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KALLIOPI KOUFA FOUNDATION
FOR THE PROMOTION OF INTERNATIONAL
AND HUMAN RIGHTS LAW

Jean Monnet Project | EURIS

EU Responsibility in the International System

Working Paper No. 6

Bivolaru and Moldovan v. France: Re-calibrating the relationship between mutual trust and equivalent protection in the European Arrest Warrant framework

Christos Zois

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I. Introduction

The place of human rights within the European Union (EU/Union) has been a bone of contestation for many decades. Despite the clear provision of Article 2 of the Treaty on the EU[1] that respect of human rights constitutes one of the Union's founding values, the history of the EU establishment -and more specifically the primacy of trade liberalisation and the creation of a single market- makes it clear that the EU could not and still cannot be primarily regarded as a human rights organisation.[2] The protracted efforts for the EU to finally accede to the European Convention on Human Rights (ECHR),[3] a legal obligation provided by Article 6(2) TEU, attest towards this tension.

At the same time, as the EU integration project intensifies, fundamental rights have progressively gained more prominence regarding the construction of a Union that is 'based on the rule of law'.[4] This intensification, which has been predominantly based on the principles of mutual trust and recognition, has raised new concerns regarding the relation between the judicial systems of the EU and the ECHR and especially the responsibility of the EU Member States in relation to their obligations under the ECHR. To deal with this contradiction, the European Court of Human Rights (ECtHR/Court) established the *doctrine of equivalent protection*, which aims to foster international cooperation and human rights protection as it will be analysed in the main part of the Working Paper.

Against this background, the present Paper will try to elucidate the new era of judicial dialogue between the CJEU and the ECtHR, opened by the latter's decision on thf *Bivolaru and Moldovan v. France case*, regarding the co-existence of mutual trust and human rights protection in the area of the European Arrest Warrant (EAW), which constitutes one of the primary elements of the EU's judicial cooperation in criminal matters architecture. In Part II, we briefly summarise the facts of the case and the decision reached by the Court. In Part III, we delve more into the origins of the equivalent protection doctrine, its previous function in relation to the EAW and the

[1] Consolidate Version of Treaty on the European Union [2012] OJ C 326/13.
[2] S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646-8.
[3] For an overview of the process, see the 'EU Accession' tab in the Blogspot of Prof. J. Callewaert, available: https://johan-callewaert.eu/category/eu-accession/ (last accessed: 23 March 2023).
[4] C-294/83 *Les Verts v Parliament,* 23.4.1986, ECLI:EU:C:1986:166, §23. On the constitutional nature of the 'rule of law' principle in the EU see L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law 107.

importance of the recent *Bivolaru and Moldovan* decision. Part IV briefly examines the importance of human rights guarantees in relation to prison conditions for the execution of EAWs. Part V provides some tentative conclusions.

II. Summary of the Case

A. Facts of the case

The two applicants are Romanian citizens. **Mr. Moldovan** was convicted in 2015 by a Romanian court on human trafficking accounts, which had been conducted both in Romania and France, and sentenced to imprisonment of seven years and six months. Following the issuance of a European Arrest Warrant by the Romanian authorities, he was arrested in June 2016 in France. Before the Riom Court of Appeals the applicant claims that his surrender had to be -at least- suspended until the French authorities acquired adequate information for the conditions of his imprisonment in Romania. Based on the information provided by the competent Romanian authorities on the compatibility of prison conditions with Article 3 ECHR, the French Courts decided on the applicant's surrender. After his appeal to the *Cour de Cassation* was dismissed, the applicant was surrender in August 2016.

Mr. Bivolaru has been the leader of a spiritual movement based on the principles of yoga since the 1990s. In 2007 he was granted refugee status in Sweden, and he was issued a refugee permanent residence permit which also allowed him to travel. In June 2013 he was sentenced *in absentia* from the Romanian High Court of Cassation to six years of imprisonment on charges of sexual relations with a minor. The Sibiu Regional Court issue an EAW for his arrest for the enforcement of the abovementioned decision.

