methodological nationalism': equating social boundaries with state boundaries and framing society, law and justice in the nation-state outlook (Franko Aas 2007).

appreciation of differences, where diversity is not the problem, but rather the solution.[2] By doing this, differences should not be replaced by common norms, values and standards or arranged hierarchically, but accepted as such. Due to the effects of globalization, cosmopolitanism entails a far less pivotal role for the nation state because it is no longer possible to see national societies isolated from the global context (Delanty and Rumford 2005; Beck and Grande 2007; Delanty 2009). For cosmopolitanism to work, it has to be grounded in a certain amount of commonly shared norms which enable it to regulate its dealings with *otherness*. In short, it combines the tolerance of *otherness* with indispensable norms or a *unity in diversity* (Vertovec and Cohen 2002; Delanty and Rumford 2005; Beck and Grande 2007). According to Van Hooft (2009), cosmopolitanism is the view that the moral standing of all peoples and each individual around the globe is equal. The human rights regime is the main illustration of how the discrepancy between the national and international is being superseded and how the international cosmopolitanization of national societies is being promoted (Beck 2006; Beck and Levy 2013). During the last few decades we have witnessed a significant development of rights and law enforcement beyond the nation state. Human rights are institutionalised in international courts and increasingly also in politico-judicial bodies, in and above the state, that control resources for enforcing norm compliance (Eriksen 2006). Van Hooft (2009) identifies 21 features that mark a genuine outlook of ethical cosmopolitanism. A selection will be used to analyse the possible increasing cosmopolitan orientation of the EU[3]:

- Acknowledging the sovereignty of nation-states while insisting on limitations to that sovereignty in order to secure human rights and global justice;
- Respect for human rights as universally normative;
- Acknowledging the moral equality of all peoples and individuals;
- Belief in a globally acceptable concept of human dignity;
- Global solidarity with struggles for human rights and social justice;
- Commitment to the liberalization of immigration and refugee policies.

The EU is recognized by cosmopolitans as an illustration of a transnational unfinished project, which reflects the juridification of cosmopolitan values of fundamental rights, supported by an institutional framework upholding these values (Amtenbrink 2008). Rhetoric often claims that the Union, in issues related to Justice and Home Affairs, has to be united in its diversity. This *unity in diversity* exemplifies cosmopolitan thinking where the *other* is positively embraced and simultaneously perceived as equally *good*.[4] Furthermore, it requires a minimum of change at the national level and justifies a maximization of interstate cooperation (Alegre 2005). Delanty (2009) argues that the *unity in diversity* rhetoric appears to be a slogan referring to a supposed co-existence of nation states and regions within the broader arena of the EU but a cosmopolitan Europe is more than just achieving a balance and the simple co-existence of differences. Therefore, the unity in diversity rhetoric positions the EU in a contradictory situation where it has to define a common European culture and simultaneously cannot negate

[2] For this article otherness and diversity can be used interchangeable, although they have a different connotation. Otherness relates to socially constructed divisions, the term difference or diversity relates to factual differences.
[3] These features were identified because they are intrinsically linked to the area of asylum or judicial cooperation in criminal matters: human rights and refugee policies. For all 21 features see Van Hooft (2009).
[4] Opening statement of Justice Commissioner Věra Jourová at the European Parliament hearings, where she stated: "*I want to build trust across the judicial systems in the EU. We should be united in our diversity, but we also need to make sure that our different cultural and legal traditions are not an obstacle to freedom, justice or the Single Market.*" (Jourová 2014)

national and regional particularities (Delanty and Rumford 2005). An essential question is whether this rhetoric is just empty or can it, in reality, fulfill this proclaimed cosmopolitan thinking?

Building an Area of Freedom, Security and Justice

The Area of Freedom, Security and Justice (AFSJ) was formally created by the Amsterdam Treaty (European Communities 1997b) and has become one of the key political priorities for the EU. In order to outline the EU's agenda-driving policies to develop this Area, the Council has adopted 5-year political programmes (Guild and Carrera 2010).[5] The first of its kind was the Tampere Programme (European Council 1999), where the first priority was to work towards the establishment of a Common European Asylum System (CEAS). This system should include a clear and workable determination of state responsibility for a fair and efficient asylum procedure, common minimum conditions for the reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.[6] The second priority was the creation of a genuine European area of justice using mutual recognition as a cornerstone of judicial cooperation in criminal matters (Murphy and Arcarazo 2014).[7] Both asylum and criminal justice have been regarded as politically sensitive issues. This is reflected in the continuous hesitations of certain Member States in having 'more Europe' in fields traditionally and deeply rooted in national sovereignty. Furthermore, the promulgation of these priorities in EU law and policy has been sensitive to events and political dynamics at the national, European and international levels (Guild and Carrera 2010). The following part will focus on the main EU instruments facilitating interstate cooperation in the fields of asylum and judicial cooperation in criminal matters. The focus will be on the EU instruments which set out the rules to deprive people of their liberty in these two areas.

