SHAPING THE FUTURE OF PRISONS IN EUROPE, AND EUROPE IN PRISONS

by

CHRISTOS PAPACHRISTOPOULOS

A thesis submitted to the University of Birmingham for the degree of

DOCTOR OF PHILOSOPHY

School of Law

College of Arts and Law

University of Birmingham

November 2023

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.

ABSTRACT

Structural shortcomings across EU prison systems give rise to systemic risks of human rights violations. This constitutes an issue for the EU on a principled and functional basis both. The prison reality undermines the EU values, objectives, and anti-crime judicial cooperation policies. The EU has acknowledged and responded to the problem. Actual EU initiatives in prison, while commendable, do not satisfactorily address the issue. A functionalist approach dominates, with the principled task of rescuing the EU values assuming secondary place. Going forward, the EU should reframe its current strategy, placing individual prerogatives at the heart of the discussion. It should further examine the potential of harmonising detention standards via an EU Prison Charter – though it is doubtful whether the current form of the Treaties legally allows for such a possibility. Finally, the EU should account for the indirect, yet significant impact of its judicial cooperation and criminal justice policies on the individual detainee.

ACKNOWLEDGMENTS

I have received funding from the College of Arts and Law (Doctoral Scholarship).

With my sincerest thanks to my supervisors, Dr. Marianne L. Wade, Professor John Child, and Dr. Javier S. Eskauriatza.

Any errors and omissions remain my own.

CP

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION……1

1.1 Research question and key findings……..…1

1.2 Terminology……...4

1.3 Structure, sub-questions, and methods……8

1.4 Motivation……...12

1.5 Originality, impact, and significance……19

CHAPTER 2 STRUCTURALLY INADEQUATE PRISONS SYSTEMICALLY UNDERMINING INDIVIDUAL RIGHTS……..27

2.1 Introduction……..27

2.2 Structural shortcomings in EU prisons……28

2.2.1 Overcrowding and excessive admissions……28

2.2.2 Poor detention conditions and regimes……36

2.3 Systemic risk of individual rights violations……42

2.3.1 Torture and inhuman treatment……43

2.3.2 Privacy, health, life, dignity……48

2.3.3 Proportionality of punishment……57

2.4 Conclusion……...61

PART A THE NECESSITY OF EU ACTION

CHAPTER 3 THE STATUS OF EU PRISONS: JUST A STATE PROBLEM?.....67

3.1 Introduction……..67

3.2 The EU human rights normative framework……68

3.2.1 EU primary law and the Charter of Fundamental Rights……71

3.2.2 The special importance of CoE and UN standards in the EU *acquis*……79

3.2.3 The EU penal imaginary……89

3.3 EU human rights: in need of a trigger……90

3.3.1 No self-standing EU prison competence……..91

3.3.2 The ancillary scope of EU human rights……..98

3.3.3 The EU as a *sui generis* order……102

3.4 Conclusion……107

CHAPTER 4 THE CROSS-BORDER DIMENSION OF DETENTION IN EU LAW: MUTUAL TRUST AND RECOGNITION AS CFREU TRIGGERS……...108

4.1 Introduction……108

4.2 The principles of mutual recognition and trust in the AFSJ……..109

4.2.1 *Aranyosi/Căldăraru* considering prisons in surrender proceedings…..……110

4.2.2 Mutual recognition as freedom of movement of judicial products……...112

4.2.3 The EAW and the ToP as mandating rules……..117

4.2.4 Mutual recognition relying on the presumption of equivalent rights protection……..122

4.3 Detention as subject of, and hurdle to, mutual recognition and trust……...……..…..127

4.4 Conclusion……135

CHAPTER 5 THE DOMESTIC DIMENSION OF DETENTION IN EU LAW: STRUCTURALLY PROBLEMATIC PRISONS AS A SYSTEMIC BREACH OF EU VALUES, ARTICLES 2 AND 7 TEU……...137

5.1 Introduction……137

5.2 Purely domestic prison issues outside the CFREU scope……..138

5.2.1 The potential of an expansive interpretation based on citizenship……142

5.3 Prisons within the scope of articles 2 and 7 TEU……..150

5.3.1 Prison breaches meeting the 'serious and persistent' threshold……151

5.3.2 The broad scope of article 7 TEU encompassing domestic situations……...156

5.4 Articles 2 and 7 TEU as CFREU triggers?.....161

5.5 Conclusion……165

CHAPTER 6 THE PRINCIPLED AND FUNCTIONAL IMPERATIVES FOR EU ACTION……..167

6.1 Introduction……...167

6.2 The axiological imperative: securing the EU as Union of Values and AFSJ……168

6.2.1 The constitutional dimension of the EU as Union of Values……169

6.2.2 The constitutional dimension of the EU as AFSJ……173

6.3 The functional imperative: safeguarding the legitimate, effective, and necessary EU judicial cooperation framework……...……...184

6.4 Conclusion……193

PART B SHAPING THE FUTURE OF THE EU IN PRISONS

CHAPTER 7 IDENTIFYING THE EU APPROACH SO FAR……197

7.1 Introduction……197

7.2 The judicial response: postponing mutual recognition……...197

7.2.1 The Advocate General's Opinion: proportionality assessment……198

7.2.2 Judgment of the CJEU: two-tiered approach……202

7.3 Litigation: pre-trial procedural rights Directives……208

7.4 Persuasion: the EC Recommendation……..215

7.5 Management: awareness, training, and funding……..220

7.6 Conclusion……223

CHAPTER 8 ASSESSING THE CJEU TWO-STEP-TEST RESPONSE……..225

8.1 Introduction……225

8.2 Aftermath: the post-*Aranyosi* saga……227

8.2.1 *Aranyosi II*: no response……...227

8.2.2 *Aranyosi III (ML)*: clarifying the scope of the executing state's assessment……228

8.2.3 *Dorobantu*: human rights to be weighed against the efficacy of judicial cooperation……...231

8.2.4 *E. D. L.:* escaping the first limb?.....234

8.3 Two-step approach undermining mutual trust……..237

8.4 Two-step approach not fully protecting fundamental rights……243

8.5 Conclusion……259

CHAPTER 9 ASSESSING THE EU LITIGATION, PERSUASION, AND MANAGEMENT INITIATIVES……260

9.1 Introduction……260

9.2 Procedural Rights Directives interpreted broadly: undermining legitimacy……..261

9.3 Perpetuating the *Melloni* spirit*:* effectiveness over rights……268

9.4 Conclusion……280

CHAPTER 10 TOWARDS AN EU PRISON CHARTER: CHALLENGES AND OPPORTUNITIES……..282

10.1 Introduction

10.2 Towards an EPC: potential……283

10.2.1 Conceptualising prison law……283

10.2.2 Potential EPC contents……..285

10.3 The EPC added value……290

10.3.1 Addressing the EU lacunae……...290

10.3.2 Addressing the CoE/UN lacunae……..296

10.4 The EPC legality……302

10.4.1 Conferral……..303

10.4.1.1 Article 82 TFEU……303
10.4.1.2 Article 352 TFEU……310
10.4.2 Subsidiarity, and proportionality……312
10.5 The EPC legitimacy……314
10.6 Conclusion……320
CHAPTER 11 ENHANCING THE UNION'S LEGITIMACY AS A DETENTION ACTOR……322
11.1 Introduction……322
11.2 Accounting for the impact of EU judicial cooperation on the individual……322
11.2.1 Adding a *de iure* refusal ground to the EAW/ToP FDs……323
11.2.2 Rethinking the *Aranyosi* two-step approach……326
11.2.3 Promoting mutual recognition instruments alternative to detention……328
11.2.4 Interpreting mutual trust and recognition in light of the EU penal imaginary……330
11.3 Accounting for the symbolic effect of EU criminal law on national *ius puniendi*……337
11.3.1 Conceptualising (EU) *ius puniendi*……338
11.3.2 Harmonisation of crimes and sanctions under article 83 TFEU……342
11.3.2.1 Securitised harmonisation……343
11.3.2.2 Functional harmonisation……350
11.3.2.3 Symbolic harmonisation……356
11.3.3 The influence of the EPPO: article 86 TFEU……360
11.3.4 EU initiatives nudging towards actuarial justice and segregation……366
11.3.5 National *ius puniendi* as the hole of the doughnut……369
11.4 Conclusion……373
CHAPTER 12 SYNTHESIS AND CONCLUSIONS……374
12.1 Answering the research question(s)……375
12.2 Shaping the future of EU Prisons: *quo vadis?*……378
12.3 Future research areas……383
12.4 Conclusions……387
CASES
LEGISLATION
BIBLIOGRAPHY

CHAPTER 1

INTRODUCTION

1.1 Research question and key findings

The EU is a Union of Values, founded on rights and dignity, and comprising liberal democracies. Across the EU and its states, human rights are recognised and protected equivalently – or so the story goes.[1] Yet, EU prison systems are characterised by a plethora of structural shortcomings that give rise to systemic rights violations. Empirical and judicial findings on the ground dispute the normative presumption.[2] All EU detainees are supposed to be protected equally, yet in practice some are more equal than others.[3]

The disparity between EU values and the structurally problematic reality of prisons serves as the thesis backbone. Building on such a basis, the research question at the heart of the analysis is this:

- Should and could the EU secure the creation and maintenance of detention conditions that actually safeguard detainee rights in the prison systems of its member states – and, if so, how?

The analysis shall meet two key burdens. Firstly, it shall establish the reciprocal and problematic nexus between the EU and prisons. Secondly, it shall identify

---

[1] John L Murray, *Fundamental Rights in the European Community Legal Order* [2008] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2142&context=ilj&httpsredir=1&referer = (accessed 14 November 2022); referring further to Francis Fukuyama, *The End of History and the Last Man* (The Free Press 1992).

[2] The analysis shall flesh out the prison situation in detail in chapter 2 of this thesis, providing empirical and judicial evidence to support the argument; and the EU human rights framework in chapter 3, analysing the relevant regulatory framework in place.

[3] In typical Orwellian fashion.

and evaluate current and potential pathways of EU action in prisons, and assess their potential effectiveness and legitimacy.

The main findings of the thesis may be succinctly sketched as follows.

The EU finds itself in a crisis. Its core values, objectives, and policies are under attack. This attack is current, persistent, and grave, and mounted by the Union's own member states – specifically, their detention regimes. A considerable number of EU prison systems provide for structurally inadequate detention standards, which pose systemic risks for detainee rights violation.[4] This reality raises a number of issues. Systemic violations of detainee rights contradict the EU human rights normative framework, and undermine its identity as a Union of Values.[5] Additionally, such systemic risks undermine the functioning of the EU cross-border anti-crime judicial cooperation framework, and the Union's efforts towards establishing itself as an internally frontierless Area of Freedom, Security, and Justice (AFSJ).[6] There is hence a principled and functional need both for the EU to act in prisons and address the crisis, ensuring equivalent protection of detainee rights.

The Union has recognized the tension between its own order and the prison reality. It has taken measures towards improving detention conditions, or at least towards protecting the individual from exposure to structurally precarious

[4] See, indicatively, *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015); *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013); see further chapter 2 of this thesis.

[5] See Consolidated Version of the Treaty on European Union [2012] OJ C326/13, arts 2 and 6; and also chapters 3 and 5 of this thesis.

[6] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 3; and Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, arts 67ff, particularly 82.

detention regimes.[7] Nevertheless, the EU has yet to properly realise the nature, extent, and gravity of the issue, and has failed to provide for a comprehensive remedy. This is because the focus of EU action in prisons has so far proven overly narrow. The EU response has centred primarily on safeguarding the continuous operation of its cross-border anti-crime judicial cooperation framework. The objective of securing the EU as a Union of Values emerges secondary. Functional considerations dominate over principled ones. While on paper the EU seems to acknowledge the individual as the "nucleus of the universal concept of human rights",[8] in practice it prioritises the effectiveness of EU law.[9]

Future EU action in detention should steer away from such narrow, "economistic" [10] justice. It should instead strive to address functional (effectiveness of EU law) and axiological (human rights) imperatives equally. Most importantly, such action should place the individual at the heart of its efforts. To this end, the EU should proceed as follows. Firstly, it should adopt an EU Prison Charter that harmonises detention standards, pursuing the protection of detainee prerogatives as a self-standing objective.[11] Secondly, the EU should acknowledge the impact of its judicial cooperation policies on the individual, and ensure individual prerogatives are not sacrificed for the sake of effectiveness.[12]

[7] See chapter 7 of this thesis for an overview analysis.
[8] Edna Raquel Hogemann, 'Human rights beyond dichotomy between cultural universalism and relativism' (2020) 14 The Age of Human Rights Journal 19, 23; further citing Fabio Konder Comparato, *A afirmação histórica dos direitos humanos* (Saraiva 2001) 1, 19.
[9] For such criticism, see chapters 8 and 9.
[10] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549, 552; referring further to Philipp Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002) 1, 250ff.
[11] Detainee prerogatives should be pursued as an end in themselves, rather as means to some other end – a proposition laid clear in chapters 6, 8, 9, and 10 of this thesis.
[12] Note the discussion in chapter 11.

Thirdly, the EU should account for the effect of EU criminal law on national prisons and *ius puniendi.*[13]

1.2 Terminology

The very title of this thesis poses an open invitation to a series of queries. 'Shaping the future of Prisons in Europe, and Europe in Prisons'.[14] Which prisons, which Europe, and how may these terms ever relate to one another – how may one understand the connecting preposition, 'in'? To this end, adhering to the maxim "*Αρχή σοφίας η των ονομάτων επίσκεψις*",[15] it is paramount to define the thesis' own heading.[16] Defining the terms is important, as it permits the author and reader to have a common understanding of the actors and issues raised. Simultaneously, this exercise allows us to conceptualise the subject matter, scope, and boundaries of the research project.

Succinctly, 'Europe' refers to the functioning of the European Union (EU, or 'the Union') as a Union of Values, and an Area of Freedom, Security and Justice (AFSJ). 'Prisons' encompass the Union's national detention regimes at pre- and

[13] ibid.
[14] Title influenced by Tom Daems and Luc Robert (eds), *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems* (Palgrave 2018). The research builds and expands on the book title, substituting 'European' for EU, and assessing the impact in a reciprocal manner. See further my article under the same title: Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311.
[15] "The beginning of wisdom is the definition of names". A maxim attributed to Socrates; alternatively, to Antisthenes the Cynic. See Εμμανουήλ Ν Φραγκίσκος, *Η των ονομάτων επίσκεψις* (ΚΝΕ/ΕΙΕ 1994) 1, 87ff. A similar saying attributed to Confucius, 'The beginning of wisdom is to call things by their proper name'; 'If names be not correct, language is not in accordance with the truth of things […] Therefore a superior man considers it necessary that the names he uses may be spoken appropriately'. See James Legge, *Confucian analects: The great learning, and the doctrine of the mean* (Dover Publications 1971) 1, 263. A similar point made in Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[16] Further definitions shall be provided, as further, more specific terms emerge in the analysis. For the purposes of the introduction, it suffices to clarify the broad, umbrella terms emerging from the title.

post-trial level. The preposition 'in' refers to the reciprocal nexus between EU and prisons.

In more detail:

'Europe' functions as a rather narrow term, meant to encompass the EU, as represented by its institutions, court, and agencies, alongside its member states and respective jurisdictions in their current state, as a collective, non-national organisation.[17] The terms 'Europe' and 'the EU', or simply 'the Union', are used interchangeably. The terms are used in their post-Lisbon meaning,[18] and referring to the consolidated legal entity,[19] established and governed by the Treaty on European Union (TEU),[20] and the Treaty on the Functioning of the European Union (TFEU).[21] The focus of the thesis lies primarily on the nature and functioning of the EU as a Union of Values,[22] and as an internally frontierless

[17] In 2023, the EU member states being: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.
[18] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.
[19] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 47.
[20] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (henceforth TEU).
[21] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (henceforth TFEU).
[22] For the purposes of the thesis, the Union of Values is examined primarily under the lens of fundamental rights and human dignity. Naturally, such notions overlap – arguably, are in a state of interdependence – with other core EU values, including the rule of law, and democracy. Consequently, any discussion regarding rights is a discussion that *a priori* holds elements of rule of law/democracy analysis, and any negative impact that prisons have on rights translates to the other values too. You cannot have one without the other. Rights, rule of law, democracy: the EU trinity. See Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart 2018).