In February 2016, the applicant was arrested in Paris while travelling with falsified Bulgarian travel and identification documentation. Before the Paris Court of Appeals, he claimed that, due to his political and religious positions, based on which he was recognised as a refugee in Sweden, he would face degrading and inhumane treatment if surrendered to the Romanian authorities. Responding to the French court's request for further information, the Swedish authorities verified that they did not intend to revoke or modify the applicant's refugee status. In June 2016, the French authorities decided to surrender the applicant to Romania, because his sentencing happened for

ordinary criminal conduct and not his political beliefs and at the same time they disregarded his request for the submission of a preliminary request to CJEU, by claiming that the Framework Decision 2002/584/JHA (EAW Framework-Decision) did not include refugee status as one of the reasons to suspend the execution of an EAW. The *Cour de Cassation* verified the Court of Appeals decision.

B. The European Court of Human Rights' decision

First, the Court reiterated its established case-law that the Contracting States remain bound by the ECHR when fulfilling their obligations as Member States of other International Organisations. However, in case the respective International Organisation(s) can provide a level of human rights' protection equivalent to the Convention, they might be justified for the measures taken, if this presumption of equivalence cannot be rebutted due to 'manifest deficiencies'. Then the Court proceeded to examine whether the execution of EAW in the present case could be brought under this presumption.

Examining **Mr. Moldovan's claims,** the Court tried to determine whether France was afforded any discretionary not to fulfil its obligations under EU law and postpone his surrender pursuant to the EAW issued by the Romanian authorities. In this regard, it concluded that in the application of EAWs EU Member States lack any discretion, since the procedure is exhaustively provided in the EAW Framework-Decision and the allowable exceptions in relation to human rights violations have been limited via the CJEU's *Aranyosi and Căldăraru* jurisprudence. This was also the case for the EAW issued against Mr. Moldovan and the French authorities' ability to take additional protective steps. Second, since the CJEU case-law has been clear on the matters of EAW execution no additional action was required by the French courts, which satisfied the requirement that the entirety of the EU fundamental rights' protection had been deployed. The Court concluded that *prima facie* the presumption of equivalent protection was applicable in the present case.

Then, it proceeded to examine whether the presumption could be rebutted based on the facts of the case, due to potential 'manifest deficiencies' regarding human rights' protection in Romanian prisons. The Court concluded that, based on the evidence provided by the Applicant regarding both the systemic deficiencies of the Romanian prison system and the specific prison where the Applicant would be incarcerated, the

French courts failed to properly evaluate the dangers of him being subjected to degrading or inhumane treatment.

After the Court concluded that the presumption of equivalence had been rebutted, it proceeded to examine whether the French courts' decision was consistent with the ECHR. *First,* it determined that the French authorities had failed to take under appropriate consideration its case law on the spacing conditions in the Gherla prison, where the applicant would be incarcerated. *Second,* it considered that the information provided by the Romanian authorities were general in nature not safeguarding the level of protection envisioned by the Convention and in any event, they were not included in the French courts' decisions. *Third,* the alternative human rights' guarantees requested by the French authorities were not sufficient to ensure that the Applicant would not be subjected to conduct contrary to Article 3.

The Court's assessment in the case of **Mr. Bivolaru** was rather different. The Applicant claimed that due to his refugee status he was in danger of suffering degrading or inhumane treatment if he would be surrendered to Romania. Regarding the presumption of equivalence, the ECtHR concluded that it did not apply in the specific case because the French courts had denied his request to submit a preliminary request in relation to the consequences of his refugee status in the execution of the EAW; therefore, they failed to make use of the entire EU judiciary system. Against this background, the Court conducted its regular scrutiny in relation to violations of Article 3 ECHR.

First, the Court reiterated the fact that the EAW Framework-Decision does not include an individual's refugee status as reason for the non-execution of an EAW. However, as mentioned above, the French courts had requested the relevant information from the Swedish authorities, which indicated that they were cognisant of the potential of the applicant being politically prosecuted for his ideas. The Court concluded that pursuant to the official case file and the information received, there was no indication that Mr. Bivolaru was either prosecuted or that Romania requested his surrender for his political ideologies. Thus, the French courts had sufficiently scrutinised whether a potential violation of Article 3 ECHR could happen.

Regarding the imprisonment conditions, the ECtHR concluded that the French authorities did not have sufficient information to determine the potential danger of

degrading or inhumane treatment, because the applicant had provided generalised and not sufficiently substantiated information regarding the prosecution of political opponents in Romania in general. For these reasons, the ECtHR did not find any violation of Article 3 ECHR by France in the execution of this EAW.