A Common European Asylum System

Asylum is a status given to persons who have fled their country due to persecutions or threats to their security and, as such, require international protection (Vermeulen and De Bondt 2014). Seeking asylum is not an unlawful act, but often, asylum seekers are detained and deprived of their liberty, and may or may not be housed in specialist institutions. Consequently, they could face the same negative psychosocial effects as regular prisoners or offenders while being detained. All the EU Member States are signatories to the 1951 Geneva Convention (United Nations General Assembly 1951) and the European Convention on Human Rights (ECHR), which obliges Member States to comply with fundamental aspects for the treatment of asylum seekers. As a result of these legal obligations, mutual trust is justified and is presumed to exist (Guild and Carrera 2010; Battjes et al. 2011).

Because all Union Member States are perceived as *equally good*, the instruments to develop a CEAS are all based on the presumption of mutual trust: the assumption that each Member State will treat asylum seekers and examine their claims according to the relevant national, European and international law. For this article, the Dublin Regulation, together with the Reception Conditions Directive, are key. The Dublin Regulation allocates which state is responsible to

[5] Tampere in 1999, the Hague in 2004, Stockholm in 2009.
[6] See par. 14 of the Tampere President Conclusions (European Council 1999).
[7] Ibid., par. 33.

handle an asylum request. When the asylum seeker is transferred, this transfer may impact the living conditions of the person(s) involved due to varying reception conditions and/or detention facilities for asylum seekers in different Member States. Therefore, the Reception Conditions Directive determines common standards of living conditions for asylum applicants.

The Dublin System

One of the core principles of the CEAS is the Dublin Regulation, which allocates state responsibility to examine asylum applications. The Dublin system was designed in the 1990s, when the gradual lift of internal barriers in the areas of trade and free movement of people emerged. Because internal border controls were abolished, asylum seekers would be able to move more easily within the Schengen area and lodge claims with several Member States. In order to avoid different outcomes of asylum applications between Member States, the Dublin Convention[8] created a system where a single Member State is responsible for examining an asylum application, in principle, the country of first entry (Battjes et al. 2011; Vermeulen and De Bondt 2014). Mutual trust implies, under the Dublin system, the obligation to take back the (unsuccessful) asylum seeker who turns up in a non-responsible State and to examine the asylum claim. The succeeding Dublin II Regulation (European Union 2003b) creates criteria to allocate state responsibility and presumes an equal level of protection in all Member States.[9] Following an evaluation of the Dublin system in 2007 (Commission of the European Communities 2007), the European Commission initiated discussions for a recast of the Dublin II Regulation in 2008 (Commission of the European Communities 2008). After facing strong opposition from the Member States and several rounds of consultations, the Dublin III Regulation (European Union 2013b) entered into force in July 2013 (Hruschka 2014). Dublin III aims to enhance the effectiveness of the Dublin system, while securing higher standards of protection for asylum applicants. In the framework of the Dublin III Regulation, only one legal ground permits the Member State who transfers the asylum seeker to another Member State to deprive the asylum seeker of his/her liberty: when the person poses a significant risk of absconding.[10] Detention on this ground is permissible only upon an objective, individual assessment on a case-by-case basis and when other less coercive measures prove to be ineffective (Battjes et al. 2011; Velluti 2014).

Reception Conditions Directive

Besides assigning state responsibility to examine asylum claims, the creation of a CEAS further entails an evolution towards equalizing reception requirements and conditions. Under the CEAS, regardless of the Member State in which the asylum seeker applied for protection, every Member State should offer an equivalent level of reception conditions. The Reception Conditions Directive (European Union 2003a) lays down minimum standards for the reception of applicants, although the Member States report difficulties in ensuring this in practice. A study of the European Migration Network highlights that the organization of reception

[8] The Dublin Convention determines the State responsible to examine applications for asylum lodged in one of the Member States of the European Communities (European Communities 1997a).
[9] These criteria are based on the strength of the link between the asylum seeker and the State: family ties, administrative and material ties, specific cases such as pregnancy, age and illness (Irish Refugee Council 2011).
[10] The meaning of the risk of absconding is defined by national law, which can lead to diverging interpretations.

facilities differs greatly amongst and within the EU Member States, resulting in unequal treatment that may result, in certain cases, in sub-standard reception conditions (European Migration Network 2014). In essence, the very introduction of this instrument reflects an awareness of substandard reception conditions for asylum seekers in the different Member States. As such, it is argued that this instrument is based on a certain level of distrust in the Member States' reception conditions, so it was eventually deemed necessary to install an instrument to guarantee adequate reception conditions for asylum seekers.