AFSJ (AFSJ).[23] The analysis focuses on EU law, but also the EU values:[24] the entire *acquis communautaire.*[25] When a specific reference is made to a distinct, non-EU 'Europe', e.g. the European Communities, the Council of Europe (CoE, or 'the Council'), or simply the geographically-defined continent under the same name, this will be made explicit. On this account, it should be further noted that the analysis involves case-law deriving from two European courts. The Court of Justice of the EU based in Luxembourg (henceforth, referred to also as CJEU, or the Luxembourg Court), and the European Court of Human Rights based in Strasbourg (henceforth, referred to also as the ECtHR or the Strasbourg Court).

By 'prisons', (alternatively cited as penitentiaries, or detention centres), the research refers to all publicly managed, closed institutions, built and operating for the purpose of housing alleged or convicted criminals. The analysis involves all detainees in EU prisons, at pre- and post-trial level. Pre-trial (or remand)[26]

[23] As established under the EU framework; see Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 3; and as opposed to other EU hats, such as the EU as a Single Market, or a Common Defense Area. When the research focuses specifically on the functioning of the EU as an AFSJ, two member states are excluded: Denmark (since it has opted out of the AFSJ); and Ireland (since it has also opted out, though it may opt-in on a case-by-case basis); see Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 21) On The Position Of The United Kingdom And Ireland In Respect Of The Area Of Freedom, Security And Justice [2016] OJ C 202/295; and Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 22) On The Position Of Denmark [2016] OJ C 202/295.

[24] Though EU values are themselves law; see the discussion under 5.3, and also Armin von Bogdandy, 'Founding Principles', in Jürgen Bast and Armin von Bogdandy (eds), *Principles of European Constitutional Law* (2nd edn, Bloomsbury 2010) 1, 11, 21, 22; Rudolf Streinz, 'Principles and Values in the European Union' in Armin Hatje and Lubos Tichý (eds), *Liability of Member States for the Violation of Fundamental values* (2018) 1, 11ff.

[25] This term refers to the body of law that is binding on all member states; further, it serves the (political) purpose of setting the standards, which standards aspiring to join the Union should fulfil. Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 8 < http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021).

[26] A term often preferred amongst English-speaking systems; see Christine Morgenstern, 'Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards' (2009) 9 ERA Forum 527.

detention refers to deprivation of liberty on orders commonly issued by the police and prosecutor, for a crime that the individual is suspected to have allegedly committed.[27] Post-trial detention, as interpreted by the CJEU, covers:[28]

> […] not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type, duration, effects and manner of implementation of the measure(s) in question deprive the person concerned of his liberty in a way that is comparable to imprisonment.

Following this definition, post-trial detention (incarceration, or imprisonment) is imposed to individuals lawfully tried, sentenced, and deprived of their liberty, by a court of law operating in accordance with the criminal justice system, for a crime they have been proven to have committed. The research focus lies on *criminal* detention. Certain categories of detainees (alleged or convicted criminals, inmates, prisoners)[29] *lato sensu* are excluded. The following all fall outside the research scope: individuals deprived of their liberty for a reason disconnected to an alleged or proven criminal offence (i.e. those held in administrative, or immigration detention); detainees under special regulatory regimes or institutions, such as those tried or convicted for an offence under military law, or housed in a mental health asylum; those held in house confinement; and, finally, persons in detention outside complete and total state administration, i.e. in private, for-profit

[27] Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia 2013); Adrian Aldea, 'The Legal Nature of Administrative Detention' (2012) 5 Bulletin of the Transilvania University of Braşov 27.
[28] Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] PPU JZ ECR I – 610, para 47; for an analysis, see Valsamis Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (2020) 57 Common Market Law Review 45.
[29] While cognizant of the stigmatisation and dehumanisation effect that the use of labels such as 'criminals' and 'inmates' has, and as proven in recent criminal justice literature, the author has opted to include such language, to accurately and holistically reflect the terminology of the pan-European penal imaginary itself, and as deriving from EU, CoE, and UN provisions.

penal institutions. Such categories are not entirely unrelated to the discussion. However, they ultimately retain their own distinctiveness, and fall beyond the scope of the present thesis.

It should also be noted that the analysis concerns itself with both prison law and *ius puniendi.* Succinctly,[30] these terms may be defined as follows. *Ius puniendi* constitutes the state prerogative to detain individuals as a response to (alleged or proven) criminal wrongdoing.[31] Prison law constitutes the body of legally-binding regulations that dictate material and procedural detention conditions.[32]

Finally, the preposition that links both actors: 'in'. The research examines the concepts of (pre-and post-trial) detention and Europe in conjunction, coexistence, and relation to one another. The former part of the title ('Prisons in Europe') relates to the current place of detention in the EU. The analysis seeks to identify how prisons look and function holistically across the Union, and how they shape and meddle with the EU *acquis*. When referring to the subject matter envisaged by the title's latter half ('Europe in prisons'), the dynamic is reversed. Here, the research refers to the place, or, more accurately, the influence (actual and potential) of the EU in national detention systems.

1.3 Structure, sub-questions, and methods

The thesis is divided into 12 chapters, and two parts.

[30] Both terms are defined in more detail later in the analysis; see chapters 10 and 11 respectively.
[31] See Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State' in AP Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014) 1, 3, 7
[32] Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof.mr. Constantijn Kelk* (Boom Juridische Uitgevers, 2008) 1, 575; and Constantijn Kelk, *Recht voor gedetineerden* (Samsom 1978) 1, 30.

Chapter 2 presents the reality of detention regimes across the 27 member states, exposing a number of structural issues across EU states that pose systemic human rights violations risks for an indeterminate number of individual detainees.

On the basis of such findings, Part A demonstrates the problematic nexus between EU and prisons.

Part A is composed of four chapters. Chapter 3 outlines the EU human rights normative framework of relevance to detention, before dismissing its direct application. This is because the Union lacks any self-standing human rights or prison competence: instead, a concrete nexus between EU and prisons must be identified. This is precisely the onus of chapters 4 and 5. Chapter 4 demonstrates how the prison reality contradicts the legal principle of mutual trust, undermining the functioning of cross-border mutual recognition instruments. The bridge between prisons and EU law manifests itself in the form of specific Charter of Fundamental Rights provisions,[33] triggered when states are implementing EU law. Chapter 5 showcases how the same reality poses a systemic threat to EU values. The bridge between prisons and EU law is to be found in articles 2 and 7 TEU, triggered when prison systems are seriously and persistently breaching EU values. Having established the nexus between EU and prisons, chapter 6 concludes that there is a functional and principled imperative both for EU action in prisons: ensure the smooth and continuous operation of mutual trust and recognition, and safeguard the identity of the EU as an AFSJ and Union of Values. In this fashion, Part A answers the following sub-questions: what is the place of

[33] Charter of Fundamental Rights of the European Union (2016/C 202/02).

prisons in the EU acquis, what is the problem, how is this a problem for the EU, and what should be achieved?

On the basis of such findings, Part B identifies and assesses EU action in prisons.

Part B is composed of five chapters. Chapter 7 identifies the current EU response. It is maintained that the Union has been striving to mitigate individual exposure to structurally problematic prison systems, while simultaneously seeking to enhance the quality of detention conditions at national level. Chapters 8 and 9 scrutinise the current EU response. It is argued that, while commendable, current EU initiatives fall short. This is because the EU overly emphasises the functional need to rescue mutual trust and recognition, while omitting to account for the place of the individual, and the objective of protecting the Union of Values. Chapters 10 and 11 proceed to offer some insight on how the EU should proceed, complementing its current efforts. Chapter 10 makes the case for an EU Prison Charter that would harmonise detention regimes at EU level. Chapter 11 focuses on the EU as a penal actor, maintaining that the Union should address the impact of its judicial cooperation and criminal law policies on the individual. Prosecution, criminalisation, and punishment remain the primary responsibility of Member States – nevertheless, it is paramount to address the impact of EU policies on national criminal law measures.

In this fashion, Part B answers the following sub-questions: how has the EU reacted to the problem; how is such EU action to be assessed; and how could and should the EU proceed?

Chapter 12 serves as an intersection point. The analysis here provides for a synthesis and conclusions, recapping and commenting on the main findings, recursively providing an answer to the overarching question. In addition, the chapter outlines further areas of research.

The thesis is a legal product. My efforts have focused on studying and reflecting on the law,[34] a traditional 'black-letter law' approach.[35] For the purposes of chapter 2, I have relied on judicial and monitoring findings derived primarily from the CoE, and supplemented when necessary and appropriate by EU and UN data. For the remainder of the thesis, I have studied EU primary and secondary[36] law and soft-law documents; international norms of relevance; case-law from the CJEU and the ECtHR; and scholarly contributions particularly from the areas of EU human rights law,[37] EU constitutional law,[38] and EU criminal law.[39]

[34] The quintessential method of the legal scholar, as noted in Rob Cryer et al, *Research Methodologies in EU and International Law* (Bloomsbury 2011).
[35] For an interesting analysis on the term and its origins, see Kasia Solon Cristobal, 'From Law in Blackletter to "Blackletter Law"' (2016) 108 Law Library Journal 181.
[36] The difference in typology does not lie in the nature or legal effect of either type. Indeed, both primary and secondary EU legislation remains supreme, that is to say, takes priority and is to be enforced over national law, in case of conflict; further, both types of EU law carry legally binding effects. Instead, the difference lies in the process of adoption, with primary law made by the member states themselves, whereas secondary law made by the EU institutions. See TEU, art 47; and TFEU, art 293ff. See Phil Syrpis, 'The relationship between primary and secondary law in the EU' (2015) 52 Common Market Law Review 461.
[37] By EU human rights, I refer to all norms of relevance to the EU human rights *acquis;* see chapter 3 of this thesis.
[38] Understood here as all EU norms of relevance that shape the EU structure, values, policies, and objectives; see Koen Lenaerts and Piet Van Nuffel, *EU Constitutional Law* (Oxford European Union Law Library 2021).
[39] While it may be argued that 'EU criminal law' is a misnomer altogether, it nevertheless remains in conventional use, and for that I use it. See the discussion in chapter 11 of this thesis; see Estella Baker, 'Governing Through Crime: the Case of the European Union' (2010) 7 European Journal of Criminology 187, 190; Jörg Monar, 'Decision-Making in the Area of Freedom, Security and Justice' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002); and Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 1, 15.

In formulating the research question(s) and structure, the analysis has loosely drawn inspiration from the EU Better Regulation Toolbox.[40] This Toolbox serves as a set of guidelines and principles that any EU action should follow "when preparing new initiatives and proposals and when managing and evaluating existing legislation".[41] The thesis itself assesses the effectiveness and potential of current and future EU action, while seeking to incite major policy changes at EU level in regards to prisons – in this fashion, thesis and Toolbox objectives are closely linked.[42] The Toolbox has proven a useful methodological tool in structuring the narrative.

1.4 Motivation

It is said that the origin of something is the source of its nature.[43] Two presumptions gave birth to this thesis: the EU is a Union of Values, and the current state of EU prisons contradicts this reality.

The latter presumption stems from my own experience.[44] Having the opportunity to visit prisons first in Greece and, later, the Netherlands, I observed first-hand the (palpable and moral) distance between the dirty, rugged, unruly state of the average Greek prison, compared to the elevated levels of safety, cleanliness, and

[40] European Commission, *Better regulation toolbox* 1, 108 <https://commission.europa.eu/system/files/2023-09/BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf > (accessed 24 July 2022).
[41] https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en (accessed 18 September 2023).
[42] This can be noted upon observing the questions that the EC toolbox invites policy-makers to consider. Such questions include, indicatively: what is the problem, how likely it is to persist and how widespread is it, why is a problem for the EU, does the EU have the competence to act, what should be achieved etc.
[43] Martin Heidegger, *Off the Beaten Track* (Cambridge University Press 2002).
[44] "The life of the law has not been logic, but experience" – as per Holme's dictum, personal observation, intuition, and moral assessment preceded (more accurately, gave birth to) legal reasoning and consideration. See Oliver W Holmes, *The Common Law* (American Bar Association 2009) 1, 3.

orderliness characterising their Dutch counterparts. Informal conversations with fellow EU lawyers[45] promptly confirmed the existence and gravity of the issue. I discovered it was not only Greek and Dutch prisons that differed markedly. Similar observations were to be made when comparing detention centres between other EU states. Such impressions are common amongst EU criminal justice practitioners, lawyers, prosecutors, and judges: some EU prisons are humane, others less so. The pattern of disparate and inadequate detention regimes is confirmed by relevant Council of Europe findings. Citing, indicatively, Council observations relating to the situation in Greek and Dutch penitentiaries: in Greece, detainees are housed in cells that well exceed their capacity, it is not uncommon to find up to five individuals sharing a single-occupancy cell, and detainees are forced to live in an environment "reaching breaking point".[46] As for the Dutch regime: the Dutch government has been renting out its empty prisons to other states.[47]

The disparity of EU prison systems is far from a well-kept secret.

[45] Understood here as individuals whose practice in law extends across more than one European jurisdictions, or encompasses cases of a transnational nature across Union domain – individuals, thus, with experience in more than one EU states.

[46] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Greek Government on the visits to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 18 April and 19 to 25 July 2016, (Council of Europe 2017) CPT/Inf 25, para 61.

[47] The Dutch prison population has considerably decreased in the Netherlands during the last decade, to the point where prison premises have been rented out to other states, such as Norway and Belgium. For more information, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to the Netherlands from 2 to 13 May 2016 of 19 January 2017,* (Council of Europe 2017) CPT/Inf 1, paras 34-36; and Francis J Pakes and Katrine Holt, 'The Transnational Prisoner: Exploring Themes and Trends Involving a Prison Deal with the Netherlands and Norway' (2017) 54 The British Journal of Criminology 79.

Naturally, *some* divergence between any given prisons and national penal systems is to be expected. Prisons have traditionally been regarded as a matter of state, and each penal (and criminal justice) system functions *in vivo*, within a specific state, cultural, and legal sphere.[48] Detention centres inevitably differ, and no two detainees will ever be treated exactly the same, even if they happen to end up in the same national prison system – this constitutes a truism.[49]

Nevertheless, such antipodean differences between EU prisons prove striking – exactly because the prisons belong to *EU* states.

This brings me to the second presumption.

The EU is more than a trading bloc, a Single Market, or an Area of free movement.[50] Rather, the EU has long redefined itself as a Union of values,[51] and celebrated "for over six decades contributed to the advancement of […] human

[48] Prisons serve as "a projection of national sovereignty and an expression of state power"; see Emma Kaufman and Mary Bosworth, 'The prison and national identity: citizenship, punishment and the sovereign state' in David Scott (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170. For an analysis on the history and meaning of this international law principle of Westphalian sovereignty, see generally Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004); Henry Kissinger, *World Order* (Penguin Press 2014); Edward A Tiryakian, 'Durkheim's "Two Laws of Penal Evolution" (1964) Journal for the Scientific Study of Religion 261, 262; Sonja Snacken, Kristel Beyens and Hilde Tubex, 'Changing Prison Populations in Western Countries: Fate or Policy?' (1995) 3 European Journal of Crime, Criminal Law and Criminal Justice 18, 40.

[49] Besides such objective qualifications, criminological research has shown how the subjective experience and individual profile of each detainee also results in discrepancies: even if we ensure that all the detention conditions are exactly the same for all detainees, the detention experience shall still differ. The thesis does not expand on this point, as the focus lies on objectively identifiable disparities and structural shortcomings. Nevertheless, for an interesting discussion, see Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109 Columbia Law Review 182; Esther van Ginneken and David Hayes, ''Just' punishment? Offenders' views on the meaning and severity of punishment' (2017) 17 Criminology and Criminal Justice 62.

[50] Or a nest of inefficient, unelected bureaucrats.

[51] TEU, art 2; TEU art 4, para 2; Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805, 809; Andrew T Williams, *The ethos of Europe: Values, law and justice in the* EU (Cambridge University Press 2010). See further chapters 3 and 6 of this thesis.

rights in Europe".[52] Human rights and dignity are firmly safeguarded in the EU Treaties, and the Union has its very own bill of rights in the form of the Charter of Fundamental Rights of the EU.[53]

In light of these observations, I found the disparity between EU prison systems, and the poor detention standards that many detainees across these systems have to suffer, unacceptable. I subsequently considered that the EU should – *certainly* – act and ameliorate the situation.