III. Judicial cooperation in criminal cases and equivalent protection doctrine

A. The ECtHR doctrine of equivalent protection and the privileged status of the EU's legal system

In cases pertaining to the expulsion of aliens from the territory of one of the Contracting Parties, the ECtHR has steadily pronounced that, according to article 3 ECHR,[5] States are under the *obligation* to halt or effectively terminate any relevant decision in case they have trustworthy and updated information that the person will face torture and/or degrading and inhumane treatment if returned to the third State.[6] This obligation of States exists regardless of the regularity of the aliens' status and most importantly regardless of the legal basis upon which the return/expulsion has been mandated,[7] thus incorporating also the case of surrendering individuals pursuant to an EAW.

The inherently awkward -implicitly antagonistic- co-existence between the legal systems of the ECHR and the EU has been further tested as the EU integration became more expedient and the Union started acquiring regulatory competences in areas that might (negatively) affect the protection of human rights. This is especially prevalent in the case of the post-Lisbon configuration of the EU Area of Freedom, Security and Justice (AFSJ), which includes among other the judicial cooperation in criminal procedures. The ECtHR aiming to achieve a balance between the need to enhance international cooperation while ensuring an adequate level of protection for human rights developed the doctrine of equivalent protection.[8] More specifically, the

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[5] *Soering v United Kingdom*, App no 14038/88, Series A no. 161, §§88-91.

[6] *Ilias and Ahmed v Hungary* (Grand Chamber), App no 47287/15, 21 November 2019, §§125-126· European Court of Human Rights Registry, Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture, Council of Europe, 2022, p. 21, §83.

[7] *Cf. Khasanov and Rakhmanov v Russia* (Grand Chamber) App nos 28492/15 and 19975/15, 29 April 2022, §94.

[8] For an extended presentation of the case law of the European Court of Human Rights and the European Commission on Human Rights on the doctrine of equivalent protection see, C Zois and V Pergantis, 'The Doctrine of Equivalent Protection before the European Court of Human Rights', EURIS Training Manual

doctrine provides, on the one hand, that the Contracting Parties remain bound by their ECHR obligations while participating in an(other) International Organisation;[9] on the other hand, though, and in light of the need to further cooperation, the ECtHR resorts to this doctrine in order to delineate the specific cases where its level of human rights scrutiny in relation to States' conduct can -allowably- be lowered and/or qualified based on specific criteria.[10]

Against this background, the Strasbourg Court has established a two-level test in order to specify in which cases the doctrine of equivalent protection must be applied. *First*, the State under question must implement an obligation which derives from the law of the International Organisation to which it is part and without having any margin of appreciation or manoeuvre regarding the specificities of its application.[11] This obligation resonates with the doctrine's main aims; if States have the possibility to determine the outcome of their conduct, then the institutional veil between them and the International Organisation is pierced[12] and they retain their primary obligation to protect human rights.[13] *Second*, the International Organisation must provide both substantive and procedural guarantees that the level and mode of protection of human rights is equivalent -not necessarily identical, though- to that ensured by the ECHR.[14]

The EU's legal system holds the most privileged position among the various International Organisations when interacting with Strasbourg; more specifically, the ECtHR has determined that the EU enjoys *a presumption of equivalence* for three reasons. *Primo,* fundamental rights are regarded as an indispensable pre-condition for

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No. 1, October 2021, available: https://www.jm-euris.eu/wp-content/uploads/2021/10/EURIS-Manual-1.pdf (last accessed: 23 March 2023).

[9] *Matthews v United Kingdom*, App no 24833/94, 18 February 1999, §§29 and 32-34.

[10] *Michaud v. France*, App no 12323/11, 6 December 2012, §104.

[11] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, App no 45036/89, 30 June 2005, §157 (hereafter *ECtHR Bosphorus Airlines v Ireland*); *Michaud v France*, *ibid.,* §103· *Avotiņš v Latvia*, App no 17502/07, 23 May 2016, §105. For a detailed analysis and discussion on the case law of the Strasbourg Court regarding the first part of the Bosphorus test on the margin of appreciation enjoyed by States when implementing International Organisations' law see, V Pergantis, 'The Contours of the State Involvement Requirement in the Framework of the ECtHR's Doctrine of Equivalent Protection' in L. Boisson de Chazournes *et al*. (eds), *Melanges en l'honneur de la professeure Haritini Dipla* (A Pedone 2020) 365-382.