One of the main aims of the Reception Conditions Directive and its successor, the Recast Reception Conditions Directive, hereafter 'the Recast' (European Union 2013a), is to provide a dignified standard of living across the Member States for those in need of international protection and lays down the minimum standards concerning the material conditions for the reception of asylum seekers (Court of Justice of the European Union 2012; European Council on Refugees and Exiles 2015).[11] The Recast sets out rules for the detention of asylum seekers. As such, the detention period cannot exceed the time necessary to determine the merits of the asylum claim.[12] Moreover, detaining asylum seekers should only occur as a measure of last resort, when proved necessary and on the basis of an individual assessment of each case. If asylum seekers are detained under the Recast, as a rule, they have to be detained in specialized detention facilities. When this is not possible, asylum seekers need to be separated from ordinary prisoners.[13]

Judicial Cooperation in Criminal Matters

The Presidency Conclusions of the 1999 Tampere Council stated that mutual recognition (MR) should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union (European Council 1999). From that moment onwards, the Union developed an expanding policy based on MR in criminal matters to enhance the facilitation of criminal investigations, prosecutions and sentences across borders between EU judicial authorities (Peers 2004; Morgan 2010). The MR principle is based on notions of equivalence and trust between the Member States, whereby every Member State is perceived as equally *good* because it ratified the ECHR, assuming fundamental rights are respected across the Union (Mitsilegas 2015). In order to facilitate judicial cooperation in criminal matters, this principle is designed so that a decision of a judicial authority in one Member State can be enforced beyond its territorial legal borders with a minimum of formalities. In theory, the Member States will not question the outcomes of other Member States' judicial processes as long as EU law and fundamental rights have been respected (Ferraro 2013). These instruments create a common framework with the aim of speeding up judicial cooperation by implying a certain level of automaticity (Mitsilegas 2009, 2012). Despite the fact that all the Member States are signatories to the ECHR, the

[11] The revision process of the Reception Conditions Directive was difficult and troublesome. As a result, the safeguards for asylum seekers regarding reception conditions in the initial 2008 Commission proposal were lowered in comparison with the eventual adopted Recast (Velluti 2014).

[12] The EU allows people who have not committed a criminal offence to be imprisoned in order to verify their nationality or identity for public safety and security reasons, to determine the elements of the asylum application in case there is a risk of absconding, and in border procedures. See art. 8(3) of the Recast Reception Conditions Directive (European Union 2013a).

[13] See art. 10 of the Recast Reception Conditions Directive. The Directive further addresses rules concerning access to open air in art. 10(2), contact opportunities in art. 10(3) & (4) and information in art. 10(5). The Directive has separate guarantees for females, families and minors (European Union 2013a).

foundations of this mutual trust are rather weak because, in practice, they do not all respect fundamental rights to the same degree (Heard and Mansell 2011). The decision to make MR the engine to develop judicial cooperation in criminal matters was, according to Vernimmen-Van Tiggelen and Surano (2008), not a natural outcome of an evolutionary process or the logical consequence of a high level of mutual trust. It was simply assumed to be there, but in reality, this trust is still not spontaneously felt and is by no means always evident in practice. Mutual trust is a learning process, which has to evolve and grow.

For this article, the European Arrest Warrant, hereafter the EAW (European Communities 2002), and the Framework Decision on the Transfer of Prisoners (European Union 2008) are key, because they facilitate surrender procedures between the Member States. As a result of this transfer, in combination with varying material detention conditions in the Member States' detention facilities, the essential question is therefore whether the EU has been successful in constructing a mechanism against sub-standard detention conditions?

The European Arrest Warrant (EAW)

In criminal matters, the flagship initiative to facilitate judicial cooperation is the EAW, which replaced and accelerated traditional extradition proceedings between the EU Member States (Plachta and van Ballegooij 2005). Based on the principle of MR, the aim of the EAW is to abolish the formalities associated with the old extradition procedures between the Member States with respect to two categories of persons: those who are sought for criminal prosecution and those who have been finally sentenced in a criminal prosecution, but are present in another Member State. This system facilitates the surrender of sentenced or suspected persons to either execute criminal sentences or to prosecute criminal charges (Carrera et al. 2013).

In the latest report on the implementation of the EAW in 2011, the European Commission recognized the varying standards across the EU in protecting fundamental rights. Even though individuals can claim a violation of their Convention rights before the ECtHR, this "*has not proved to be an affective means of ensuring that signatories comply with Convention's standards*" (European Commission 2011b). The instrument has been perceived as positive,[14] although it is far from being perfect. Despite the shortcomings of the instrument[15] and initiatives by the European Parliament (European Parliament 2014), the Commission finds it premature to re-open discussions to amend the EAW (European Commission 2015).

Framework Decision on the Transfer of Prisoners

Also, for prisoners, interstate cooperation was facilitated by a Framework Decision (Council of the European Union 2009). In essence, it provides a mechanism through which a Member

[14] See for example, the Opinion of Advocate General Bot delivered on 7 September 2010 in the Mantello case par. 1: "*based on a high level of confidence between those authorities. It is regarded, rightly, as the instrument of judicial cooperation in criminal matters which produces the best results*" (Bot 2010).

[15] The Commission has received representations from European and national parliamentarians, defence lawyers, citizens and civil society groups highlighting a number of problems with the operation of the EAW: no entitlement to legal representation in the issuing state during the surrender proceedings in the executing state; detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons and the non-uniform application of a proportionality check by the issuing states, resulting in surrender requests for relatively minor offences that, in the absence of a proportionality check in the executing state, must be executed (European Commission 2011b).