My conclusion proved less obvious than initially thought. Upon discussing my ideas with fellow practitioners and scholars, I received the following feedback.[54]

Some considered that the disparity between EU prison systems is indeed unjustified, on the basis of the crimson passport. Citizens of all member states share the EU citizenship, and the crimson passport with the letters 'European Union' imprinted on its cover.[55] "The color of your passport matters a lot: red or green, burgundy or azure, you are either granted valuable rights worldwide or only painful liabilities":[56] one should think such a statement does not hold true for

[52] The Nobel Peace Prize 2012 <https://www.nobelprize.org/prizes/peace/2012/summary/> (accessed 28 March 2023).
[53] See subsection 3.2.1 of this thesis for an analysis; note TEU, arts 2 and 6; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 648; Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131.
[54] Such discussion primarily occurred before the start of my PhD, or throughout the first year – the pandemic unfortunately considerably delimited opportunities for academic discourse.
[55] See TEU, art 9; and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, 77–123; alongside its current consolidated version of 16/06/2011; for an analysis, see Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU citizenship directive: a commentary* (Oxford University Press 2019).
[56] Dimitry Kochenov, 'Ending the passport apartheid. The alternative to citizenship is no citizenship: A reply' (2020) 18 International Journal of Constitutional Law 1525, 1525.

the EU. One Union, one citizenship, one passport – equal rights, no discrimination. Yet it would seem that there are shades of crimson, at least in prison. On this basis, some urged me to study prisons under the lens of citizenship, and argue for common standards on the basis of EU citizenship-deriving rights.

I take issue with this approach. In my own professional experience, I discovered that EU prisons do not house *just* EU citizens. Indeed, research showcases that approximately 20% of all detainees are foreign nationals.[57] In this light, and while I do briefly consider such ideas,[58] I have ultimately dismissed the notion of framing the problem on the basis of citizenship. Such a methodological or normative choice would, by design, exclude foreigners – a proposition I find unjust and grossly unfair.[59] Any discussion in regards to prisons in the EU should focus on *all* detainees, not just those privileged (lucky) enough to hold a crimson passport.[60] After all, the EU is a society founded in dignity, equality, and human rights for all, where pluralism and non-discrimination prevail.[61]

---

[57] Eurostat data, available at: < https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023); see also chapter 2 of this thesis.

[58] See chapter 5 of this thesis.

[59] See chapter 5 of this thesis, particularly section 5.2. I must nevertheless admit that such research has the potential to prove highly influential, and have a tremendous impact on individual rights. It is far from my intent to initiate a polemic against researchers considering human rights in light of (EU) citizenship. To this end, I should acknowledge the work of Armin von Bogdandy, Dimitry Kochenov (who I would also like to thank for his cordial feedback on a presentation of some early ideas that shaped this thesis, in Salzburg), and my own supervisor, Marianne L Wade, amongst others. See Armin von Bogdandy et al, 'Reverse Solange: Protecting the essence of fundamental rights against EU Member States' (2012) 49 Common Market Law Review 489; Dimitry Kochenov (ed), *EU Citizenship and Federalism* (Cambridge University Press 2017); Marianne L Wade, 'True EU citizenship as a precursor to genuine criminal justice in Europe: an analysis of EU citizenship as it relates to a sustainable area of freedom, security and justice' (2020) 31 Criminal Law Forum 291.

[60] For the same reason I excluded the idea of a multi-speed Europe, with some member states (those with robust prisons systems) continuing to cooperate under the AFSJ and the Union of Values as usual, whereas others would be excluded, left behind.

[61] TEU, art 2.

Others, with whom I had the opportunity to discuss my ideas, pointed me towards the impact of detention regimes in the context of mutual recognition and trust. As explained in more detail later on,[62] the EU has adopted its own regulatory framework in judicial cooperation. This framework functions on the presumption of equivalency: the idea that all member states are supposed to equivalently respect human rights. In case of inadequate, disparate detention regimes giving rise to systemic risks of human rights violations, the presumption of equivalent protection proves falsehood, and the very foundations of the Union's judicial cooperation framework are undermined. In this manner, the nexus between EU and detention is clear, and commentators urged me to pursue it further.

This argumentative thread I have indeed incorporated in my thesis.[63] However, it is far from the sole focus of the research. This is for a simple reason: I maintain that the nexus between EU and prisons is far broader in scope and significant in impact, escaping the confines of cross-border cooperation based on mutual trust and recognition. The prison problem does not only concern cross-border cooperation; rather, it also concerns the very identity of the EU, its normative *acquis,* and values. A focus on abstract legal mechanisms and principles, while significant and indispensable, would miss the point, if allowed to dominate.[64] At the heart of the matter lies the very ethos of the EU, and, more importantly, the

[62] See, in particular, the discussion under section 4.2.
[63] See chapter 4 of this thesis in particular.
[64] Indeed, as explained in Part B, one may well argue that the EU has taken measures in the right direction to begin addressing the problematic nexus between prisons and the EU law principles of mutual trust and mutual recognition – yet, if one expands the research focus, and assesses such measures against the imperative to safeguard individual prerogatives and the Union of Values, it quickly becomes clear that EU action may safeguard mutual trust while not necessarily promoting its values and the interests and rights of the individual detainee. See chapters 8 and 9 of this thesis in particular.

individual, who should take precedence. After all, the law (including law based on mutual trust and recognition) is made to serve the latter, rather than vice versa. For this reason, and while acknowledging the importance of judicial cooperation based on mutual recognition and trust for the discussion,[65] I have ultimately decided to expand the scope of my research.

Perhaps the majority of practitioners and academics I talked with, finally, urged me to give up on the idea of the EU and prisons.[66] They argued that the EU is not a human (much less detainee-) rights organisation.[67] This spot is reserved for other actors, such as the Council of Europe (CoE), the continent's self-proclaimed 'conscience'.[68] Any analysis of prisons and detainee prerogatives at European level should focus on the CoE, and its European Convention on Human Rights (ECHR),[69] the flagship "constitutional instrument of European public order",[70]

[65] See particularly chapter 4 of this thesis; for scholars who have exerted a considerable influence in the area, and whose seminal research has inspired my own, see, among others, Valsamis 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; Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221; Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021).

[66] Not to diminish the value of such feedback – on the contrary, and in light of such comments, I realised the following. Before initiating any sort of discussion on EU action in prisons, it proves a prerequisite to first identify, pinpoint, and prove the nexus between the two actors. This burden is met under Part A. In addition, any discussion orbiting EU action should be firmly grounded on the basis of human rights, and the impact of EU law on the individual. This burden is met under Part B.

[67] Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45; see also section 3.3 of this thesis.

[68] Jonathan Sharpe, *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Council of Europe 2010); Birte Wassenberg, *History Of The Council Of Europe* (Council of Europe 2013); Kanstantsin Dzehtsiarou and Vassilis P Tzevelekos, 'The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights' (2020) 1 European Convention on Human Rights Law Review 1.

[69] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) European Treaty Series - No. 5 (Council of Europe 1950) – henceforth ECHR.

[70] *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995), para 75; and *Banković and others v Belgium and sixteen other States* App no 52207/99 (ECtHR, 12 December 2001), para 80.

alongside its European Court of Human Rights (ECtHR), which has provided for rich jurisprudence in regards to European prisons and detainee rights.[71]

While the CoE holds a prominent spot in the analysis, the epicentre of this thesis is the EU, not the Council. This is due to a conscious choice and firm belief in the EU ethos,[72] alongside the necessity to acknowledge and provide the normative foundations of the emerging place of the Union as a detention actor.[73] The EU and prisons are – and shall remain – intrinsically connected. The choice of focusing on the EU (rather than the CoE or any other organisation) relates also to a number of practical factors, relating to the originality, impact, and significance of the thesis.

1.5 Originality, impact, and significance

The thesis bridges EU and prisons.

Prisons have been part and parcel of the European identity from antiquity until today. No history of Europe is complete without at least some reference to the Athenian *desmotiria,* the Roman *lautumiae,* the medieval dungeons and Oubliettes, the prison-island of Elba, the Bastille, the Millbank, the Kilmainham, the Soviet Gulags, the WWII concentration camps, or the Bastøy. Prisons have been the subject of European literature, from Duma's *Château d'If* to Rowling's Azkaban; of European philosophy, from Plato's Gorgias to Bentham's

[71] See subsection 3.2.2 of this thesis; see also Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy: penology and human rights* (Oxford University Press 2009); Dirk van Zyl Smit and Sonja Snacken, 'Shaping penal policy from above? The role of the Grand Chamber of the European Court of Human Rights' in Andrew Crawford (ed), *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 1, 168ff; *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 94.
[72] See chapters 3 and 6 of this thesis.
[73] As shaping both prison law and *ius puniendi*; see chapters 7, 10, and 11 of this thesis.

Panopticon; of European religion, from the detention of Christ prior to crucifixion, to Tartarus serving as a prison for the defeated Titans in the Pantheon; of European art, from Van Gogh's Prisoners' Round to David's *La Mort de Socrate*. Prisons have captured the European interest and imagination for millenia.

Academia has not remained immune to this tendency. Unsurprisingly, the topic of detention is a well-researched one, and the subject of various disciplines, including law. Legal studies in prison have adopted a multitude of perspectives, ranging from the domestic, to the transnational, regional, and international. Traditionally, the legal study of detention has flourished in the context of national law.[74] This makes sense, since detention-related matters are in direct correlation with a series of topics of national interest. Indicatively, the quality of detention conditions is linked to criminality and recidivism rates,[75] alongside radicalisation and recruitment efforts by criminal organisations.[76] Consequently, detention regimes are directly tied to the security of a nation. Matters of detention also translate into palpable financial benefits (or harm) for the national taxpayer – prisons and detention centres are an extremely costly machinery to maintain, while detainees do not actively contribute as productive members of society,

[74] Due to the vastness of the resources produced from the study of prisons at national level, no comprehensive list of references may be provided. I trust such an observation constitutes a truism.

[75] Among others, see P Gendreau, C Goggin and FT Cullen, *The Effects of Prison Sentences on Recidivism* (Solicitor General 1999) <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf> (accessed 21 July 2023); F Drago, R Galbiati and P Vertova, *Prison Conditions and Recidivism* (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper 2009).

[76] See indicatively Peter R Neumann, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries* (International Centre for the Study of Radicalisation and Political Violence and the National Consortium for the Study of Terrorism and Responses to Terrorism 2010); and J Illardi, Prison radicalisation: The devil is in the detail. Paper presented at the ARC Linkage Project on Radicalisation – Conference, Understanding Terrorism from an Australian Perspective: Radicalisation, De-Radicalisation and Counter Radicalisation, Monash University, Australia, 2010.

further increasing secondary costs.[77] Detention conditions overall have an effect on the effectiveness, transparency, and perceived legitimacy of national penitentiaries, and the entire criminal justice system and state apparatus.[78] The symbolic and moral connotations of carceral sovereignty have also been well documented.[79]

Criminal justice scholars and criminologists have introduced a transnational element to the topic, adopting a comparative approach, seeking to juxtapose detention systems across states.[80] Besides this cross-border, comparative element, detention has for decades constituted the subject of European law *lato sensu*, through the prism of the Council of Europe human rights framework.[81] Prisons have been researched, albeit to a somewhat more limited extent, in the context of international law.[82]

---

[77] Estimations reveal that it costs 51 Euros per day to keep one inmate behind bars per average; see Marcelo F Aebi and Mélanie M Tiagoet, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report* (Council of Europe 2019); see also VW Ballegooij, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS, European Added Value Unit 2017); more generally on this point see JR Sparks and AE Bottoms, 'Legitimacy and Order in Prisons' (1995) 46 The British Journal of Sociology 45.

[78] J Jackson et al, 'Legitimacy and procedural justice in prisons' (2010) 191 Prison service journal 4.

[79] Indicatively Emma Kaufman and Mary Bosworth, 'The prison and national identity: citizenship, punishment and the sovereign state' in David Scott (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170.

[80] See indicatively Ben Crewe, Julie Laursen and Kristian Mjåland, 'Comparing deep-end confinement in England & Wales and Norway' (2022) Criminology 1; and Joseph Hale, 'Does Prison Work? A Comparative Analysis on Contemporary Prison Systems in England and Wales and Finland, 2000 to Present' (2020) 4 Wolverhampton Law Journal 64.

[81] For a discussion on the effect of the Council of Europe normative and judicial influence on national detention systems see, indicatively, Dirk Van Zyl Smit and Sonja Snacken, 'Shaping penal policy from above? The role of the Grand Chamber of the European Court of Human Rights' in Andrew Crawford (ed), *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 1, 168; Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy: penology and human rights* (Oxford University Press 2009).

[82] See, among others, Mary Margaret Penrose, 'Creating an International Prison' (2016) 38 Houston Journal of International Law 425, where the author examines whether a permanent international prison is necessary. Further, for a discussion on international *ius puniendi*, see Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293. Finally, see Dirk van Zyl Smit, 'International Prison Standards and

Perhaps the latest research framework that legal scholars and policymakers have employed has been that of EU law. The EU traces its origins to the 1951 Coal and Steel Treaty.[83] Yet prisons have for decades escaped the study of the EU law aficionado – equally, the criminal justice or penology scholar would have no need of EU law knowledge to conduct her research. Traditionally, prisons and EU law have not been studied in conjunction, but rather considered to function as parallel lines. The reasons for this, as examined in more detail later on,[84] are multiple – yet revolve, at their core, around a simple observation. The EU lacks the self-standing competence to regulate or enforce prison law, has no *ius puniendi*, nor is a human rights organisation. While I prove[85] that neither of these statements is entirely accurate, they have nevertheless exerted considerable influence, and drawn attention away from an examination of EU law and prisons.

In recent years, and with relative hesitation, the trend has been reversed. The field of EU penal law and penology remains at its theoretical infancy.[86] However, scholars and policymakers, particularly those active in EU criminal law, have started examining detention and EU law in conjunction. The principal focus of such investigation has centred on the interaction between detention conditions and the EU law principles of mutual trust and recognition in criminal cooperation.

Transnational Criminal Justice' (2019) 97 Irvine Journal of International, Transnational, and Comparative Law 261.

[83] Treaty establishing the European Coal and Steel Community Document 11951K/TXT – no longer in force; see https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT (accessed 23 August 2023).

[84] See section 3.3 of this thesis.

[85] See particularly chapters 4, 5, 6, and 12 of this thesis.

[86] An expression I owe to Professor Dermot PJ Walsh, who suggested the term 'EU penal law' to me during one of our (rather informal) discussions. He thought the term would more accurately capture the EU *acquis* emerging in prisons, as opposed to grouping such measures under the general 'EU criminal law' umbrella.

This nexus constitutes a focal point of this thesis too. I must further admit that the key findings of scholarship in this field so far find me in agreement. Nevertheless, as already stated, this thesis maintains that an analysis focusing primarily on the interaction between prisons and mutual recognition and trust fails to capture the narrative in its entirety.

Instead, I contend that prisons pose an issue for the EU on a functional and principled basis both. I further claim that any scholarly analysis or policymaking response that ignores the principled nexus between prisons and EU law is flawed, and has the capacity to further detriment (rather than fulfil) the EU objectives and the protection of individual prerogatives. I also assert that the nexus between prisons and EU law is reciprocal: prisons affect *and are simultaneously affected by* EU law.

On the basis of such observations, the originality and significance of the thesis emerges clear.

The thesis shall prove that the EU and prisons are two actors intrinsically linked. It shall be proven that prisons have a negative impact on the EU. This is due to an axiological and functional imperative both. The functioning of the EU mutual recognition and trust instruments is undermined; simultaneously, the EU values, and its identity as AFSJ and Union of Values, are in peril. This issue remains, to this day, unaddressed, as any discussion focuses primarily on the functional imperative, omitting the principled one – the EU response suffers from the same shortcoming. Consequently, this thesis constitutes a relevant, significant, and timely contribution, as it addresses a very much current, pressing, and unresolved

situation, one that undermines the entire EU regulatory framework, its values, policies, and objectives.

The effect of detention on EU law, policies, and values, constitutes only the first link of the chain. The analysis shall reverse the nexus between these actors. It shall be proven that EU law is not only shaped by, but simultaneously shaping detention. The nexus is reciprocal. The current impact of EU law in regards to prison law, *ius puniendi*, and human rights is identified and examined.[87] The potential of future EU action in prisons is also discussed and assessed *ex ante*, with a view to ensure that such action remains in line with the functional and principled imperative both, and also effective and legitimate, and within the core principles that guide EU action (i.e. conferral, subsidiarity, and proportionality).[88]

The focus on uncovering the reciprocal nexus between EU and prisons, the examination of the Union's untapped potential[89] as a driver of integration in the field of detention, the appraisal of EU efforts against the functional and axiological imperative, and the examination of future EU action in prisons, are all points that add to the originality and significance of this thesis. In this fashion, the research tackles issues so far studied primarily under the (precise, yet somewhat confined) lens of EU criminal law.