[12] J d'Aspermont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 5 International Organizations Law Review 91.

[13] E Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) 91-100.

[14] *Bosphorus Airlines v Ireland* (n 11) §§155-156· *Michaud v France* (n 10) §§105· *Avotiņš v Latvia* (n 11) §101.

assessing the legality of Union acts,[15] considering that the Union is structured around the rule of law.[16] *Secundo,* the ECtHR has considered as crucial the jurisprudence of the CJEU on the issue of fundamental rights and especially the fact that the latter quite often and consistently refers to the Strasbourg case-law on human rights protection. *Tertio,* the ECtHR has given additional value to the fact that following the Treaty of Lisbon, the EU Charter of Fundamental Rights (CFR) has been elevated to the same level as the other EU Treaties, which means that all EU acts, some of which the Union Member States are called to implement even without discretion, must be compatible with its fundamental rights provisions.[17] Against this background, the ECtHR case law has highlighted the crucial role of the CJEU for the protection of human rights in the Union; more specifically, in order for the presumption to remain applicable, it is necessary that the entire judicial mechanism aiming at the procedural supervision of human rights respect has been employed.[18] However, in the *Bosphorus case,* the ECtHR almost immediately qualified its equivalence findings; it pronounced that the presumption in favour of the Union can be rebutted if, based on the particular circumstances of the case at hand, the protection of human rights provided is *manifestly deficient*.[19] However, such a finding of manifest deficiency, does not automatically entail the violation of the ECHR on behalf of the State which remains able and responsible to fulfil its Convention obligations.[20]

B. The EAW, judicial cooperation within the EU and the presumption of equivalent protection before *Bivolaru and Moldovan v France*

The EU mechanisms on judicial cooperation in criminal cases, which are premised on the principles of mutual trust and recognition, raise important issues are far as equivalent protection is concerned. Although a term never found in the text of EU law's primary treaties, the CJEU has pronounced that mutual trust 'is of

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[15] For an analysis on the role of fundamental rights in the EU legal system see, X Groussot, L Pech and GT Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (2011) Eric Stein Working Paper No 1/2011, available: http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf (last accessed: 20 March 2023).

[16] C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission,* 3 September 2008, ECLI:EU:C:2008:461, §316.

[17] *Michaud v France* (n 10) §106· *Avotiņš v Latvia* (n 11) §102.

[18] *Avotiņš v Latvia*, *ibid.,* §104· *Bivolaru and Moldovan v France*, App nos 40324/15 and 12623/17, 25 March 2021, §§98-99· *Michaud v France* (n 10) §104.

[19] *Bosphorus Airlines v Ireland* (n 11) §156.

[20] Ravasi (n 13) 145.

fundamental importance' for the achievement of the Union's goal for an area without internal borders.[21] Based on the presumption that because of and through their participation in the European Union all Member States have internalised and achieved in their domestic legal systems a fundamental level of respect for fundamental rights, the principle of mutual trust (and recognition) obliges Member States to almost automatically accept that all other States provide -at least a minimum- equivalent framework of human rights protection and security.[22] In this regard, they shall not, besides in exceptional circumstances, conduct any check regarding the respect of human rights during the execution of decisions[23] in the area of criminal cooperation, including the EAW. Besides, the text of the EAW Framework-Decision (Articles 3-5) provides an exhaustive list of reasons for an EAW automatic and voluntary non-execution, which are based only on a case-by-case evaluation and not on the systemic problems in human rights protection within a Member State.