State that sentences a national of another Member State to imprisonment may send the prisoner home to serve his/her sentence. Thus, prisoners can be transferred to their country of nationality or residence, without their consent, based on the presumption that social rehabilitation and reintegration can be more easily achieved there. This Framework Decision has been criticized, because it does not tackle the issue of prisoners ending up in a stricter prison regime as a result of the transfer or prisoners being transferred to a facility which does not provide the same material detention conditions. Moreover, this Framework Decision has been criticized because it takes a distinctly authoritarian perspective or a Member State interest approach: The catalyst behind this mechanism is to see criminal law more effectively enforced (Van Zyl Smit and Spencer 2010).

The Link with Material Detention Conditions

When the aforementioned instruments are used to transfer asylum seekers or to surrender prisoners or offenders between the Member States, this often takes place automatically without questioning the detention conditions of the receiving country. This is justified by the reasoning that the application of EU instruments, which facilitate interstate cooperation, are anchored in a high level of mutual trust between the Union States' asylum administrations and criminal justice regimes and authorities. This system of interstate cooperation, constructed on automaticity, speed and trust, has been called into question by both the ECtHR and the CJEU, which have pointed out various shortcomings (Carrera et al. 2013; Mitsilegas 2015). One of these identified shortcomings is the variance in the Member States' material detention conditions, which will be analysed in the following section.

Material Detention Conditions and the Limitations of *Otherness*

Detention, as such, negatively affects the people deprived of their liberty. When detention facilities lack appropriate accommodations, this may cause additional unnecessary suffering. Variations in the Member States' material detention conditions may result in asylum seekers, prisoners and offenders being exposed to variable detention conditions which may impact their general well-being and human dignity (Konstadinides and O'Meara 2014). Furthermore, for asylum seekers, detention is highly undesirable, because it delays the start of the integration process and places undue hardship on people in a vulnerable position. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a prison is, by definition, not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence. The Committee further states that the approach of detaining asylum seekers in prisons is fundamentally flawed, even if the actual conditions of detention for these persons in the establishments concerned are adequate, which has not always been the case (CPT 2002).

Article 19(2) of the EU Charter stipulates that "*no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*" (European Union 2012). Despite the fact that the Member States are signatories of the ECHR and must comply with the EU Charter in applying EU law, doubts persist about the way standards are endorsed across the EU. The European Commission Green Paper on detention acknowledged that detention conditions can have a direct impact on the smooth functioning of the MR principle (European Commission 2011a).

Also, research in the area of judicial cooperation in criminal matters concluded that the often detrimental material detention conditions in the Member States' detention facilities could potentially infringe on prisoners' fundamental rights under the ECHR (Vermeulen et al. 2011b). The study also addressed the alarming fact that a number of inferior standards derive from binding European and international norms and/or ECtHR jurisprudence. The only possible sanctioning of insufficient implementation by the Member States appears to be ECtHR jurisprudence, which implies that an immense burden of proof rests upon the applicant. On the other hand, the CJEU, in its case law on asylum matters, introduced a mandatory human rights refusal ground combined with a specific duty on the Member States to examine the transfer impact on the involved person's fundamental rights on a case-by-case basis.

Evidence of poor treatment, prison overcrowding and unhygienic facilities undermine mutual trust, which is the foundation to facilitate interstate cooperation in asylum and criminal matters. The ECtHR and the CJEU ruled that the mutual trust presumption should be regarded as rebuttable. As a result, mutual trust cannot be a blind assumption in which it is safe to automatically transfer asylum seekers, prisoners and offenders between the EU Member States. The following section examines the influence of both the ECtHR and the CJEU in extending the scope of asylum regulations and judicial cooperation in criminal matters, with special attention given to material detention conditions.

Jurisprudence in the Area of Asylum

The measures to build a CEAS leave substantive discretionary powers for the Member States to detain asylum seekers although certain limitations apply. Analysing all grounds for detention is beyond the scope of this article, but when asylum seekers are detained, the ECtHR has found, in numerous cases, that certain detention policies (such as the detention of unaccompanied minors) and reception facilities amount to inhuman or degrading treatment, triggering a breach of Article 3 ECHR.[16]

The ECtHR has been called to decide on a number of cases involving the Dublin system. The initial response of the Court has been that, in the context of this system, there is a presumption that each EU Member State complies with ECHR fundamental rights in order to guarantee fundamental rights and minimum reception conditions for asylum seekers (Velluti 2014).[17] This initial position changed in the well-debated M.S.S. v. Belgium and Greece case (2011), where the ECtHR ruled that, although being in compliance with the Dublin Regulation, unacceptable detention conditions can amount to a violation of Article 3 ECHR. The mutual trust presumption upon which the CEAS is based was considered rebutted for the first time. Additionally, the CJEU, in the joint cases of N.S. and M.E. (2011), adopted the identical reasoning: An asylum seeker cannot be transferred to the responsible Member State if there is a real risk that he/she will suffer inhuman or degrading treatment. Hence, the Dublin system must be restricted in situations where asylum seekers are sent to another Member State, where there is a 'serious risk'