In terms of originality and impact, it should also be noted that an EU-centred examination of prisons in Europe has considerable potential. The CoE has served

[87] See the discussion in chapters 7, 8, and 9 of this thesis.
[88] See chapters 3, 10, and 11 of this thesis.
[89] Wouter van Ballegooij, 'Measuring the Added Value of EU Criminal Law' (2016) 2 eucrim 90.

as a frame of reference for a plethora of detention-oriented studies,[90] whereas the EU has not.[91] Regarding the potential to shape the situation on the ground, the Council lacks the legal bite necessary to enforce its standards.[92] In contrast, the EU has a powerful enforcement mechanism, the added value of which could prove significant in terms of inciting major policy change and achieving the objective of equivalent detention standards at national level.[93] The Union's role as a driver of integration in the field of detention remains at its theoretical infancy, whereas the problems facing EU detainees are rather actual, pressing, and persistent – and the CoE-focused research has failed to satisfactorily address such issues.

In terms of timing, it should be noted that the research commenced with the case of *Aranyosi/Căldăraru*, [94] where the CJEU for the first time explicitly acknowledged the problematic impact of prisons on EU law. The thesis reached its conclusion at the very aftermath of the EC Recommendation on detention,[95]

[90] See, indicatively; Dirk Van Zyl Smit and Sonja Snacken, 'Shaping penal policy from above? The role of the Grand Chamber of the European Court of Human Rights' in Andrew Crawford (ed) *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 1, 168ff; Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy: penology and human rights* (Oxford University Press 2009); Jim Murdoch, *The treatment of prisoners: European standards* (Council of Europe 2006); Anne Costelloe and Kevin Warner, 'Prison education across Europe: Policy, practice, politics' (2014) 12 London Review of Education 175; Norman Bishop, 'Prisoner participation in prison management' (2006) 3 Champ pénal/Penal field <https://journals.openedition.org/champpenal/487> (accessed 24 July 2023).

[91] The bulk of relevant EU-detention studies in criminal and penal law centre primarily on article 82 TFEU, whereas the approach here is more holistic; for both arguments, see chapters 4 and 5 of this thesis respectively.

[92] See, among others, Wolfgang Benedek, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 1 European Convention on Human Rights Law Review 151.

[93] See chapter 10 of this thesis.

[94] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198; see sections 4.2 and 7.2 of this thesis.

[95] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44; see section 7.4 of this thesis.

and the CJEU case of *E.D.L,*[96] the latest addition in the *Aranyosi/Căldăraru* saga. The inclusion of such topical developments in the analysis further enhances the originality and potential impact of the thesis.

The research seeks to address a key problem that concerns not only academic curiosity, but also professionals around the Union, while seeking to amend a *status quo* detrimental for hundreds of thousands[97] detainees across the EU territory. The thesis has the potential to prove significant and impactful for a variety of actors, while also striving to lay the foundations for major policy change at EU level, and streamline the potential of the EU as a key player in the field of prison law, *ius puniendi*, and detainee rights.

Most importantly, the thesis seeks to place the individual detainee, the "caged, dependent and in his existence unfree"[98] actor all too readily forsaken, at the heart of the discussion.

[96] Case C-699/21 *E. D. L.* [2023] OJ C 73/22; see section 7.2 of this thesis.
[97] More than half a million; Eurostat data, available at: < https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023).
[98] "It should not be forgotten that the essence of a prison,/regardless of the huge difference in repression and arbitrariness that between/several systems can exist, at one and the same highest/unnatural situation: that of the caged,/dependent and in his existence unfree man. The original text as follows: Men mag niet vergeten dat het wezen van een gevangenis,/ongeacht het enorme verschil in repressie en willekeur dat tussen/diverse stelsels kan bestaan, op één en dezelfde hoogst/onnatuurlijke situatie betrekking heeft: die van de gekooide,/afhankelijke en in zijn existentie onvrije mens. See Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof. mr. Constantijn Kelk* (Boom Juridische Uitgevers 2008) 1, 573; referring further to Constantijn Kelk, *Nederlands detentierecht* (Gouda Quint 2000) 1, 5.

CHAPTER 2

STRUCTURALLY INADEQUATE PRISONS SYSTEMICALLY UNDERMINING INDIVIDUAL RIGHTS

2.1 Introduction

In order to assess the negative impact of prisons on the EU *acquis*,[99] and the objectives and form that the EU (re)action should follow,[100] it is first important to comprehend the current prison reality.[101] This chapter provides an overview summary of the prison landscape across the 27 EU member states.[102] To this end, judicial and monitoring findings from the CoE primarily, and (supplementary) the UN and the EU itself are used.[103] The analysis exposes a variety of structural shortcomings that place individual prerogatives at systemic risk.

[99] The task carried out under Part A.
[100] The task carried out under Part B.
[101] To provide some key overview data: EU detention centres host approximately half a million people. This translates to 106 detainees per 100.000 inhabitants, or 1 prisoner per 941 inhabitants. Approximately 5% of adult detainees are women; 1% juveniles (almost all of which male); 1 in 5 on remand (pre-trial) detention; and 1 in 5 foreign citizens. On average, there are 2 detainees per individual personnel. As for the financial cost of detention, latest estimates reveal it to be at 0.2% of the EU GDP, which translates to roughly 31.6 billion Euros per year. See Eurostat data, available at: < https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023); European Prison Observatory, Prisons in Europe. 2019 Report on European Prisons and Penitentiary Systems (Rome: epo, 2020) 1, 10; Data from the World Bank, available at < https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU > (accessed 28 May 2023); and Marcelo F Aebi et al, *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report* (Council of Europe 2022) UNILCRIM 2022/3 1.
[102] It should be noted that some states are composed of a number of jurisdictions (e.g. Germany, Spain), at both state and local level. When not explicitly stated otherwise, all findings refer to the *state* dimension of such systems.
[103] The CoE and UN collecting data of relevance to detention and prisons is unsurprising, considering the human rights mandate of such organisations – the fact that the EU itself is collecting such data is a precursor and first indication of the argument that is unravelled in part A of this thesis, and already betrays the EU interest in detention. Simultaneously, the fact that the bulk of data concerning detention stems from the CoE is something that the EU should address, going forward – see chapter 11 of this thesis.

The reality presented here represents the problem that is to be addressed by EU action. On the basis of such findings, subsequent Parts address the link between the two actors and the necessity of EU action in prisons, before moving on to examine and assess the potential of such EU action.

2.2 Structural shortcomings in EU prisons

The section provides an overview exposition of EU prison systems, identifying the most prevalent and common shortcomings. These are grouped in two broad categories. The first concerns the number of individuals detained. Many EU prisons are facing a structural problem of overcrowding and excessive admission rates. The second category concerns the standards of the prison environment itself. Many EU prisons provide for structurally poor detention conditions, and an inadequate, intrusive, violent regime. In simple terms, the number of detainees housed is too high and ever-increasing, and the conditions in which these detainees live are too poor and deteriorating.

2.2.1 Overcrowding and excessive admissions

Overcrowding, i.e. the situation where the number of detainees housed in a penitentiary eclipses the institution's official capacity,[104] proves the most common and pressing issue at EU prison systems.[105]

[104] This definition is in line with the European Committee on Crime Problems (CDPC) *White Paper on Prison Overcrowding* (Council of Europe 2016) PC-CP (2015) 6 rev 7, para 10.
[105] Council of Europe European Committee on Crime Problems, *High-level Conference on prison overcrowding* (Council of Europe 2019) https://www.coe.int/en/web/cdpc/high-level-conference-on-prison-overcrowding (accessed 07 July 2023); European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2015/2062(INI)), Recital D; Committee of Ministers of Council of Europe, *White paper on prison overcrowding* (Council of Europe 2016) CM(2016)121-add3 1, 4.

Quantitative estimates from the Council of Europe reveal eight EU states as operating over their design capacity, where individuals housed exceed the number of detention places available.[106] These include Romania,[107] Greece,[108] Cyprus,[109] Belgium,[110] Italy,[111] France,[112] Sweden,[113] and Hungary.[114] There are two more that are alarmingly close to maximum capacity: the Czech Republic,[115] and Austria.[116] Such data does not constitute a merely accidental snapshot. Instead, previous CoE reports echo the latest one.[117] This demonstrates a longitudinal tendency of overcrowded EU prisons.

Directly relating to overcrowding, other structural issues concern the excessive number of admissions, and the (ab)use of remand or pre-trial detention (PTD).

The turnover ratio is an important factor of relevance. The CoE defines this ratio as "an estimation of the release rate per 100 potential releases (i.e., the percentage of effective releases from the total number of potential releases)".[118] The ratio is calculated on the basis of admissions (number of inmates admitted in prison), stock (prison population in total), and effective releases (number of

[106] Marcelo F Aebi et al, *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report* (Council of Europe 2022) UNILCRIM 2022/3 1, 10, figure 9.
[107] ibid; 119.3%.
[108] ibid; 111.4%.
[109] ibid; 110.5%.
[110] ibid; 108.4%.
[111] ibid; 105.5%.
[112] ibid; 103.5%.
[113] ibid; 100.6%.
[114] ibid; 100.5%.
[115] ibid; 96.7%.
[116] ibid; 96.2%.
[117] Marcelo F Aebi and Mélanie M Tiagoet, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report* (Council of Europe 2019) 1, 7, figure 7; see also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities* (Council of Europe 1992) Cf. CPT/Inf (92) 1, 3, 13, para 46.
[118] Marcelo F Aebi and Mélanie M Tiagoet, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report* (Council of Europe 2019) 1, 14.

inmates released from prison). Once calculated, it provides us with an estimation on the potential fluctuation in detention numbers. A scenario where the number of releases exceeds that of admissions (known as high turnover ratio) is positive, signalling future reduction of prison population. A scenario where admissions exceed releases (known as low turnover ratio) is negative, signalling a potential increase. As the CoE recognises, "'a low turnover ratio (less than 50%) implies relatively long periods of custody and could thus be seen as an early warning sign of a risk of prison overcrowding".[119]

The turnover ratio data for EU states is problematic. Latest estimates reveal that a total of 12 member states face a turnover ratio of 50% or less.[120] Amongst them one finds Hungary, [121] the Czech Republic, [122] Greece, [123] Sweden, [124] Romania,[125] and Belgium.[126] These are overcrowded prison systems, as already submitted in the previous paragraph. Other EU members, not yet overcrowded but getting alarmingly close to maximum capacity, include Estonia, [127] Lithuania,[128] Spain,[129] Portugal,[130] the Slovak Republic,[131] and Germany.[132]

[119] ibid 1, 14.
[120] Marcelo F Aebi et al, *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report* (Council of Europe 2022) UNILCRIM 2022/3 1, 15, figure 13.
[121] ibid; 46.3%
[122] ibid; 38.8%.
[123] ibid; 32.5%.
[124] ibid; 31.8%.
[125] ibid; 28.9%.
[126] ibid; 26.6.
[127] ibid; 46.6%.
[128] ibid; 41.5%.
[129] ibid; 37.6%.
[130] ibid; 36.4%.
[131] ibid; 33.5%.
[132] ibid; 24.2%.

In simple terms, this means that nearly half of the EU states admit more people than they release. This demonstrates a tendency towards overcrowding.

In addition, PTD is abused in many states. As already noted, over 100.000 individuals not yet convicted are in EU prisons.[133] This translates to approximately 20% of the entire prison population. This number and percentage have been steadily rising in the past years.[134] Recent reports invite particular attention to the excessive use of PTD in France, Poland, Ireland, and Hungary.[135] Further, the use of PTD in various EU states has often been criticised as unjustified and rather arbitrary,[136] used indiscriminately, and excessively.[137] Too many pre-trial detainees are housed in EU prisons for no good reason.

It should be noted that the data presented above was collected during the pandemic. At that period, admission flows were reduced, and the overall prison

[133] See chapter 1 of this thesis; see also Eurostat data, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023).

[134] Adriano Martufi and Christina Peristeridou, 'Towards an Evidence-Based Approach to Pre-trial Detention in Europe' (2022) 28 European Journal of Criminal Policy and Research 357, 358; referring further to G Max De Vries, 'De recidivegronden voor voorlopige hechtenis getoetst aan artikel 5 EVRM: Drie aandachtspunten voor een verdragsconforme Nederlandse praktijk' (2022) 17 Nederlands Juristenblad 1380; and Christine Morgenstern, 'Need for Speed: Die neue Beschleunigungsfreude im Strafverfahren am Beispiel der Untersuchungshaft' (2020) 40 Zeitschrift Für Rechtssoziologie 90.

[135] Fair Trials, 'Pre-Trial Detention Rates and the Rule of Law in the European Union April 2021 Briefing to the European Commission' (2021) <https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/> (accessed 24 July 2023).

[136] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT urges European states to hold persons in remand detention only as a measure of last resort and in adequate conditions* (Council of Europe 2017) https://www.coe.int/en/web/cpt/-/cpt-urges-european-states-to-hold-persons-in-remand-detention-only-as-a-measure-of-last-resort-and-in-adequate-conditions (accessed 05 September 2023); See also Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* (2016), 1, 32 <https://fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> (accessed 07 July 2023).

[137] Catherine Heard and Helen Fair, *Pre-trial detention and its over-use: Evidence from ten countries* (Institute for Crime and Justice Policy Research 2019) https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf (accessed 07 July 2023); Lonneke Stevens et al, 'Incapacitation by pre-trial detention' in Marijke Malsch and Marius Duker (eds), *Incapacitation: Trends and New Perspectives* (1st edn, Ashgate Publishing 2012) 1, 97.

population was on a declining curve.[138] This was anomalous, not meant to last. The recent easing of movement restrictions and lift of curfews signalled an increase in the flow of admissions.[139] Indeed, at the time this thesis is submitted, a quick review of the latest data reveals that the problem is even more profound.[140] This constitutes further evidence that low turnover ratios, excessive PTD, and a tendency towards overcrowding remain the norm across many EU states.

The structural nature of such issues is confirmed by a series of ECtHR *pilot* and *leading* judgments.

The pilot judgment procedure, as developed by the Strasbourg Court, is defined by the Court as follows:[141]

> […] a technique of identifying the **structural problems underlying repetitive cases** against many countries and imposing an obligation on States to address those problems. Where the Court receives **several applications that share a root cause,** it can select one or more for priority treatment under the pilot procedure. In a pilot judgement, the Court's task is not only to decide whether a violation of the European Convention on Human Rights occurred in the specific case but also to

[138] Marcelo F Aebi et al, *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report* (Council of Europe, 2022) UNILCRIM 2022/3 1; see also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) 1, 26ff.
[139] Marcelo F Aebi et al, *Prisons and Prisoners in Europe 2022: Key Findings of the SPACE I report* (Council of Europe 2023) UNILCRIM 2023/2 1, 4.
[140] ibid 1.
[141] European Court of Human Rights, *Factsheet: Pilot judgments* (Council of Europe 2020) 1, 1, emphasis added. See also Committee of Ministers, *14th Annual Report of the Committee of Ministers* (Council of Europe 2021) 1, 83; and Lize R Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2017) 34 Netherlands Quarterly of Human Rights 41.

> identify the **systemic problem** and to give the Government clear indications of the type of remedial measures needed to resolve it.

Consequently, a pilot judgment is by design meant to identify problems structural in nature.

Five pilot judgments have been issued regarding overcrowding, against five member states: Poland (*Orchowski*, and *Norbert Sikorski*); [142] Italy (*Torreggiani*); [143] Bulgaria (*Neshkov*); [144] Hungary (*Varga*); [145] and Romania (*Rezmiveș*).[146] In each of these cases, the ECtHR found a *systemic, structural issue of overcrowding*, plaguing the entirety of the prison system of the state concerned. The structural nature of the problem is confirmed by the sheer number of applications received by the Strasbourg Court, ranging in the hundreds.

In other words, the issue of overcrowding does not concern a closed group of detainees in a limited number of penitentiaries. Instead, it expands and encompasses the entirety of the prison population.

This is confirmed by judicial remarks found in the body of the cases themselves. By way of example, in *Varga* the ECtHR found:[147]

> […] the violations were neither prompted by an isolated incident nor attributable to a particular turn of events in those cases, but originated in a **widespread problem**

[142] *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009); *Norbert Sikorski v Poland* App no 17599/05 (ECtHR, 22 October 2009).
[143] *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013).
[144] *Neshkov and Others v Bulgaria* App nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015).
[145] *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015).
[146] *Rezmiveș and Others v Romania* App nos 61467/12, 39516/13, 48231/13 and 68191/13 (ECtHR, 25 July 2017).
[147] *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015), para 99, emphasis added.

> resulting from a **malfunctioning** of the Hungarian **penitentiary system** and insufficient legal and administrative safeguards against the proscribed kind of treatment.