However, the almost mechanical understanding of the CJEU regarding the role of mutual trust in the EU legal order, has been criticised for endangering the respect of human rights within the AFSJ.[24] For this reason, in the case of *Aranyosi and Căldărarυ* the CJEU clarified that the principle of mutual trust should not be equated with 'blind trust'[25] but must be relativised in cases there is an actual danger of violation of an individual's *(absolute) fundamental rights* if surrendered to a specific Member States pursuant to an EAW, including among others the danger of inhumane and degrading treatment,[26] owing to systemic fallacies,[27] including the prison conditions. More specifically, the CJEU has developed an examination framework of two-steps in order to determine in which instances the national implementing authorities can deny the

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[21] Opinion 2/13, *Accession of the European Union in the European Convention of Human Rights*, 18 December 2014, ECLI:EU:C:2014:2454, §§172, 191 and 197.
[22] N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market', European Papers 2, 1/2017, 114.
[23] *Opinion 2/13* (n 21) §191· Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. et al. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, ECLI:EU:C:2011:865, §§78-80 (hereafter *N.S. et al.*).
[24] V Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 New Journal of European Criminal Law 457, 465-471.
[25] K Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, 2015, p. 29, available: https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf (last accessed: 22 March 2023).
[26] Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198, §85· *Cf.* Case C-578/16 PPU, *C.K. et al. v Slovakia*, 16 February 2017, ECLI:EU:C:2017:127, §59.
[27] *Cf.* N.S. *et al.* (n 23) §105-108.

execution of an EAW because of the potential violation of the individual's fundamental rights. *First,* national authorities must examine, based on objective, reliable, specific and updated data -including the relevant ECtHR jurisprudence on the subject-matter- whether it is possible to detect *systemic and generalised deficiencies* regarding the imprisonment conditions, which might lead to the danger of inhumane treatment.[28] *Secondly,* national authorities are obliged to verify the existence of *the real danger that the human rights of the specific individual under question will be violated* if the EAW is executed.[29] More specifically, the CJEU has pronounced that the abovementioned examination must refer to the conditions in *the specific prison or confinement facility* where the individual challenging their surrender will be sent.[30] The second stage of examination, i.e. the determination of the personalised danger of the specific individual's human rights, includes also procedural obligations for both the Member State executing and the one that has issued the EAW: the executing State *is obliged* to ask further information in case there are doubts or concerns about the human rights conditions in the prison(s) under examination (Article 15 EAW Framework-Decision).[31] In the *Dorobantu* case, the CJEU progressed its case-law on the matter by concluding that if the above information is provided by the judicial authority that has issued the EAW, the executing authority is obliged, due to mutual trust, to rely on this specific information and consider it enough to determine the danger for human rights, at least in the absence of other more compelling evidence.[32] However, if this information is provided by non-judicial authorities, such as the Ministry of Justice, the CJEU has recognised a wider margin of appreciation to the executing authorities which are required to consider this information alongside other evidence but not ultimately rely on them.[33] On the other hand, the authority that has issued the EAW is under the obligation, pursuant to the principle of sincere cooperation as established in Article 4(3)

[28] *Aranyosi and Căldăraru* (n 26) §89-90.

[29] *Ibid.*, §91-92· N Daminova, 'The ECtHR Preamble vs. the European Arrest Warrant: Balancing Human Rights Protection and the Principle of Mutual Trust in EU Criminal Law' (2022) 42 Review of European and Comparative Law 97, 121-122.

[30] Case C-220/18 PPU, *ML*, 25 July 2018, ECLI:EU:C:2018:589, §87.

[31] *Aranyosi and Căldăraru* (n 26) §97· Case C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586, §§76-77.

[32] *ML* (n 30) §112· Case C-128/18, Dumitru-Tudor Dorobantu, 15 October 2019, ECLI:EU:C:2019:857, §68.

[33] *ML*, *ibid.*, §113.

of the Treaty on the EU, to provide information that are as accurate and updated as possible.[34]

In the past, the ECtHR had applied -somehow inconsistently- the presumption of equivalent protection in the cases of surrenders based on EAWs.[35] This elucidated the Strasbourg position that *prima facie* the almost automated character of the execution of decisions in instances of criminal cooperation is compatible with the ECHR and does not posit a danger to human rights *per se*.[36] More specifically, regarding the first stage of the evaluation, the ECtHR has determined that EU Member States do not enjoy any type of discretion when called to execute EAWs, since they are obliged to follow the substantive and procedural provisions of the EAW Framework-Decision, and, in any event, their ability to refuse any execution because of human rights concerns is curtailed and limited by the case law of the CJEU, as presented above.[37] Nevertheless, the ECtHR has clarified that the principle of mutual trust must always be applied *in accordance with the ECHR values and principles,* which entails that the presumption of equivalent protection must not be automatically applied to all cases pertaining to criminal justice cooperation, including the EAW.[38] On the contrary, the presumption can be rebutted in cases were the protection during the execution of an EAW is manifestly deficient due to the potential danger of inhumane or degrading treatment contrary to Article 3 ECHR if surrendered in another State.[39]