[16] Dougoz v. Greece (2001), Riad and Idiab v. Belgium (2008), S.D. v. Greece (2009), A.A. v. Greece (2010), Muskhadzhiyeva and Others v. Belgium (2010), M.S.S. v. Belgium and Greece (2011), R.U. v. Greece (2011), Kanagaratnam and Others v. Belgium (2011), Bygylashvili v. Greece (2012), Popov v. France (2012), A.F. v. Greece (2013), Horshill v. Greece (2013), Tabesh v. Greece (2013), C.D. and Others v. Greece (2013), B.M. v. Greece (2013), Ahmed v. Malta (2013), F.H. v. Greece (2014), Tatishvili v. Greece (2014).

[17] For example in K.R.S. v. United Kingdom (2008) the removal of the asylum applicant from the U.K. to Greece would not constitute a violation of art. 3 because Greece, as a Contracting State has undertaken to abide Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed by art. 3.

of Charter rights violations. This judgment was the first time the CJEU has acknowledged in the AFSJ, explicitly, the need to limit mutual trust on fundamental human rights grounds (Janssens 2013). Consequently, there cannot be a blind presumption that all the Member States adhere to the same standards for receiving, and when deemed necessary, detaining asylum seekers.

It is important to consider the high threshold the CJEU applied for incompatibility with fundamental rights in the N.S. and M.E. cases: A transfer under the Dublin Regulation would be incompatible with fundamental rights if there are "*substantial grounds* for believing that there are *systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the responsible Member State, resulting in inhuman or degrading treatment, within the meaning of Article 4 Charter".[18] According to the CJEU, at issue here is the *raison d'être* of the EU and the creation of an AFSJ, and more particularly the CEAS, based on mutual confidence and the presumption of the compliance of all Member States with EU law, and fundamental rights.[19] Accordingly, the applied threshold is justified on the assumption that all Member States respect fundamental rights and by the alleged existence of mutual trust between the Member States in applying the Dublin Regulation. As a result, the CJEU argued that considering the slightest infringements of measures building the CEAS, as sufficient to prevent the transfer of an asylum seeker to the responsible Member State under the Dublin Regulation, would be incompatible with the aims of the Dublin Regulation.[20] The Court further reiterated the objective of the Dublin Regulation in designating, quickly and in a clear and effective way, the responsible Member State to examine the asylum claim (Mitsilegas 2015).[21]

In the Abdullahi judgment, the CJEU reiterated the principle objective of the Dublin Regulation: The establishment of a clear and workable method to rapidly determine the responsible Member State for the processing of an asylum application.[22] As a result, the efficiency thinking was reaffirmed by the Luxembourg Court, and as such, only 'systemic deficiencies' in the responsible Member State asylum system are justified to challenge a Dublin transfer.[23] The CJEU is not a human rights court. Its purpose is to ensure that enacted EU law is respected, correctly interpreted and applied in the Member States. The ECtHR, on the other hand, has a more distinct human rights objective, but also applies a high threshold when assessing potential Article 3 ECHR violations resulting in inhuman or degrading treatment. The Strasbourg Court, in its rulings, does not emphasize efficiency objectives, but rather, the cumulative nature of conditions that may amount to a breach of Article 3 ECHR. For example, in the Tarakhel case (2014), the argumentation was based on the applicants' inherent vulnerability, combined with the inadequate living conditions in Italian detention centres which amounted to a violation of Article 3 ECHR (European Council on Refugees and Exiles 2015).

The case law of both European courts brought to an end the automatic presumption of Member States' full compliance with fundamental rights. Consequently, a Member State cannot transfer an asylum seeker to the responsible Member State where they cannot be unaware that there are systemic deficiencies in the asylum procedure or in the reception conditions in that Member State which may amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. As such, the European Courts introduced a duty on the Member States to examine the impact

[18] See par. 86 of the joined cases N.S. and M.E. (2011).
[19] Ibid., par. 83.
[20] Ibid., par. 84.
[21] Ibid., par. 84–85.
[22] See par. 59 of Shamso Abdullahi v. Bundesasylamt (2013).
[23] Ibid., par. 60.

of the transferred person fundamental rights on a case-by-case basis (Mitsilegas et al. 2014; Mitsilegas 2015). This rationale was also adopted in the Dublin III Regulation, where article 3(2) states: "*it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union*" (European Union 2013b). By explicitly introducing a mandatory human rights refusal ground in EU asylum law, based on grounds of distrust in another Member State, both the EU and the Member States recognized this problem as a common concern in need of being dealt with at a European level. As a result, the equal goodness of the Member States and the accepted diversity incorporated in the *unity in diversity* rhetoric reached its limits. In the Sharifi and Others v. Italy and Greece case, in line with the M.S.S. ruling, the ECtHR further stressed the Member States' obligation to assess the risk of Convention violations when applying the Dublin Regulation. The State carrying out the transfer is obliged to ensure that the destination country offers adequate guarantees in respecting the human dignity of the person involved and the rights under the ECHR and the Charter (The AIRE Centre 2014).