Similar observations are to be found in each pilot judgment.[148]

Turning to leading cases, these are identified as "revealing new structural [and] systemic problems, either by the Court directly in its judgement, or by the Committee of Ministers in the course of its supervision of execution".[149] Their function is thus similar to pilot judgments.[150]

Regarding overcrowding, the ECtHR has dealt with the following leading cases, concerning: Slovenia (*Mandić and Jović*, and *Štrucl*);[151] Greece (*Samaras*; *Tzamalis;* and *Al. K.*);[152] Belgium (*Vasilescu*);[153] Portugal (*Petrescu*);[154] and

[148] *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009), paras 147ff; *Norbert Sikorski v Poland* App no 17599/05 (ECtHR, 22 October 2009), paras 132ff; *Torreggiani and Others v. Italy* App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013), paras 70ff; *Neshkov and Others v Bulgaria* App nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015), paras 226ff; *Rezmiveș and Others v Romania* App nos 61467/12, 39516/13, 48231/13 and 68191/13 (ECtHR 25 July 2017), paras 106ff.

[149] Committee of Ministers, *14th Annual Report of the Committee of Ministers* (Council of Europe, 2021) 1, 12, 83.

[150] For an analysis on ECtHR case-law identifying structural issues and systemic risks, see Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2019) 12 German Law German 1231; and Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 Nomiko Vima (The Greek Law Journal) 1890. For an analysis specifically on leading cases, see George Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think. Part 2: The Hole in the Roof' (2019) ECJ Talk https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed 01 September 2023).

[151] *Mandić and Jović v Slovenia* App nos 5774/10 and 5985/10 (ECtHR, 20 October 2011); *Štrucl and Others v Slovenia* App nos 5903/10, 6003/10 and 6544/10 (ECtHR, 20 October 2011).

[152] *Samaras and Others v Greece* App no 11463/09 (ECtHR, 28 February 2012); *Tzamalis and Others v Greece* App no 15894/09 (ECtHR, 04 December 2012); *Al. K. v Greece* App no 63542/11 (ECtHR, 11 December 2014).

[153] *Vasilescu v Belgium* App no 64682/12 (ECtHR, 25 November 2014).

[154] *Petrescu v Portugal* App no 23190/17 (ECtHR, 02 December 2019).

France (*J.M.B*).[155] Once more, in each of these cases, the Court found the detention systems of the respective states to be structurally overcrowded.[156]

In overview, accounting for both pilot and leading judgments, the Strasbourg Court has found nearly half of the EU prison systems as overcrowded in recent years. Accounting for turnover ratios, more EU states are gravitating towards the same reality. The situation is particularly dire in regards to pre-trial detention, which is increasingly (ab)used.

A final finding of relevance concerns the post-judgment response of the states to such findings. All ECtHR cases raising structural issues are supervised by the Committee of Ministers under a special ('enhanced') procedure.[157] The Committee monitors action taken by the states to respond to the ECtHR findings. Examining the latest report of the Committee, it is noted that structural issues relating to poor conditions of detention "represent one of the highest percentages of leading cases in enhanced supervision".[158] Indicatively, the Committee refers to Belgium, expressing "deep concern at the worsening situation in prisons despite various measures announced long ago";[159] also to France, noting that

[155] *J.M.B. and Others v France* App no 9671/15 (ECtHR, 30 January 2020).
[156] See *Mandić and Jović v Slovenia* App nos 5774/10 and 5985/10 (ECtHR, 20 October 2011), paras 77ff; *Štrucl and Others v Slovenia* App nos 5903/10, 6003/10 and 6544/10 (ECtHR, 20 October 2011), paras 81ff; *Tzamalis and Others v Greece* App no 15894/09 (ECtHR, 04 December 2012), paras 41ff*; Samaras and Others v Greece* App no 11463/09 (ECtHR, 28 February 2012), paras 51ff; *Al. K. v Greece* App no 63542/11 (ECtHR, 11 December 2014), paras 49ff*; Vasilescu v Belgium* App no 64682/12 (ECtHR, 25 November 2014), paras 111ff; *Petrescu v Portugal* App no 23190/17 (ECtHR, 02 December 2019), paras 74ff; *J.M.B. and Others v France* App no 9671/15 (ECtHR, 30 January 2020), paras 254ff.
[157] For an overview of the enhanced supervision procedure, see the info included in the CoE website itself https://www.coe.int/en/web/execution/the-supervision-process (accessed 02 October 2023).
[158] Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 16th Annual Report of the Committee of Ministers* (Council of Europe 2022) 1, 25.
[159] ibid 1, 34.

"the latest figures […] show a worsening of the situation, especially in remand centres";[160] and Greece, noting that "the total number of prison inmates exceeds the current capacity of prisons",[161] and "recent policy changes towards more severe sentences along with the suspension of the alternative sentences scheme are likely to result in a further increase in prison inmates".[162] Based on the Committee reports, the reaction of EU states to the issues identified above is not adequate, effective, or fast enough. The structural nature of the issues is further underlined by domestic inertia.

The next section (2.3) examines how this reality is problematic for individual prerogatives. For now, the analysis continues with other structural shortcomings plaguing EU prisons.

2.2.2 Poor detention conditions and regimes

EU detention systems are often characterised by materially poor living conditions, particularly regarding sanitary, hygiene, and privacy standards.

Once more, ECtHR judgments outline this clearly. In the pilot judgment of *Torreggiani*, the ECtHR observed a lack of hot water, sufficient lighting, and ventilation.[163] In *Neshkov*, the ECtHR observed that Bulgarian detention centres were infested with vermin, and utterly failed to provide for a sanitary environment.[164] In *Vasilescu,* it was found that detainees lacked the availability

[160] ibid 1, 34.
[161] ibid 1, 35.
[162] ibid 1, 35.
[163] *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013), para 77.
[164] *Neshkov and Others v Bulgaria* App nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015), para 243.

of a toilet and running water, and also proper bedding, having to instead sleep on mattresses laid down on the floor.[165]

Qualitative data supports the ECtHR case-law. Of particular relevance proves data and empirical observations from the Council's own European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (henceforth CPT).[166] In *Rezmiveș*, the ECtHR relied on CPT reports that showed a lack of light and proper ventilation, and sanitary facilities in need of repair and renovation.[167] Observations by the CPT outline more structural problems. These range from the age and deteriorating state of buildings used to house detainees,[168] to the lack of beds forcing detainees to sleep on the floor on mattresses. [169] Similarly, reports by UN National Preventive Mechanisms (NPM)[170] reveal a litany of sanitary issues, including "rubbish in the corner of rooms, dirty facilities, broken water-drainage mechanisms, unclean toilet bowls and unpleasant smells".[171]

[165] *Vasilescu v Belgium* App no 64682/12 (ECtHR, 25 November 2014), paras 89ff.
[166] Responsible for monitoring detention conditions on the ground across all CoE members, a task carried out via annual or *ad hoc* visits. See Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Text of the Convention and Explanatory Report* [2002] CPT/Inf/C (2002) 1.
[167] *Rezmiveș and Others v Romania* App nos 61467/12, 39516/13, 48231/13 and 68191/13 (ECtHR, 25 July 2017) paras 49ff.
[168] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to Belgium from 27 March to 6 April 2017* (in French) (Council of Europe 2018) CPT/Inf 1, 8.
[169] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Reports on the December 2019 periodic visit and July 2020 ad hoc visit to France and responses of the French authorities* (in French) (Council of Europe 2020) CPT/Inf (2021) 14 1.
[170] Subcommittees on Prevention of Torture, established under the UN Optional Protocol to the United Nations Convention against Torture, with a mandate to independently monitor detention regimes; see United Nations, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [2002] resolution A/RES/57/199, arts 17ff.
[171] European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality Luxembourg: Publications Office of the European Union* (FRA 2019) 1, 25.

Another common problem concerns access to sanitary facilities, including toilets and showers. Such facilities are, in principle, present. However, detainees are often refused autonomous access, becoming instead dependent on staff for their use.[172] This dependency is problematic, as it may result in considerable delays; in other occasions, prison staff have been found to unreasonably and excessively delimit the duration and frequency of the use of sanitary facilities.[173]

Problems relating to the use of prison facilities prove particularly acute when coupled with overcrowding. In the case of *Longin,* the ECtHR identified an overly close proximity between sanitary facilities and living spaces – practically, there was no physical distinction between the two, all spaces were simultaneously used for both purposes.[174] In *Orchowski,* the Strasbourg Court considered that, while detainees had access to hygienic facilities, they had to shower alongside large groups of strangers.[175] In a number of cases, the ECtHR found that overcrowding made it impossible to separate the smokers from the non-smokers. This resulted in non-smoker detainees (amongst them some who even suffered from chronic health issues) to suffer passive smoking.[176]

Such cases demonstrate that inadequate material conditions of detention are only exacerbated by overcrowding. Housing too many detainees in an

[172] ibid 1, 25.
[173] *Danilczuk v Cyprus* App no 21318/12 (ECtHR, 3 April 2018); *Lonić v Croatia* App no 8067/12 (ECtHR, 04 December 2014), para 76; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to Cyprus from 2 to 9 February 2017* (Council of Europe 2018) CPT/Inf 1, 16.
[174] *Longin v Croatia* App no 49268/10 (ECtHR, 06 November 2012), para 60.
[175] *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009), para 134.
[176] *Vasilescu v Belgium* App no 64682/12 (ECtHR, 25 November 2014), para 94; *Sylla and Nollomont v Belgium* App nos 37768/13 and 36467/14 (ECtHR, 16 May 2017), para 41; *Elefteriadis v Romania* App no 38427/05 (ECtHR, 25 January 2011), paras 49-55; *Florea v Romania* App no 37186/03 (ECtHR, 14 September 2010), paras 60-62.

environment not designed to support them further exacerbates the already inadequate conditions of detention.

In addition to cell space and material detention conditions, the prison regime proves problematic across many EU states. Here, structural shortcomings of relevance concern the inability of authorities to control intra-detainee violence; the violence inflicted from wardens onto the detainees; and the lack of meaningful activities provided to detainees.

Data collected by both the CoE and the EU itself reveals a persisting problem of intra-detainee violence. Detainees in various member states are victimized by other inmates, with regular instances of bullying, rape, and fighting. These often result in a deterioration of detainee physical and mental health, and may lead them to commit self-harm or suicide.[177] The ECtHR has convicted EU states for failing to provide adequate safeguards that could prevent such incidents.[178]

It has been further noted that incidents of intra-detainee violence occur more often in regimes where no purposeful activities are provided to individuals.[179] This only strengthens the obligation for national authorities to provide stability and the potential of self-realisation to their detainees. Hence, the CPT has found that

[177] European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality Luxembourg: Publications Office of the European Union* (FRA 2019) 1, 15; see also data included in World Prison Brief https://www.prisonstudies.org/country/poland (accessed 05 October 2023) and Europris https://www.europris.org/agency/central-board-of-prison-service-pl__trashed/ (accessed 05 October 2023).

[178] *Pantea v Romania* App no 33343/96 (ECtHR, 3 June 2003), paras 191-196; *D.F. v Latvia* App no 11160/07 (ECtHR, 29 October 2013), paras 81-95; see also Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 16th Annual Report of the Committee of Ministers* (Council of Europe 2022) 1, 30, 33.

[179] See indicatively European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) 1.

constantly moving detainees between cells and facilities may hinder the effective protection of their individual rights,[180] and that activities should be provided to all detainees,[181] including those on remand.[182] Such out-of-cell activities would allow for the normalisation of the detention experience, and boost the rehabilitation potential of individuals, while respecting their rights.[183] They also provide for a balance and necessary safeguard against prolonged periods of detention, which can be extremely detrimental.[184] It is problematic that CoE and UN reports have found that detention regimes across the EU often fail to provide adequate or meaningful activities to individuals, or overly delimit their effective access to such activities.[185]

Besides striving to prevent incidents of violence between detainees, staff in detention centres should further refrain from inflicting any unnecessary, disproportionate violence themselves. The ECtHR has identified instances where prison authorities submit detainees to random strip searches that serve no legitimate purpose.[186] Similarly, the Court has identified EU prison regimes that

[180] *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009), para 134.
[181] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to Cyprus from 2 to 9 February 2017* (Council of Europe 2018) CPT/Inf 16.
[182] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to Sweden from 18 to 29 January* 2021 (Council of Europe 2021) CPT/Inf 20.
[183] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on its visit to Latvia from 12 to 22 April 2016* (Council of Europe 2017) CPT/Inf 16.
[184] European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality Luxembourg: Publications Office of the European Union* (FRA 2019) 1, 30; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Reports on the December 2019 periodic visit and July 2020 ad hoc visit to France and responses of the French authorities* (in French) (Council of Europe 2020) CPT/Inf (2021) 14 1.
[185] NPM
[186] *Roth v Germany* App nos 6780/18 and 30776/18 (ECtHR, 22 October 2020), paras 70-72; *Dejnek v Poland* App no 9635/13 (ECtHR 1 September 2017), paras 61ff.

employ strip searching as a tool to humiliate and debase detainees.[187] The ECtHR has also convicted EU states for failing to conduct such searches in a proper manner. Common issues include obliging the detainee to strip naked in front of others, and failing to carry out the search with respect to the rights and dignity of the person.[188]

In similar fashion, the ECtHR has convicted EU prison authorities for excessive and unjustified use of physical force.[189] The Court has identified numerous instances of unjustified use of shackles or handcuffs,[190] and the imposition of disciplinary punishment by segregation of detainees without considering the fact that they suffer from serious mental disturbances.[191] Empirical CPT findings reveal that disproportionate and punitive violence and ill-treatment remain common occurrences across many EU detention regimes.[192]

In addition, detainees should be allowed family visits, and any restriction to this right should be absolutely necessary and justified.[193] Similarly, detainees should be allowed to leave their detention centre temporarily, to e.g. attend a relative's funeral, or visit an ailing relative – such requests should be refused only if

[187] *Valašinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001), para 117; *Van der Ven v the Netherlands* App no 50901/99 (ECtHR, 4 February 2003), para 60; *Iwańczuk v Poland* App no 25196/94 (ECtHR, 15 November 2001), para 58.
[188] *Valašinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001), para 117; *Iwańczuk v Poland* App no 25196/94 (ECtHR, 15 November 2001), para 58.
[189] *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 101.
[190] *Henaf v France* App no 65436/01 (ECtHR, 27 November 2003), paras 52-60; *Mouisel v France* App no 67263/01 (ECtHR, 14 November 2002), para 47; *Duval v France* App no 19868/08 (ECtHR, 26 May 2011), paras 50-53.
[191] *Keenan v the United Kingdom* App no 27229/95 (ECtHR, 4 March 2001), para 116; *Renolde v France* App no 5608/05 (EctHR, 16 October 2008), para 129.
[192] See indicatively European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report on the September 2020 periodic visit to Spain and response of the Spanish authorities* (Council of Europe, 2021) CPT/Inf (2021) 27.
[193] *Kučera v Slovakia* App no 48666/99 (ECtHR, 17 July 2007), paras 127-134.

absolutely justified and necessary.[194] Detainees should, in principle, be allowed access to pornographic material while detained.[195] Once more, these rights are too often not respected by EU states.[196]

A further worrying indicator should be noted. Suicide rates of detainees have been shown to be higher compared to suicide rates of the general population in the vast majority of EU states. In more detail, the suicide rates of detainees are nearly five times more than those of the average (non-detaineed) population.[197] Suicide rates are particularly high amongst pre-trial detainees, revealing them to be a particularly vulnerable group in this regard.[198] Mental health disorders amongst the prison population are also particularly profound and prevalent.[199] Such disorders and tendencies are only punctuated by the overcrowded, inadequate, and unruly detention centres in which individuals find themselves in.[200]

2.3 Systemic risk of individual rights violations

The structural shortcomings identified in the previous section give rise to systemic risks of human rights violations. Such risks are systemic, since they result from the poor state of the prison system(s) in general, rather than the specific

[194] *Płoski v Poland* App no 26761/95 (ECtHR, 12 November 2002), paras 26-39; *Schemkamper v France* App no 75833/01 (ECtHR, 18 October 2005), paras 19-36.
[195] *Chocholáč v Slovakia* App no 81292/17 (ECtHR, 7 July 2022), paras 52-56 and 76.
[196] See in overview European Court of Human Rights, *Guide on case-law of the Convention: Prisoners' rights* (Council of Europe 2022) 1, 22ff.
[197] European Prison Observatory, Prisons in Europe. 2019 Report on European Prisons and Penitentiary Systems (Rome: epo, 2020) 1, 16.
[198] ibid 1, 16.
[199] World Health Organisation, *Status report on prison health in the WHO European Region 2022* (World Health Organisation 2023) 1, 44ff.
[200] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) 1, 25.

circumstances of any individual detainee. In other words, such risks have the potential to affect an open, indeterminable number of individuals across the prisons of the EU member states.