It is worth mentioning that the ECtHR in its decision on the *Romeo Castaño v. Belgium* case (regarding the potential violation of Article 2 ECHR) determined the quality and the intensity of the control that the executing authority must conduct in order to ensure that a minimum level of respect of human rights will be safeguarded in case of an individual's surrender pursuant to an EAW. Therefore, the executing authority shall base any potential decision not to surrender an individual on updated and detailed information, from which it can be safely derived that the *specific person will endure a serious and personalised danger* to their human rights.[40] Put differently,

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[34] *Ibid.*, §109.
[35] European Court of Human Rights Registry, «Guide on the case-law of the European Convention on Human Rights: Immigration», Council of Europe, 2022, p. 31, §64.
[36] *Pirozzi v Belgium*, App no 21055/11, 17 April 2018, §§60-61.
[37] *Ibid.*, §62· *Avotiņš v Latvia* (n 11) §107.
[38] *Pirozzi v Belgium* (n 36) §§63-64.
[39] *Cf. Avotiņš v Latvia* (n 11) §116.
[40] *Romeo Castaño v Belgium*, App no 8351/17, 9 July 2019, §§82-91.

the ECtHR aligned itself entirely with the CJEU decisions in the *Aranyosi and Căldărarv* and *ML* cases[41] by incorporating in its own test the need of the executing States to conduct a personalised check on the danger of human rights and requiring additional information from the issuing authorities; therefore, mutual trust and sincere cooperation have been indirectly incorporated in the ECHR legal system.[42]

C. *The post-Bivolaru and Moldovan era:* A new chapter in the Strasbourg-Luxembourg dialogue regarding the protection of human rights in the field of criminal cooperation

Against this background, the ECtHR decision on *Bivolaru and Moldovan v France* definitely shook new ground in the co-existence and the judicial dialogue between the Union and the ECHR legal orders, especially regarding their methodological approaches to human rights.

First, it constitutes the first decision in which the Strasbourg Court holistically and systematically examined the compatibility of the EAW with the presumption of equivalent protection, especially concerning the issue of the protection afforded by Article 3 ECHR with which it had not dealt in the past. The ECtHR confirmed its previous case law that EU Member States do not enjoy any margin of appreciation or manoeuvre when implementing a EAW, since the procedure for executing and the criteria for refusing the execution because of human rights concerns, including the danger of inhumane treatment according to Article 4 CFR (and 3 ECHR), are described in the Framework-Decision and the CJEU jurisprudence respectively.[43] Therefore, it becomes obvious that the two-stages control in the case of the EAW regarding potential human rights violations is qualitatively different from the general margin of appreciation that the Dublin II Regulation was recognising to the EU Member States and which was the basis for the non-applicability of the Bosphorus presumption in the *M.S.S. v Belgium and Greece* case.[44]

[41] Daminova (n 29) 118-119· *Romeo Castaño v. Belgium*, *ibid.,* Concurring Opinion of Judges Spano and Pavli, Section II, §1.
[42] A Martufi, 'Prison Conditions and Judicial Cooperation in the EU – What Future for the European Arrest Warrant?' (2021) 11 European Criminal Law Review 131, 151-152.
[43] *Bivolaru and Moldovan v France* (n 18) §114.
[44] *M.S.S. v Belgium and Greece* (Grand Chamber), App no 30696/09, 21 January 2011, §§338-340.