Jurisprudence in the Area of Judicial Cooperation in Criminal Matters

The protection of fundamental rights is considered to be one of the general principles on which the EU is founded. As a result, Framework Decisions, such as the EAW and the Transfer of Prisoners, must be consistently implemented, applied and executed in a manner that does not infringe EU law (Janssens 2013).[24] In the aftermath of the N.S. and M.E. judgments, the question arises of whether the mutual trust limitations in the field of asylum can also be applied to criminal matters, in which fundamental rights violations may set a limit on the principle of mutual recognition. In the Radu case (2013), expectations were high if the CJEU would draw inspiration from asylum case law. The Luxembourg Court was asked if a national court is entitled not to execute an EAW when there is a breach of fundamental rights: the right to be heard (this ground for non-execution is not provided in the Framework Decision). The CJEU reiterated in the Radu case the purpose of the EAW in facilitating and accelerating judicial cooperation and ruled that there was no violation of Charter rights. The different outcome between the Radu (2013) and the N.S. and M.E. (2011) rulings can be explained that, in the latter case, a moderation of the mutual trust principle was necessary to avoid a breach of Article 4 of the Charter. In the Radu case, there was no breach of the Charter,[25] and thus, no need to moderate the MR principle (Janssens 2013).

In the Melloni case (2013), the CJEU ruled that the Charter (Article 53) does not give Member States the power to apply higher fundamental rights standards when a situation falls within the scope of EU law and can compromise the "primacy, unity and effectiveness of EU law".[26] According to Advocate General Bot, the level of protection in the EU reflects a balance

[24] Due to the delay in the implementation of the Transfer of Prisoners Framework Decision, the CJEU did not have to rule concerning the scope, application and/or implementation of this Framework Decision at the time of writing this article.

[25] See for example par. 39: *"... the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued."* (Radu 2013)

[26] See par. 60 of the Melloni case (2013).

between the need to ensure the effectiveness of EU action and the need to provide adequate fundamental rights protection. In a situation where a Member State invokes a higher level of protection, this would upset the balance and therefore jeopardize the application of EU law.[27] From a cosmopolitan perspective, the CJEU, by highlighting the primacy of the EU Charter, set boundaries for the Member States' diversity, although this diversity may result in higher fundamental rights protection. As a result, the *otherness* of the Member States is accepted to the extent that it does not compromise the unity and effectiveness of EU law (Bot 2012). The CJEU ruled in favour of a unity, but a *unity in diversity* with limitations and boundaries.

The ECtHR, from an early stage, has been vigilant in the protection of individuals where there is a substantial risk that an individual would suffer torture, or inhuman or degrading treatment when sent to another country (Guild and Carrera 2010). When people are incarcerated, they do not lose the protection of their rights guaranteed by the ECHR. On the contrary, persons in custody are in a vulnerable position, and the authorities are under a duty to protect them.[28] When people are deprived of their liberty, the ECtHR accepts that this inevitably leads to a restriction of certain rights, but certain imprisonment conditions are so severe that they may result in a violation of Convention rights. The Strasbourg Court has highlighted, on frequent occasions, that material detention conditions in the EU Member States have violated Article 3 ECHR. In its rulings, the ECtHR frequently refers to the norms developed by the CPT. These norms and standards are used to assess whether or not the detention conditions in a specific case reach the minimum level of severity required to fall within the scope of Article 3 ECHR, despite the absence of an intent on behalf of a Member State to humiliate a detainee (Vermeulen et al. 2011a). In certain cases, overcrowding in itself can constitute a violation of Article 3 ECHR,[29] but more often it is the combination and the cumulative effects of conditions (overcrowding, together with the duration of the sentence, unsanitary conditions, lack of daylight, ventilation, etc.) that eventually result in a violation of Article 3 ECHR.[30] Furthermore, the ECtHR, in the form of pilot-judgments, has an interesting instrument at its disposal for repetitive cases deriving from a common dysfunction. By using this technique, the Strasbourg Court can identify the underlying structural problems of repetitive cases against a country and impose an obligation on the state under scrutiny to address the identified problems. The ECtHR has already issued such a judgment in the Torreggiani and others v. Italy case (2013). The structural and systemic problem of overcrowding, specifically, the cramped personal space in the prison cells, coupled with the length of imprisonment, subjected the applicants to hardship and suffering which amounted to a violation of Article 3 ECHR.