2.3.1 Torture and inhuman treatment

Amongst the most important rights systemically undermined is the prohibition of torture. This is safeguarded under article 3 ECHR, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".[201] Article 3 imposes an absolute prohibition – it is to be respected at all times, and no excuse will suffice to ever justify torture.[202]

Findings identified previously reveal a number of risks. Detaining an individual in an unsuitable detention environment may give rise to a breach of article 3 ECHR. [203] Failing to provide effective and timely medical assistance corresponding to the actual needs of the detainee may amount to a violation of article 3 ECHR.[204] Holding a detainee in prison, while there is a real and immediate risk to their life, may amount to such a violation.[205] Failing to protect

[201] ECHR, art 3.
[202] See Natasa Mavronicola, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 Human Rights Law Review 723; Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) Human Rights Law Review 1; *Ilaşcu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 334; Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (Hart 2007) 1, 212.
[203] *Dorneanu v Romania* App no 55089/13 (ECtHR, 28 November 2017), paras 93-100.
[204] *Serifis v Greece* App no 27695/03 (ECtHR, 2 November 2006), paras 34-36; and *Xiros v Greece* App no 1033/07 (ECtHR, 9 September 2010), paras 84-90.
[205] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 94; *Wenerski v Poland* App no 44369/02 (ECtHR, 20 January 2009), paras 56-65.

detainees from victimization,[206] inflicting disproportionate force on detainees,[207] or using strip searches as a humiliation tool,[208] may amount to a violation of article 3 ECHR. Making the use of sanitary and healthcare facilities dependent on staff may amount to degrading treatment.[209] Forcing detainees to tolerate passive smoking may, again, give rise to a violation of article 3 of the Convention.[210] These scenarios are far from hypothetical – on the contrary, the structural shortcomings revealed previously give rise to such risks of article 3 ECHR violation on the ground.

The ECtHR case-law establishes this risk in a clear fashion. In all pilot judgments and all leading cases concerned with overcrowding, the ECtHR found a violation of article 3 ECHR.[211] Such a violation arose from the excessive number of detainees housed in the prison system, in conjunction with the poor and inadequate conditions of detention. Indicatively, in *Torreggiani* the Court admitted a lack of personal space, hot water, and insufficient ventilation and lighting. Such conditions caused the detainees intense hardship, enough to amount to a violation of article 3 ECHR.[212]

---

[206] *Pantea v Romania* App no 33343/96 (ECtHR, 3 June 2003), paras 191-196; *D.F. v Latvia* App no 11160/07 (ECtHR, 29 October 2013), paras 81-95.
[207] *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 101; *Roth v Germany* App nos 6780/18 and 30776/18 (ECtHR, 22 October 2020), paras 70-72.
[208] *Valašinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001), para 117; *Van der Ven v the Netherlands* App no 50901/99 (ECtHR, 4 February 2003), para 60.
[209] See in particular the reasoning of the Court in *Ananyev and Others v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012), para 158.
[210] *Sylla and Nollomont v Belgium* App nos 37768/13 and 36467/14 (ECtHR, 16 May 2017), para 41; *Elefteriadis v Romania* App no 38427/05 (ECtHR, 25 January 2011), paras 49-55; *Florea v Romania* App no 37186/03 (ECtHR, 14 September 2010), paras 60-62.
[211] See the pilot and leading cases mentioned previously; for an overview report, see European Court of Human Rights, Factsheet – Detention conditions and treatment of prisoners (Council of Europe 2023) https://www.echr.coe.int/documents/d/echr/fs_detention_conditions_eng (accessed 08 November 2020).
[212] *Torreggiani and Others v Italy* App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013), paras 77-78.

More importantly, the Court noted that the individual applicants in such cases were not the only concerned parties. To use the *Torreggiani* example again: the shortcomings identified in that case were present across the Italian prison system, and of a structural nature. Consequently, the risk was systemic, and capable of affecting a growing number of individuals.[213] Similarly, in *Varga* the Court found a violation of article 3 ECHR. This was due to a lack of cell space, unjustified restrictions on access to sanitary facilities, and lack of privacy.[214] Again, the ECtHR admitted that such problems were of a recurrent and persistent nature, and affecting an indeterminate number of detainees:[215]

> It appears, therefore, that the violations were neither prompted by an isolated incident nor attributable to a particular turn of events in those cases, but originated in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system and insufficient legal and administrative safeguards against the proscribed kind of treatment. This problem has affected, and has remained **capable of affecting, a large number of individuals** who have been detained in detention facilities throughout Hungary.

The risk of an article 3 ECHR violation was thus of a systemic nature. In practice, this means that the ECtHR may have ruled on the specific pilot and leading cases identified before, and assessed the conditions of the specific applicants. However, this does not mean that the full extent of the issue was laid clear before the Strasbourg Court. On the contrary, and as the Court acknowledged, it is only the tip of the proverbial iceberg that emerges at court proceedings. The same

[213] ibid paras 87-88; for an analysis, see Federica Favuzza, 'Torreggiani and Prison Overcrowding in Italy' (2017) 17 Human Rights Law Review 153.
[214] *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015), para 99.
[215] ibid para 99, emphasis added.

structural problems that systemically undermine the rights of Mr Torreggiani, Mr Varga, or any other particular applicant, simultaneously undermine the rights of an indeterminate number of detainees in EU prisons.

A final observation proves of particular importance. In assessing whether a risk of violating article 3 ECHR is present, the ECtHR considers all factors of relevance. In practice, this means that a prison suffering from a structural problem (e.g. overcrowding) does not automatically give rise to an article 3 ECHR violation.[216] Similarly, however, an article 3 ECHR violation does not depend solely on the existence of a structural problem. The gravity and extent of any given issue is not the primary concern of the Court. Instead, the ECtHR is concerned with the (actual or potential) impact on the individual.

To demonstrate this point, it proves useful to refer to the specific case of *Orchowski*. In assessing the potential of an article 3 ECHR violation, the ECtHR considered two factors in particular. The first had to do with cell space provided to the detainees. Such space was minimal, less than 2 square metres (m^2) per person.[217] The second factor the Court considered had to do with the prison facilities and regimes themselves. Food and hygiene proved of particular importance in *Orchowski.* Each detainee had access to food and was entitled to use hygienic facilities. Due to acute overcrowding, however, detainees had to eat while in the same room with many others, and had to shower alongside groups

[216] European Court of Human Rights, Factsheet – Detention conditions and treatment of prisoners (Council of Europe 2023) https://www.echr.coe.int/documents/d/echr/fs_detention_conditions_eng (accessed 08 November 2020).
[217] *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009), para 134.

of strangers.[218] The Court considered all these factors in conjunction, and concluded that a violation of article 3 ECHR had occurred, in light of their "cumulative effect on the applicant".[219]

Orchowski clearly demonstrates two points. The first point is that overcrowding and inadequate material conditions of detention often constitute two sides of the same coin. Housing too many detainees in an environment not designed to support them directly gives rise to sanitary, hygiene, and privacy concerns – and such concerns, when present, are only exacerbated by an increased number of detainees.

The second point is arguably even more important. In *Orchowski*, the problem was not the facilities and their failure to properly accommodate all housed detainees. Similarly, the problem was not the excessive number of individuals sharing these facilities. The problem, instead, was the impact that these two factors had on the individual detainee *together*. The ECtHR does not concern itself with either qualitative or quantitative data *per se* and for its own sake. Instead, the ECtHR centres its analysis on the individual.

We shall resume this point later in the analysis, to showcase that any EU response to the prison problem must not concern itself with any individual factor in isolation. Instead, such EU action must be comprehensive enough to account for the cumulative effect of all relevant factors, and their holistic impact on the rights of the individual detainee.[220]

[218] ibid para 134.
[219] ibid para 135.
[220] See the discussion in chapters 2, 3, 8, and 9 of this thesis in particular.

For now, the analysis returns to detainee rights that are facing a systemic risk.

2.3.2 Privacy, health, life, dignity

Structural shortcomings in national detention regimes put other ECHR rights at peril too. These include particularly the rights to privacy, life, health, and dignity.

The right to privacy is safeguarded under article 8 ECHR, entitled 'right to respect for private and family life'. The article states the following. "Everyone has the right to respect for his private and family life, his home and his correspondence". The article is necessarily delimited by detention,[221] yet its core remains (should remain) intact.[222]

As already mentioned, the ECtHR found a violation of article 3 ECHR in all pilot judgments and leading cases identified before. However, in the same cases the Court found no violation in regards to article 8 ECHR. This may be justified on the basis of a few reasons. In some cases, the applicants did not raise a violation of article 8 ECHR as an issue.[223] In others, the Court did not engage with such allegations, even though they were raised by the applicants. Instead, the ECtHR deemed the relevant complaints (and related facts) as already examined and considered under the viewpoint of article 3 ECHR.[224] The Court hence chose to

[221] In accordance with the ECHR, art 8 para 2, which allows justified limitations on the basis of public security.
[222] *Klibisz v Poland* App no 2235/02 (ECtHR, 04 October 2016) para 354; and *Hirst v the United Kingdom (no. 2)* App n. 74025/01 (ECtHR, 6 October 2005), paras 69-70.
[223] Indicatively in *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015).
[224] See, indicatively, *J.M.B. and Others v France* App no 9671/15 (ECtHR, 30 January 2020), para 309: "However, having regard to its finding relating to Article 3 (paragraph 302 above), the Court considers that there is no need to examine the alleged violations of Article 8 of the Convention on account of the conditions of detention of the applicants" (own translation).

refrain from embarking upon an analysis of the article 8 theoretical framework, and its application regarding detention conditions.

I maintain that failing to examine the structural issues identified before through the prism of article 8 ECHR is a missed opportunity by the Strasbourg Court.[225] The absence of an article 8 ECHR violation in the context of pilot and systemic judgments does not reflect on the absence of such a risk on the ground. On the contrary, it is maintained that such a risk is evident, in light of findings identified previously.

The problem of structural overcrowding proves of particular relevance to article 8 ECHR. Overcrowding undermines the detainees' privacy. To stress this point, it should be noted that the CPT devoted a section on overcrowding in its latest general report.[226] There, the CPT stated that an overcrowded prison necessarily translates to a lack of personal cell space and privacy when using prison facilities.[227] Such remarks have been confirmed by the ECtHR pilot and systemic cases, which identified lack of space and privacy as structural issues in all EU states examined (even if they failed to consider such issues under article 8). If overcrowding is present; and if it poses a systemic risk of article 3 ECHR violation; then it must necessarily pose an equal risk of article 8 ECHR violation. It is simply

[225] Generally on this point see Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 Netherlands Quarterly of Human Rights 385.
[226] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) paras 84ff.
[227] ibid paras 86 and 88.

impossible to construe an overcrowded prison system that respects individual space and privacy.

Besides overcrowding, other structural deficiencies may give rise to a violation of article 8 ECHR. In a series of cases, the ECtHR has convicted EU states as violating article 8 ECHR for failing to ensure a minimum level of privacy for detainees using sanitary facilities.[228] In addition, states have an obligation to keep the medical data of their detainees private and under authorised access; the Court has convicted EU states for disclosing medical data of individuals in PTD, stating it raises issues under article 8 ECHR.[229] Article 8 ECHR is also relevant in regards to the prison regime. The Court has found that random strip searches that serve no legitimate purpose, or are carried out to humiliate and debase detainees, may run counter to article 8 ECHR.[230]

In light of such poor detention conditions and regimes, the systemic risk of article 8 ECHR violations becomes apparent. Indeed, a prison system does not have to be overcrowded to violate the space and privacy of its detainees. It suffices to prove that such a system suffers from structural issues relating to some other aspect of its regime (such as overly strict and abusive wardens, or lack of respect regarding the detainees' data). Such deficiencies would equally give rise to a systemic risk of article 8 ECHR violation.

Turning to the rights to life and health.

---

[228] *Szafrański v Poland* App no 17249/12 (ECtHR, 15 March 2016), paras 37-41; *Danilczuk v Cyprus* App no 21318/12 (ECtHR, 3 April 2018), paras 57 and 59; *Sylla and Nollomont v Belgium* App nos 37768/13 and 36467/14 (ECtHR, 16 May 2017), paras 9, 30 and 41.
[229] *Frâncu v Romania* App no 69356/13 (ECtHR, 13 October 2020), paras 57-61.
[230] *Syrianos v Greece* App no 49529/12 (ECtHR, 7 October 2021), paras 85-91.

Article 2 ECHR dictates that "[e]veryone's right to life shall be protected by law".[231] Once more, this provision applies to all individuals, including detainees. The article refers to life, without including any reference to health. Nevertheless, the ECtHR has long established that individual health is of relevance to the Convention; and has admitted health issues to be examined under various ECHR articles, including articles 2, 3, and 8 ECHR.[232]

Once more, the ECtHR pilot and leading cases identified before make no explicit reference to article 2 ECHR, or the rights to life and health. It is also interesting to note that the ECtHR generally refrains from examining any potential violations under article 2 ECHR, unless the individual actually passes away.[233] Such an approach stands out as rather excessive – one needs not die, before their right to health is put at risk. Indeed, if death is the only occurrence that can trigger an article 2 ECHR violation before the ECtHR, the very right itself becomes rather meaningless to the individual.

At any rate, the point stands: the ECtHR has rarely considered structural issues in detention regimes under the lens of article 2 ECHR.

Once more, it is maintained that such an omission means little. It is submitted that the life and health of detainees are systemically undermined due to structurally poor conditions of detention.

It has already been noted that a materially inadequate and unsanitary environment gives rise to diseases and deterioration of individual health,

[231] ECHR, art 2.
[232] European Court of Human Rights, *Thematic Report: Health-related issues in the case-law of the European Court of Human Rights* (Council of Europe 2015) 1, 5.
[233] *Dzieciak v Poland* App no 77766/01 (ECtHR, 9 December 2008), para 101.

including mental health.[234] Suicide rates amongst EU detainees remain particularly problematic.[235] Such issues are only exacerbated by the excessive use of detention, and the overcrowded detention centres in which individuals find themselves in.[236] In the case of *Longin,* the Strasbourg Court similarly stated that an overly close proximity between sanitary facilities and living spaces would raise objections from a hygiene perspective.[237]

The argument is strengthened once we consider the general standards established by the ECtHR in relation to state obligations towards detainees.[238]

It is a general principle of ECtHR case-law that states have a positive obligation to take preventive operational measures to protect an individual whose life is at risk.[239] This duty extends to situations where an individual needs protection from herself.[240] The Strasbourg Court has further acknowledged that individuals in custody are in a particularly vulnerable position, since they have been detained on an involuntary basis.[241] Detainees rely on prison authorities, and prison authorities are under a duty to protect them.[242] Consequently, and in case the

[234] World Health Organisation, *Status report on prison health in the WHO European Region 2022* (World Health Organisation 2023) 1, 44ff.
[235] European Prison Observatory, Prisons in Europe. 2019 Report on European Prisons and Penitentiary Systems (Rome: epo, 2020) 1, 16.
[236] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) 1, 25.
[237] *Longin v Croatia* App no 49268/10 (ECtHR, 06 November 2012), para 60.
[238] For an analysis, see O M Yaroshenko et al, 'The impact of the European court of human rights on the development of rights in health care' (2022) 15 International Journal of Human Rights in Healthcare 501.
[239] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para 115; *Branko Tomašić and Others v Croatia* App no 46598/06 (ECtHR, 15 January 2009), para 50.
[240] *Renolde v France* App no 5608/05 (EctHR, 16 October 2008), para 81.
[241] *Fernandes de Oliveira v Portugal* App no 78103/14 (EctHR, 7 March 2018), paras 13 and 124.
[242] *Keenan v the United Kingdom* App no 27229/95 (ECtHR, 4 March 2001), para 91; *Renolde v France* App no 5608/05 (EctHR, 16 October 2008), para 81; *S.F. v Switzerland* App no 23405/16 (ECtHR, 30 June 2020), para 78.

authorities knew or ought to have known at the time of the existence of a real and immediate risk to the individual's life, they must take all measures within the scope of their powers to avoid that risk.[243] In case they fail to do so, the ECtHR has found states as having violated article 3 ECHR, by subjecting the detainee to inhuman treatment.[244]

In more detail, the ECtHR has ruled that state authorities must provide for appropriate medical treatment for all detainees, at a level at least comparable to that which is provided to the population as a whole,[245] and seeking the opinion of specialised medical experts, if necessary.[246] In case such standards are not met, and the authorities fail to provide effective and timely medical assistance corresponding to the actual needs of the detainee, the ECtHR has found EU states as violating article 3 ECHR.[247] This obligation of the state extends to providing medical aids to the detainee; for instance, the ECtHR has found that not providing eyeglasses to detainees with eyesight problems may further give rise to an article 3 ECHR violation.[248] If, now, the detainee's condition is such that the detention environment proves altogether unsuitable for them, the ECtHR has found that national authorities must consider taking special measures, and even place the individual outside detention, if necessary – failure to do so may, again, give rise to a breach of article 3 ECHR.[249]

[243] *Younger v the United Kingdom* App no 57420/00 (ECtHR, 7 January 2003); *Fernandes de Oliveira v Portugal* App no 78103/14 (EctHR, 7 March 2018), para 110.
[244] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 94; *Wenerski v Poland* App no 44369/02 (ECtHR, 20 January 2009), paras 56-65.
[245] *Cara-Damiani v Italy* App no 2447/05 (ECtHR, 7 February 2012), para 66.
[246] *Wenner v Germany* App no 62303/13 (ECtHR, 1 September 2016), para 57.
[247] *Serifis v Greece* App no 27695/03 (ECtHR, 2 November 2006), paras 34-36.
[248] *Xiros v Greece* App no 1033/07 (ECtHR, 9 September 2010), paras 84-90.
[249] *Dorneanu v Romania* App no 55089/13 (ECtHR, 28 November 2017), paras 93-100.