Additionally, the present case further established the indispensable character of procedural human rights' guarantees for the application of the presumption of equivalent protection, i.e. the deployment of the entire supervisory mechanism of fundamental rights protection within the EU. Albeit inconsistently, the ECtHR has examined the conditions under which the non-submission of a preliminary reference according to Article 267 of the Treaty of the Functioning of the European Union, results in the non-application of the *Bosphorus presumption.*[45] More specifically, in *Michaud v France* the ECtHR concluded that the presumption *was not applicable also because the Conseil d'Etat* denied the applicant's request to submit a preliminary reference to the CJEU, even though the specific subject-matter had not been addressed in the past.[46] Such instances elucidate the fact that implicitly and sometimes explicitly the ECtHR conflates the right to a fair trial and the Bosphorus presumption when discussing the preliminary reference procedure and engages in a more substantive and intense control than expected.[47] In the present case, the ECtHR confirmed that the French courts *by denying Mr. Bivolaru's request to submit a preliminary reference regarding a subject-matter that had not been clarified in the past*, i.e. the effect of a person's refugee status in the surrender procedures based on an EAW, did not employ the entire protection mechanism of the EU which resulted in the non-application of the Bosphorus presumption.

It is, also, rather interesting the fact that the ECtHR examined the potential violations of Article 3 ECHR in the stage of determining whether the human rights protection afforded could be regarded as *manifestly deficient.* This exemplifies what we previously mentioned about the fact that the Strasbourg Court does not consider that the (quasi-)automated character of the EAW execution endangers human rights in a general and systemic way.[48] On the contrary, the mechanism provided in the Framework-Decision as well as the two-stages test created by the CJEU are regarded

[45] C Lacchi, 'The ECrtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure' (2015) 8 Review of European Administrative Law 95, 121-3; Pergantis (n 11).
[46] *Bivolaru and Moldovan v France* (n 18) §115· *Michaud v France* (n 10) §115.
[47] J Krommendijk, '"Open Sesame"!: Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer' (2017) 42 European Law Review 46, especially 51 and footnotes there.
[48] L Mancano, 'Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship' (peer reviewed version) (2022) 56 Revista General de Derecho Europeo, 56/2022, p. 11, available: https://www.research.ed.ac.uk/en/publications/judicial-cooperation-detention-conditions-and-equivalent-protecti (last accessed: 22 March 2023).

as providing an equivalent level of protection and that any exception must be decided on a case-by-case basis.

Second, in *Bivolaru and Moldovan v France,* the ECtHR clarified its position regarding on the one hand the quality of the guarantees that must be provided by the issuing States regarding the minimum protection of the individual's human rights once surrendered and on the other hand, the intensity of the revue of this evidence that the executing State is obliged to conduct.[49] More specifically, the Court concluded that, even though they did not enjoy any discretion as already mentioned, the French courts were under the obligation to properly evaluate the already-issued ECtHR decisions regarding the detention conditions in the Gherla correction facility.[50] Secondly, they were also obliged to conduct a stronger check considering the fact that the Romanian authorities provided purely generalised information, which resulted in the failure to evaluate the existence of an individualised and real danger for Mr. Moldovan.[51]

Third, the ECtHR decision clarified -albeit indirectly and in a qualified manner- the correlation between a person's already established refugee status and their surrender pursuant to an EAW. In dismissing the French Government's submission,[52] the Court elucidated the nuances between the present case and the CJEU *I.B.* decision, where the surrender was not hindered by the applicant's refugee status since all EU Member States are automatically presumed 'safe countries' and no violation of the *non-refoulement* principle could be established.[53]

IV. Imprisonment conditions and the prohibition of torture and/or inhumane and degrading treatment under Article 3 ECHR

Even though the focus of the decision was the application or not of the presumption of equivalent protection regarding the execution of the EAWs issued against the two applicants, the ECtHR also examined the detention conditions in order to establish a potential violation of Article 3 ECHR. In this regard, it repeated its

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[49] W Julié and J Fauvarque, 'Bivolaru and Moldovan v. France: A New Challenge for Mutual Trust in the European Union?' (*Strasbourg Observers,* 22 June 2021) available: https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/ (last accessed: 22 March 2022).

[50] *Axinte v Romania*, App no 24044/12, 22 April 2014, §111· *Voicu v Romania*, App no 22015/10, 10 June 2014, §51; *Constantin Aurelian Burlacu v Romania*, App no 51318/12, 10 June 2014, §27.

[51] *Bivolaru and Moldovan v France* (n 18) §§117-126· Daminova (n 29) 123.

[52] *Ibid.*, §55.