The Luxembourg Court, on frequent occasions, has affirmed that, in the context of the EAW, mutual recognition does not imply an absolute obligation to execute a warrant.[31] The question can be raised whether or not it is acceptable that the CJEU does not apply the same human rights approach in the field of judicial cooperation in criminal matters in comparison to EU asylum law? In order for the CJEU to judge over a certain regulation, a case need to be referred to them. A case is currently pending before the CJEU (Aranyosi) and has great potentials to become the

[27] See par. 125 of the opinion of Advocate General Bot delivered in case C-399/11, criminal proceedings against Stefano Melloni (Bot 2012).
[28] See par. 120 of Orchowski v. Poland (2009).
[29] See for example the cases of Labzov v. Russia (2005), Andrey Frolov v. Russia (2007), Kantyrev v. Russia (2007), Lind v. Russia (2007).
[30] See for example the cases of Peers v. Greece (2001), Kalashnikov v. Russia (2002), Slawomir Musial v. Poland (2009), Orchowski v. Poland (2009), Florea v. Romania, (2010), Canali v. France, 25 April (2013), Radulescu v. Romania (2014), Vasilescu v. Belgium (2014), Adrian Radu v. Romania (2015).
[31] See for example par. 50 of I.B. (2012), par. 64 of Melvin West (2012), par. 36 of Jeremy F. (2013).

successor of the N.S. and M.E. judgement in the area of judicial cooperation in criminal matters.[32] The logic outcome may be that the CJEU applies the same human rights approach in this field resulting in a mandatory human rights refusal ground. After all, it may not be surprising that, in asylum cooperation, a mandatory refusal ground has already been implemented in EU legislation. This policy area transferred at an earlier stage to the Community method of decision making.[33] As a result, interstate cooperation in asylum matters has a longer history in policy development than judicial cooperation in criminal matters. This policy area can be labelled as relatively 'new' with the first instrument, the EAW, coming into operation in 2004. Interstate cooperation in asylum, through the Dublin system, dates from the early 1990s with the signing of the Dublin Convention which entered into force in 1997 (European Communities 1997a).[34]

The Clash Between Judicial and Political Realities

The case law of the ECtHR and the CJEU reveal that the minimum fundamental rights harmonization in the Member States does not prevent essential shortcomings in the Member States' detention facilities. The European Courts can set these cosmopolitan principles, although this is in sharp contrast with the political realities dominating the debates in the areas of asylum and judicial cooperation in criminal matters.

In the previously discussed N.S. and M.E. judgments, inspired by the M.S.S. v. Belgium and Greece case, the CJEU found that the Member States have a duty not to transfer asylum seekers when there is a 'substantial ground' for believing that, due to systemic flaws in the asylum procedure, the asylum seeker would face 'a real risk' of being subjected to inhuman or degrading treatment within the meaning of Article 4 Charter (Janssens 2013). This mandatory refusal ground is certainly beneficial for the individual in question, but essentially initiates grounds of distrust in EU asylum legislation: Member States cannot assume anymore that the detention conditions in another Member State will not amount to breach Convention or Charter rights. Instead of trusting another Member State to be compliant with these fundamental guarantees, an assessment needs to be made on a case-by-case basis. The emphasis of both Courts in which only systemic deficiencies can amount to a violation of Article 3 ECHR or Article 4 Charter highlights the fact that differences between the Member States' material detention conditions are accepted, although only to a certain extent. Minor or trivial breaches, which are not systemic in nature, cannot amount to degrading or inhuman treatment, even if these breaches negatively impact the living conditions of the person involved. A cosmopolitan Europe needs to be grounded on common norms in order to deal with differences. The systemic nature is the threshold which needs to be fulfilled in order to challenge the transfer of asylum seekers under the Dublin Regulation and can be labelled as the common norm

[32] C-404/15 Aranyosi: A German court raised the question if the extradition for the purpose of prosecution is impermissible where there are strong indications that detention conditions in the issuing state infringe the fundamental rights of the person concerned. Furthermore, in such circumstances can or must the executing state decide on the permissibility of the extradition based upon the assurances given that detention conditions are compliant?

[33] With the entry into force of the Treaty of Amsterdam in May 1999 only police and judicial cooperation in criminal matters continued to remain under the auspices of the old EU Third Pillar (Mitsilegas et al. 2014).

[34] The Dublin system was indirectly already applied beginning on 26 March 1995 when the Schengen acquis resulted in the abolition of border controls between Belgium, Germany, France, Luxembourg, the Netherlands, Spain and Portugal (European Commission 2010).

limiting Member States' *otherness*. With the implementation of this mandatory human rights refusal ground in EU asylum law, the *equal goodness* of the Member States' asylum systems is accepted, as long as they do not trespass this boundary. The fact that the EU legislature has also incorporated the rationale of the European Courts into asylum law, reflects the increasingly cosmopolitan orientation of the EU in this area.