Similarly, CoE standards dictate that the detention environment itself must be suitable for all individuals, and especially those in a vulnerable state. Hence, the ECtHR has found that detainees suffering from chronic health issues should be separated from detainees who smoke, to not be inflicted with passive smoking. The fact that such segregation may not prove possible in light of lack of space or overcrowding constitutes no justification – the state's obligation to safeguard the detainee's health proves paramount, and providing for an environment that forces individuals to tolerate passive smoking may, again, give rise to a violation of article 3 of the Convention, or at the very least be considered an aggravating factor to the detainee experience.[250] In addition, the ECtHR has convicted EU states for failing to ensure proper record-keeping of the health condition of their detainees, to allow for regular and systematic supervision of their state of health, and ensure that the healthcare provided to them is comprehensive.[251] The ECtHR has also convicted EU states for failing to guarantee the prisoners' right to life,[252] and their physical or mental integrity.[253]

In light of the structural shortcomings identified in the previous section, and in light of the established CoE standards, as deriving particularly from ECtHR case-

[250] *Sylla and Nollomont v Belgium* App nos 37768/13 and 36467/14 (ECtHR, 16 May 2017), para 41; *Elefteriadis v Romania* App no 38427/05 (ECtHR, 25 January 2011), paras 49-55; *Florea v Romania* App no 37186/03 (ECtHR, 14 September 2010), paras 60-62.
[251] *Iacov Stanciu v Romania* App no 35972/05 (ECtHR, 24 July 2012), paras 180-186; *Z.H. v Hungary* App no 28973/11 (ECtHR, 8 November 2012), para 29; *Grimailovs v Latvia* App no 6087/03 (ECtHR, 25 June 2013), para 151.
[252] *Jasinska v Poland* App no 28326/05 (ECtHR, 1 September 2010); *Ketreb v France* App no 38447/09 (ECtHR, 19 October 2012); *De Donder and De Clippel v Belgium* App no 8595/06 (ECtHR, 6 March 2012); See also *Keenan v the United Kingdom* App no 27229/95 (ECtHR, 2 April 2001).
[253] *D.F. v Latvia* App no 11160/07 (ECtHR, 29 January 2014); *Indelicato v Italy* App no 31143/96 (ECtHR, 18 January 2002). See further Dia Anagnostou and Dimitris Skleparis, 'Human Rights in European Prisons: Can the Implementation of Strasbourg Court Judgments Influence Penitentiary Reform Domestically?' in Tom Daems and Luc Robert (eds) *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Macmillan 2017) 1, 37ff.

law, a systemic risk of violation of the detainees' rights to life and health may be established.

The same point applies in regards to dignity.

Similar to health, a right to dignity is not formally qualified under the ECHR.[254] To this day, there is a single reference included under a Convention Protocol, concerning the death penalty.[255] Nevertheless, such a textual absence means little. ECtHR case-law has established that protecting human dignity is the essence of the ECHR.[256] Further, the Court often refers to dignity as included in international declarations.[257] The Court is taken to use these references to reflect its "deliberate intention of building a bridge between the universal instruments and the silent European text, filling the gap or the vacuum created by the authors of the Convention".[258]

[254] Jean Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014), 1, 394.
[255] European Court of Human Rights, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances* (Council of Europe 2002) stating that "the abolition of the death penalty is essential […] for the full recognition of the inherent dignity of all human beings".
[256] *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002), para 90; *SW v United Kingdom* App no 20166/92 (ECtHR, 22 November 1995); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 1, 3; Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904; see also Sonja Snacken, 'Human Dignity and Prisoners' Rights in Europe' (2021) 50 Crime and Justice 301.
[257] Such as The Universal Declaration of Human Rights that appears in 75 cases, and the International Covenant on Civil and Political Rights that is mentioned in 171 cases; see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff.
[258] Jean Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014), 1, 400; Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 5.

Granted, detention constitutes an *a priori* assault on human dignity – yet this is justified and inevitable.[259] The point, here, is that the structural issues identified previously constitute a violation of human dignity, or at least give rise to a systemic risk of such violation.

This is evidenced by the vast number of ECtHR convictions that refer to dignity in conjunction with ECHR provisions, especially in regards to articles 3 and 10 ECHR.[260] Of particular relevance prove cases relating to the use of force against detainees,[261] the use of overly harsh interrogation techniques,[262] use of restraint on vulnerable (particularly ill) individuals.[263] Also of relevance prove cases that assess dignity in regards to overcrowding,[264] limited sanitation facilities,[265] lack of natural light,[266] and generally poor conditions of detention.[267] In reality, every ECHR violation is a violation of dignity, as dignity serves as the "very essence" of the ECHR.[268]

[259] See *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 30; *Costello-Roberts v United Kingdom* App no 13134/87 (ECtHR 25 March 1993), para 30; *Dougoz v Greece* App no 40907/98 (ECtHR 06 March 2001), para 4.
[260] Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff; Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021); *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 33 ("[…] he was treated as an object in the power of the authorities"); *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 90.
[261] *Ribitsch v Austria* App no 18896/91 (ECtHR, 4 December 1995).
[262] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), para 78.
[263] *Mousiel v France* App no 67263/01 (ECtHR 14 November 2002).
[264] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).
[265] *Isyar v Bulgaria* App no 391/03 (ECtHR, 20 November 2008).
[266] *Aliev v Georgia* App no 522/04 (ECtHR, 13 January 2009).
[267] 390 cases out of 1303 relating to Article 3 concern poor conditions; see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff. Note further *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978); *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999); *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).
[268] *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002), para 90; Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

Indeed, one may consider it particularly challenging to safeguard individual dignity in detention settings that are "reaching breaking point".[269]

2.3.3 Proportionality of punishment

It is submitted that inadequate and harsh detention regimes across member states undermine the principle of proportionality of punishment.[270] This becomes clear once we consider the following hypothetical.

Tall and Short are each sentenced to *n* years of imprisonment, having (independently) committed the same (grave, and warranting imprisonment) crime. Is this proportionate? Indeed, and according to the principle of cardinal proportionality, it stands to reason that equally serious crimes should get equally severe punishments (*relative* cardinal proportionality), and that the punishment should fit the crime (*absolute* cardinal proportionality).[271] Incarceration of equal years seems fair for both.[272]

Consider, now, that Tall and Short spend their (numerically identical) sentences in different prisons. Tall is sent to a large, individual cell, with large windows, ready access to sanitary facilities, and friendly, collaborative wardens and peers. Short, however, ends up in a tiny, shared cell, with no natural light, an unsanitary,

[269] I owe this expression to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015* (Council of Europe 2016), para 61.
[270] See, to this point, Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022).
[271] Göran Duus-Otterström, 'Weighing Relative and Absolute Proportionality in Punishment' in Michael Tonry (ed), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press 2019) 1, 30.
[272] Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55.

unruly, and violent environment.[273] Would these objectively identifiable variations in detention conditions affect proportionality? According to criminal justice scholarship, the answer lies in the affirmative: inequalities in treatment result in unequal, unfair, and ultimately disproportionate punishments.[274] This is because equally serious crimes get unequally severe punishments (the number of years (*n*) behind bars remain the same, yet the suffering experienced differs considerably), and the punishment does not fit the crime (if we assume *n* years of incarceration in *average* detention conditions to be a fitting punishment, then the same *n* years in *harsh* conditions appears excessive).

Essentially, and according to well-established criminal justice doctrine, as backed by criminological findings, objectively identifiable variations in detention conditions should be considered, before determining whether an imprisonment sanction is proportionate.[275]

The EU prison reality chooses to ignore this convention. Instead, Tall, as a Dutch citizen, ends up in a Dutch cell, in a safe, well-taken care of environment,[276] while Short, a Greek, finds herself in a prison system in "chronic crisis". [277]

[273] A matter of luck – Tall got fortunate, whereas Short got the *short* end of the stick.
[274] Indicatively, Adam J Kolber, 'The Subjective Experience of Punishment' (2009) 109 Columbia Law Review 182, 188; Esther van Ginneken and David Hayes, ''Just' punishment? Offenders' views on the meaning and severity of punishment' (2017) 17 Criminology and Criminal Justice 62. While the authors proceed to zoom in on the subjective experience of punishment, they nevertheless provide a useful *exposé* in regards to objectively quantifiable factors as well.
[275] For a comparative analysis of this approach in the American jurisprudence, with valuable comparative lessons for the European legal order, see E Thomas Sullivan and Richard S Frase, *Proportionality Principles in American Law* (Oxford University Press 2009) 1, 129ff.
[276] See, indicatively, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016* (Council of Europe 2017) CPT/Inf 1, 1, 20ff.
[277] See, indicatively, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Greek Government on the ad hoc visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or*

Consequently, and due to structural shortcomings, the rights of Short are in systemic risk,[278] while those of Tall are safeguarded throughout the duration of her detention.

The suffering inflicted upon Short is considerably greater compared to Tall, and thus the punishment is to be found disproportionate, and unfair. This, in turn, may lead to excess distress or hardship,[279] and ultimately constitute a violation of article 3 ECHR.[280] The sentence accorded to a crime should reflect the seriousness of the offence.[281] Sentences that result in distinct levels of individual rights protection violate the principle of proportionality.[282] In turn, the very violation of the proportionality principle amounts to a violation of individual prerogatives, since the disproportionate detention of the individual exposes them to an environment that undermines their rights.[283]

The Strasbourg Court in the case of *Price* deemed a custodial sentence of a single week as violating article 3 ECHR.[284] The reasoning behind this judgment was not the (rather short) duration of the sentence. Instead, the Court focused on

Degrading Treatment or Punishment (CPT) from 22 November 2021 to 1 December 2021 (Council of Europe 2022) CPT/Inf 16, 1, 8ff.

[278] Utilising here the language of the CJEU, see Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 89ff.

[279] *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008), para 96.

[280] Unlike EU law, the ECHR does not acknowledge an explicit principle of proportionality; see Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022) 1, 91ff; see further *Vinter and Others v UK* App nos 66069/09, 130/10, and 3896/10 (ECtHR, 17 January 2012), para 89; *Léger v France* App no 19324/02 (ECtHR, 11 April 2006), para 72.

[281] Dirk Van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 The Modern Law Review 541.

[282] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1.

[283] Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022) 1, 155ff.

[284] *Price v United Kingdom* App no 33394/96 (ECtHR, 10 July 2001).

the detention regime, which failed to adequately accommodate the health problems of the individual detainee. In this fashion, the ECtHR considered that a custodial sentence in an environment unsuitable to the needs and rights of the individual detainee contradicts the principle of proportional punishment. The ECtHR with *Price* confirmed its earlier line, in which conditions of detention and proportionality are directly linked – such case-law has been well-established.[285]

The example provided before concerns post-trial detention. However, the same logic applies in regards to pre-trial detention. Here, the ECtHR has held that:[286]

> the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it **must also be necessary** in the circumstances.

In this fashion, a proportionality test – although not prescribed by the Strasbourg Court – is "implicit in the logic of using pre-trial detention as a measure of last resort".[287] Indeed, the unjustified use of PTD gives rise to a violation.[288] As already explained, this is a recurrent issue across EU prison systems.

Consequently, it is submitted that sending individuals to be detained in prison systems providing for poor detention conditions and inadequate, harsh regimes

[285] See further *Aerts v Belgium* App no 25357/94 (ECtHR, 30 July 1998), a case concerning a mental patient, where no violation was found.
[286] *Stanev v Bulgaria* App no 36760/06 (EctHR, 17 January 2012), para 143, emphasis added; also *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000), para 78.
[287] Adriano Martufi and Christina Peristeridou, 'The Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 153, 164.
[288] ibid.

should be regarded as a disproportionate measure, and be deemed as a human rights violation.[289] Since the reality of prisons in the EU is plagued with structural problems, the existence of a systemic risk in regards to the proportionality of punishment becomes evident.

2.4 Conclusion

The chapter has identified a number of structural deficiencies, and shown how they threaten a number of individual rights. A litany of problems face EU detention regimes. Such problems are structural in nature, stemming from widespread deficiencies that form part and parcel of the very prison system(s). These deficiencies result in systemic risks of individual rights violations. Such violations exceed the suffering that is inevitable and inclusive in the very nature and purpose of detention in the criminal justice system. The risk of such violations is systemic in nature. This is because the structural shortcomings do not affect specific detainees in regards to certain rights. Instead, they remain capable of affecting an indeterminate number of individuals, regarding a number of rights, across the entirety of the prison system.

The analysis in this chapter is not meant to be exhaustive. This is both by choice and necessity.

By design, I have chosen to underline these issues and risks that emerge as key on the basis of CoE findings. Yet one could make the case for other rights being

[289] Dirk Van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 The Modern Law Review 541. See further *Aerts v Belgium* App no 25357/94 (ECtHR, 30 July 1998), para 46; *Brand v Netherlands* App no 49902/99 (ECtHR, 11 May 2004), para 62; *M v Germany* App no 19359/04 (ECtHR, 17 December 2009), para 128; *Grosskopf v Germany* App no 24478/03, (ECtHR, 21 October 2010), para 51.

at peril. Indicatively, these could (and likely would) include the right to liberty as safeguarded under article 5 ECHR,[290] the freedom of religion as safeguarded under article 9 ECHR,[291] the presumption of innocence as safeguarded under article 6 ECHR,[292] and the *ne bis in idem* principle as enshrined under Protocol no 7 of the Convention.[293] Similarly, one could focus on other structural problems, such as inadequate or of poor quality nutrition,[294] unjustified and violent force-feeding practices,[295] insufficient outdoor activities,[296] intrusive surveillance regimes,[297] or lack of educational opportunities provided to detainees.[298]

[290] *Pankiewicz v Poland* App no 34151/04 (ECtHR, 25 February 2008), para 45; *Sy v Italy* App no 11791/20 (ECtHR, 24 January 2022), paras 82-89 and 134-135. See also Leandro Mancano, 'Storming the Bastille: Detention conditions, the right to liberty and the case for approximation in EU law' (2019) 56 Common Market Law Review 61.

[291] See in relation to the failure of national authorities to provide food that accounts for specific dietary requirements rising from the individual's religion, giving rise to a violation of the right to freedom of religion, as safeguarded under article 9 ECHR: *Jakóbski v Poland* App no 18429/06 (ECtHR, 07 December 2010), paras 48-55; and *Vartic v Romania (No 2)* App no 14150/08 (ECtHR, 17 December 2013).

[292] Andrew Ashworth, 'Four threats to the presumption of innocence' (2006) 10 The International Journal of Evidence and Proof 241; Adriano Martufi and Christina Peristeridou, 'The purposes of pre-trial detention and the quest for alternatives' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 153; A Van Kalmthout et al, 'Introductory summary' in AM van Kalmthout, MM Knapen and C Morgenstern (eds), *Pre-trial detention in the European Union* (Wolf Publisher 2009) 1, 49.