[53] Case C-306/09, *I.B.*, 21 October 2010, ECLI:EU:C:2010:626, §§44-47.

established case-law that in the case of multi-occupancy accommodation in prison the existence of available space of less than $3m^2$/detainee constitutes a strong presumption of Article 3 violation.[54] More specifically, in *Muršić v Croatia* the ECtHR pronounced that the detainees must be able to freely move around the space[55] and clarified that its methodology is primarily based on the one also used by the Committee Against Torture (CAT), where furniture but not hygiene facilities are calculated.[56] The well-established reference of the ECtHR to the CAT methodology and findings constitutes another example of (quasi-)judicial dialogue in the field of human rights, which has also been engaged by the CJEU. Additional criteria that have been used by the ECtHR in determining whether a potential violation of Article 3 ECHR has occurred are the duration of the detention, the ability of the detainees to engage into activities outside of their accommodation venue as well as the physical and/or mental health of the individual considered.[57] Lastly, elements of crucial importance when determining the danger of inhumane and/or degrading treatment due to imprisonment conditions has been the access of detainees to clean and sanitised water and air as well as natural light, the existence and functioning of a ventilating system and the ability to use restroom facilities with respect to privacy considerations.[58]

V. Conclusion

Based on the previous analysis, it becomes evident that the ECtHR decision on the *Bivolaru and Moldovan v France* case initiated a new era in the turbulent judicial co-existence between Strasbourg and Luxembourg on the issue of human rights' protection in the area of criminal cooperation. This case was the first one in which the ECtHR engaged in a full and in-depth examination of the application of the presumption of equivalent protection in the area of the EAW. However, more interesting is the fact that the ECtHR eventually found a violation of the Convention in the case of Mr. Moldovan, where it applied the presumption of equivalent protection, while in the case

[54] *Muršić v Croatia* (Grand Chamber), App no 7334/13, 20 October 2016, §137.
[55] *Ibid.*, §114· *Lautaru and Seed v Greece*, App no 29760/15, 23 July 2020, §54.
[56] European Court of Human Rights Registry, «Guide on the case-law of the European Convention on Human Rights: Prisoners' Rights», Council of Europe, 2022, p. 13, §34.
[57] See, for example, *Muršić v Croatia* (n 54) §103· *Samaras et al. v Greece*, App no 11463/09, 28 February 2012, §57· *Varga et al. v Hungary*, App nos 14150/08 *et al.*, 10 March 2015, §76.
[58] European Court of Human Rights Registry, «Guide on the case-law of the European Convention on Human Rights: Prisoners' Rights» (n 56) p. 13, §31.

of Mr. Bivolaru, where the presumption was not applied, the Court found the level of protection offered by France as adequate.

Secondly, the decision further elucidated the ECtHR's inherent awkwardness towards the almost automated function of the principle of mutual trust in the execution of the EAW. While as shown above, the literature considers the decision as deferring completely to the CJEU jurisprudence on the matter, a close reading showcases the contradictions to which the Strasbourg court is led in order to maintain a balance between the need for European integration and its own legal integrity. More specifically, even though mutual trust is brought under the equivalent protection framework, the ECtHR demands from the national courts, such as the French ones in the present case, to conduct a higher and more rigorous level of scrutiny of the provided information before deciding on the execution of an EAW. Such a finding, though, contradicts both the EU legal order conception of mutual trust, which is premised on the existence of a common level of human rights protection in all Member States as well as the ECtHR Bosphorus presumption, since it recognises some margin of appreciation for EU Member States in the execution of EAWs.

Lastly, we cannot overlook how this decision has already started impacting the CJEU case law on EAW execution. In the *Puig Gordi et al.* decision issued in January 2023 the CJEU cautiously proceeded towards recalibrating its *Aranyosi and Căldăraru test*[59] by softening its position on the pre-eminence of cooperation in favour of human rights protection.[60]

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[59] Case C-158/21, *Puig Gordi and Others*, 31 January 2023, ECLI:EU:C:2023:57, §§102-17 and 121-26.
[60] S Top, 'Explosive Case, Cautious Ruling: The CJEU Prudently Favours Cooperation in the Puig Case' (*EJIL:Talk!*, 20 February 2023) available: https://www.ejiltalk.org/explosive-case-cautious-ruling-the-cjeu-prudently-favours-cooperation-in-the-puig-case/ (last accessed: 23 March 2023).