On the level of the European Courts, cosmopolitan norms are protected. On a political level a different picture appears where political realities may hamper these cosmopolitan norms. In the area of asylum, certain Member States cannot obey the detention and reception standards set by the EU legislator and the European courts due to the large and uneven influx of asylum seekers in combination with financial constraints. Initially, Germany made bold statements and wanted to 'lead by example' by applying an open door policy for Syrian refugees. In a cosmopolitan perspective this should be encouraged. On the other hand, from a strategic point of view it opens opportunities for 'cherry picking' behavior which was aimed to avoid at the first place with the establishment of the CEAS. The debates on the Relocation scheme proposed by the Commission and President Juncker is another example where political realities dominate the debate and where the lack of international solidarity is extremely visible. The aim of this plan is to relieve the burden of the Member States which are located at the periphery and consequently receive a highly uneven amount of asylum seekers. An initial plan to relocate 40,000 people was adopted by the Council (Council of the European Union 2015b). A week after, the vote on a second Commission proposal to relocate 120,000 refugees was highly contested resulting in a rarely applied qualified majority vote (Council of the European Union 2015a).[35] The lack of consensus reflects the internal divergent positions within the Member States. Furthermore, the lack of solidarity in this debate is amplified by the reaction of certain Member States to the influx of asylum seekers by closing borders, building walls or fences and emphasising European (Christian) values. This does not reflect protecting cosmopolitan norms, on the contrary, it resembles more a 'beggar they neighbor' spirit. In the area of judicial cooperation in criminal matters, the tensions between the judicial and political reality is less visible. In this area, not third country nationals but nationals from EU Member States are being surrendered to another Member State for criminal investigation or to execute a custodial sentence. The EAW is widely applied throughout the EU and also the FD 909 is now implemented, although with delay, by most Member States. Detention conditions have proven to be an essential element in surrender cases. The Aranyosi case will shed more light on this matter whether or not the CJEU will uphold cosmopolitan norms or if it will prioritise the effectiveness of the instrument.

When going back to the features of cosmopolitanism explained earlier. The first feature relating to the limitations of sovereignty is fulfilled because asylum and transnational crimes are areas with cross-border activities which cannot be tackled effectively by one Member State alone. As a result, in the last two decades we witnessed, to a certain extent, the shift of certain policy areas from the national to the EU level. The promotion and respect of human rights, by extent also the rights granted to people deprived of their liberty, are 'unobjectionable' norms or considered impossible to oppose openly (Elgström 2005). This is also reflected by the European courts and the EU legislator by incorporating a mandatory human rights refusal ground in EU asylum legislation. Again this judicial reality has to be balanced to the political realities. When particular (Christian) values are emphasised by some Member States in policy debates related to the large uneven influx of asylum seekers in Europe, the moral equality of all

[35] Czech Republic, Slovakia, Romania and Hungary voted against, Finland abstained (Council of the European Union 2015a).

individuals, another feature of cosmopolitanism, is seriously at risk. When looking at another cosmopolitan feature: The need for global solidarity with struggles for human rights, this was envisioned in the Relocation scheme proposed by the Commission. Despite this call for increased solidarity, a consensus was not reached between the Member States. In the area of judicial cooperation in criminal matters, it will depend on the future interpretation by the CJEU on fundamental rights guarantees whether it decides to further protect cosmopolitan norms as it has done in the area of asylum.

Cosmopolitan Reflections in the EU Framework?

Building an Area of Freedom, Security and Justice constructed on the mutual trust assumption requires that the Member States should be *united in diversity*. The asylum and judicial systems of the Member States are initially considered as *equally good*. The European Courts play a key role in challenging the apparent unproblematic nature of the *equal goodness of otherness* in the EU Member States, in protecting commonly accepted norms and in stimulating policy change. In the area of interstate cooperation in asylum matters, both the ECtHR and the CJEU have indicated the acceptable level of *otherness* and have highlighted the boundaries of mutual trust. As a result, EU legislation has limited automaticity in the Dublin system by introducing a mandatory human rights refusal ground when transferring asylum seekers to another Member State when there is a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

The article illustrates that when the Member States' diversity and *otherness* is too substantial, meaning that it may result in systemic human rights deficiencies, the acceptable level of the diversity of the Member States reaches its boundaries. This is the common norm that needs to be protected in order for the EU to pursue common obligations amidst their diversity. Diversity and the *otherness* of the Member States are still accepted, because minor violations will not reach the threshold to violate the Convention or Charter rights. The fact that the EU legislature incorporated the rationale of the European Courts in asylum law reflects the increasing cosmopolitan orientation of the EU in building an AFSJ. Next to this judicial reality there is also a political reality which is in sharp contrast to the cosmopolitan norms protected by the Courts. A lack of solidarity between the Member States is present when it comes to protecting third country nationals who seek international protection. Whether the CJEU will draw inspiration or parallels from asylum jurisprudence in surrender cases will become clear in the near future with the Aranyosi case. Whether the Luxembourg Court will also initiate a mandatory human rights refusal ground limiting the mutual recognition principle in criminal matters remains, for the time being, unanswered. Despite the analysed cosmopolitan orientation by the EU in building an AFSJ, it is important to keep in mind that this cosmopolitan orientation is not a finished process nor absolute, but it constitutes an ongoing process in how to deal with diversity on a transnational level.

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