[293] ECHR, Protocol no 7, art 4 para 1: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[294] *Kadiķis v Latvia (no. 2)* App no 62393/00 (ECtHR, 4 May 2006), para 55; *RR and Others v Hungary* App no 36037/17 (ECtHR, 02 March 2021). See further Clare James, 'Food, dignity, and the European Court of Human Rights' (2023) Legal Studies 1.

[295] For an analysis on ECHR provisions and ECtHR case-law in regards to hunger strikes of prisoners, see Christos Papachristopoulos, 'On the legitimacy of force-feeding of prisoners and detainees on hunger strike under the European Convention and the European Court of Human Rights' (2019) Poiniki Dikaiosini (Criminal Justice) 1304; see also Pauline Jacobs, *Force-feeding of prisoners and detainees on hunger strike* (Interesentia 2012).

[296] European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality Luxembourg: Publications Office of the European Union* (FRA 2019) 1, 30.

[297] *Van der Graaf v the Netherlands* App no 8704/03 (ECtHR, 1 June 2004); *Vasilică Mocanu v Romania* App no 43545/13 (ECtHR, 6 December 2016), para 36.

[298] *Muršić v. Croatia* App no 7334/13 (ECtHR, 20 October 2016), paras 13-17.

Besides the research design and methodological choice, there is another factor at play. Practically, it is simply impossible to achieve a fully comprehensive analysis. Structural shortcomings are impossible to identify in their entirety. Judicial and monitoring CoE findings serve as a solid indication. However, both the ECtHR and the monitoring (e.g. CPT) mechanisms in place fail to capture the entire picture. This is because the Court plays a subsidiary role, with a minority of cases reaching it.[299] As for monitoring mechanisms, it is often (notoriously) difficult for detainees to have effective access to external communication, and report fully and honestly. This challenge is particularly relevant when trying to assess the quality of any given detention regime via observation, interviews, and other qualitative techniques.[300] As stated before, what is known of structural problems and systemic risks constitutes merely the tip of the proverbial iceberg – especially regarding data gathered during the pandemic.

Nevertheless, it is maintained that such points only strengthen the overarching argument. One does not need to be in a position to pinpoint these exact problems that afflict these specific individuals in these distinct prisons in these states, and argue for a systemic risk of this and that particular right. Such a comprehensive catalogue is not a prerequisite. The point is made: an overview image across the

[299] Part of this is because a case may only reach the ECtHR once all internal domestic remedies have been exhausted. See Françoise Tulkens, 'Droits de l'homme et prison. Jurisprudence de la nouvelle Cour européenne des droits de l'homme' in Olivier de Schutter and Dan Kaminski (eds) *L'institution du droit pénitentiaire. Enjeux de la reconnaissance de droits aux détenus* (Bruylant 2002) 1, 255ff.

[300] See in particular European Prison Litigation Network (EPLN), *Bringing justice into prison: for a common European approach* (2019), <http://www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf> (accessed 13 October 2023); Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU* (European Parliament Directorate-General for Internal Policies 2023) 1, 20; and Eva Aizpurua and Mary Rogan, 'Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies' (2020) 11 New Journal of European Criminal Law 204, 205.

27 states reveals a series of persisting, structural issues that affect a *numerus apertus* of detainee rights of an indeterminate number of individuals or groups thereof at pre- and post-trial level both.

Having exposed the structurally poor state of many EU national detention regimes giving rise to systemic risks of individual rights violations, the analysis now turns to the question: how and why is this reality a problem for the EU? This shall be the principal task of Part A.

PART A

THE NECESSITY OF EU ACTION

The previous chapter outlined the problem to be addressed. Later chapters assume this very task, focusing on the ways in which the EU may address structurally problematic state prisons. Before proceeding, however, another task proves a prerequisite: establishing the relationship between EU and prisons.

This task emanates from the very nature of the EU, as defined by the principle of conferral.[301] As is well known, the Union may only act within the limits of its own competence. In regards to prisons, the EU has no self-standing competence.[302] In regards to individual rights violations occurring at state level, the EU has but an ancillary competence.[303] In this light, the nexus between the problem of prisons and EU law is not readily apparent. On the contrary, it is something that must be proven.[304]

In this fashion, and before being able to discuss EU action in prisons, the preliminary point of establishing an EU-prisons nexus must be addressed. To put it bluntly: what does the EU have to do with it? Providing an answer to this question constitutes the task of this Part.

To this end, the analysis proceeds in three steps. Chapter 3 outlines the EU human rights *acquis,*[305] and underlines its limits. Chapters 4 and 5 identify the

[301] Alongside the principles of subsidiarity and proportionality; for an analysis on EU competence, see chapters 3 and 10 of this thesis.
[302] See chapter 1 and section 3.3 of this thesis.
[303] See section 3.3 of this thesis.
[304] See section 1.4 of this thesis, and chapter 3 as well.
[305] As mentioned in the introduction, the term *acquis* refers to the body of law that is binding on all member states; further, it serves the (political) purpose of setting the standards, which standards aspiring to join the Union should fulfil. Matti Joutsen, 'The European Union and

connection between EU and prisons on the basis of two points: mutual recognition and trust, and systemic breaches of EU values undermining article 2 TEU, as read in conjunction with article 7 TEU. Chapter 6 underlines the importance and extent of the problematic impact of prisons on the EU, maintaining the existence of a functional and principled imperative of EU action in prisons.

Cumulatively, these points establish the adverse consequences of the current prison reality for the Union, and prove the necessity of an EU (re)action. Part B turns to the EU (current and potential) responses to this problem.

Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 8 <http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021). Similarly, the EU *human rights acquis* refers to all EU rules, policies, legislation, founding Treaties, CJEU judgments, and hard law "relating to the EU's internal fundamental rights policy"; see Steven Greer, Janneke Gerards and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press 2018) 1, 284.

CHAPTER 3

THE STATUS OF EU PRISONS: JUST A STATE PROBLEM?

3.1 Introduction

This chapter submits two points. Firstly, there is an EU human rights normative framework of direct relevance to detention. Secondly, the mere existence of such a framework does not justify EU action in prisons.

The findings presented in the previous chapter are of obvious relevance to the national scholar or policymaker, when examined independently and in isolation, grouped per state.[306] Yet, a holistic analysis uncovering core issues across the entirety of the Union's territory is of little direct value in such a purely domestic context.[307] To justify it, one must adopt an EU-specific perspective.

Yet the adoption of such a perspective constitutes in itself a challenge. This challenge does not stem from the absence of EU human rights provisions, for the EU has developed its own human rights *acquis,* which includes a number of detention-related provisions.[308] The challenge instead results from the nature of this EU *acquis.* Indeed, the EU human rights normative framework is but an accessory to EU law, not addressed to the member states unless the domestic issue in question presents a sufficient nexus with the EU legal order.[309] In the

[306] E.g. "these are the prisons Greek prisons are facing, these are the risks regarding Spanish detainees". such findings would be of obvious relevance to domestic or comparative law scholars, a point already raised in chapter 1 of this thesis.
[307] Arguably from a comparative perspective only.
[308] A point elaborated on under section 3.2 of this thesis.
[309] See section 3.3 of this thesis; note, among others, Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

absence of a self-standing EU competence in prisons or detention matters, such a nexus appears lacking.

Section 3.2 focuses on the EU human rights *acquis,* highlighting aspects of particular relevance to prisons. Section 3.3 outlines the key points that prohibit any claims of an EU self-standing human rights or prison competence. The chapter concludes that the mere existence of EU human rights provisions of relevance to detention does not justify EU action in prisons – unless a specific hook that links prisons to EU law may be identified.

3.2 The EU human rights normative framework

The EU has construed its own human rights *acquis* that is of relevance to detention.

While the existence of EU human rights law is uncontested, it is rather difficult to agree on the exact definition or contents of such an *acquis.*[310] This is because the sources of human rights norms in EU law are multiple,[311] deriving from EU

[310] For a discussion, see Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 Common Market Law Review 1201.

[311] For an analysis, see Helene Sjursen, 'The EU as a Normative Power: How Can This Be?' (2006) 13 J. EUR. PUB. POL'Y 235; Jan Wouters, 'From an Economic Community to a Union of Values: the Emergence of the EU's Commitment to Human Rights' in Jan Wouters et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 1, 11; Takis Tridimas, 'Judicial Federalism and the European Court of Justice' in J Fedtke and BS Markezinis (eds), *Patterns of Federalism and Regionalism: Lessons for the UK* (Hart 2006) 1, 149, 150 – referring to the contribution of the judicial process 'to the emergence of a European demos'; Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 1, 74; referring further to JF Lindner, 'Grundrechtsschutz in Europa: System einer Kollisionsdogmatik' (2007) 42 Eur 160, 160; Kaarlo Tuori, 'The pluralism of European fundamental rights law', in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edgar 2017) 1, 35; Jan Wouters and Michal Ovádek (eds) *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 1, 94.

primary law,[312] EU secondary law,[313] EU case-law,[314] and influenced by a variety of external sources, including the constitutional traditions common to the member states,[315] the CoE,[316] and the UN human rights regulatory frameworks.[317] In this fashion, EU human rights law is a fluid and debated concept, rather similar to the mythological Arabian Phoenix, of which it is said that "nearly all maintain that it exists but no one can locate its whereabouts".[318]

Regardless, a few key points may be safely and uncontroversially submitted. An overview of these points is provided here, with detailed analysis to follow in subsequent sections.

The EU is a Union of Values, having established its very own human rights normative framework.[319] Individual rights and dignity are particularly relevant to this framework, as they constitute EU values[320] and objectives[321] both. The sources of the EU human rights framework are internal, resting on the Union's own regulatory framework (rather than external and handed down to the Union

[312] See TEU, arts 2, 3, 6, 7; and the CFREU as well.
[313] See chapter 7 of this thesis for a discussion on Directives of particular relevance to detention. It shall also be reminded that both primary and secondary EU legislation remains supreme, that is to say, takes priority and is to be enforced over national law, in case of conflict; further, both types of EU law carry legally binding effect. Instead, the difference lies in the policy-making process. See Phil Syrpis, 'The relationship between primary and secondary law in the EU' (2015) 52 Common Market Law Review 461
[314] See Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645; and Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
[315] See TEU, art 6; and Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419.
[316] See indicatively Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; and Case 249/86 Commission v. Germany [1989] ECR 1290.
[317] See the analysis in Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 Cambridge Journal of International and Comparative Law 696, 702.
[318] Quoting the simile used by Alberto di Martino, 'Book Review: The Principle of Mutual Trust in EU Criminal Law, by Auke Willems' (2022) 59 Common Market Law Review 1950, 1950.
[319] On the development, see Filippo Fontanelli, 'The implementation of European Union law by Member States under Article 5 1(1) of the Charter of Fundamental Rights' (2014) 20 Columbia Journal of European Law 193, 197ff.
[320] TEU, art 2.
[321] TEU, art 3.

by some other entity). Of particular importance is the Charter of Fundamental Rights of the EU (CFREU),[322] which constitutes primary law. The CFREU provisions often correspond in scope and meaning to the articles safeguarded under the ECHR.[323] In addition, the CJEU, when interpreting the CFREU, generally strives to align (far as possible) its interpretation to the established ECtHR jurisprudence.[324] In this fashion, the EU human rights framework draws inspiration from the ECHR and the Strasbourg jurisprudence. The Strasbourg Court in turn often relies on soft-law standards, set in particular by the CPT and the European Prison Rules (EPR).[325] Because of the import of such standards in the ECtHR case-law, the EU human rights *acquis* itself is indirectly inspired by the CPT and the EPR standards. Finally, both the EU and the CoE strive to promote respect with international human rights law, in particular the Universal Declaration of Human Rights (UDHR).[326] Consequently, the EU human rights framework is intrinsically connected to the CoE and UN one.[327]

[322] Charter of Fundamental Rights of the European Union (2016/C 202/02), henceforth CFREU.
[323] See CFREU, art 52 para 3: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".
[324] On the application and influence of the ECHR in EU law, see cases 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; 36/75 *Roland Rutili v. Ministre de l'interieur´* [1975] ECR 1219; 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; 249/86 *Commission v. Germany* [1989] ECR 1290. See also Estelle Askew-Renaud and Katja Mirwald, 'Conference Report: A Critical Assessment of the EU Constitutional Treaty' (2005) 2 Essex Human Rights Review 79. The ECJ's adherence to the rights protected by the ECHR is also supported by the other EU institutions, see Joint Declaration by the European Parliament, the Council and the Commission, *Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1977] OJ C I03 1, 1.
[325] European Council, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, as amended* (Council of Europe 2020) < https://rm.coe.int/09000016809ee581> (accessed 24 July 2023).
[326] United Nations, *Universal Declaration of Human Rights* (United Nations 1948) General Assembly resolution 217 A
[327] See already Case T-10/93 *A v Commission of the European Communities* [1994] ECRII-00179, para 48, stating that "Fundamental rights form an integral part of the general principles of

In sum, it is maintained that there is a common pan-EU human rights *acquis* of relevance to detention.

Defining the exact contents of this *acquis*, or engaging in an in-depth analysis of the plethora of its sources, escapes the scope of this thesis.[328] Instead the section focuses on sketching out some key points, seeking to establish a solid basis that proves and highlights the EU human rights normative framework.

3.2.1 EU primary law and the Charter of Fundamental Rights

While originally the EU[329] had nothing to do with individual rights,[330] it has long escaped its confinements. The justifications behind this development have been

law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories […] [t]he European Convention on Human Rights has special significance in that respect […] the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed." Referring further to Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, para 13; and Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECR I-2925.

[328] Others have assumed the task with a CoE focus; see Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy: penology and human rights* (Oxford University Press 2009). Outlining detention-related principles as deriving *just* from the CoE took its own book – to fully flesh out the EU principles of prison law, penology, and detainee rights would be a task worthy of its own thesis.

[329] More accurately, its predecessors, in the form of the European Community, and the European Coal and Steel Community before; see TC Harleny, *The Foundations of European Community Law* (2nd edn, Clarendon Press 1988) 1, 130.

[330] See the landmark decision in Case 1/58 *Stork v. High Authority* [1959] ECR 43.

well-documented,[331] and will be examined in detail later in the analysis.[332] For now, it suffices to outline the following.

Article 2 of the TEU declares that "[…] the European Union is founded on the values of respect for human dignity, freedom, […] and respect for human rights".[333] Article 3 TEU directly refers to these values and places them as objectives to be achieved, maintaining that the Union seeks "to promote […] its values and the well-being of its peoples".[334]

All EU action should respect the EU values. The CJEU is responsible for supervising their enforcement.[335] To complement the Court's efforts, the European Commission acts as the so-called 'Guardian of the Treaties',[336] supervising the implementation of EU law and values across the Union. When

[331] For an overview of this evolution, see generally Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649; see further the CJEU's jurisprudence on fundamental rights, especially Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], 2 BvL 52/71 *Solange I* [974], para 62; Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] 197/83 *Solange II* [1986], para 132. See also Corte Costituzionale [Italian Constitutional Court], No. 183/73 *Frontini* [1973]; No. 170/1984 *Granital* [1984]; No. 232/1989 *Fragd* [1989]. For an analysis see, among others, Joseph HH Weiler, 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 1, 137ff.

[332] See chapter 6 of this thesis.

[333] TEU, art 2.

[334] TEU, art 3.

[335] Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Poiares Maduro, para 19.

[336] See Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 European Law Journal 141, 146; Carol Harlow and Richard Rawlings, 'Accountability and Law Enforcement: The Centralized EU Infringement Procedure' (2006) 31 European Law Review 447; Melanie Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge 2010) 1, 15ff; Editorial Comments, 'A revival of the Commission's role as guardian of the treaties?' (2012) 49 Common Market Law Review 1553; R Daniel Kelemen and Tommaso Pavone, Forb*earance and Enforcement at the European Commission: A Response to von der Leyen* (EU Law Enforcement 2022) https://eulawenforcement.com/?p=8299; Jacquelyn F MacLennan, 'Decentralized Enforcement of EC Law: Is the European Commission Still the Guardian of the Treaties?' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 165.

faced with alleged breaches of EU law on the part of the member states, the Commission has the power to initiate infringement proceedings against the member state concerned, and bring them before the CJEU.[337]

To complement CJEU and Commission supervision, article 7 TEU provides the European Council with the power to suspend the rights of a member state in case it systemically violates the EU values. Such a sanction may be imposed in case of "serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]",[338] which include, as mentioned already, the protection of human rights. This provision is meant to provide an additional tool for political authorities to impose pressure on the non-compliant states.[339] The analysis shall return to the notion of 'serious and persistent breaches undermining EU values' soon.[340]

In addition, the EU has its own Charter of Fundamental Rights (CFREU, or the Charter).[341] Drafted in 2000, since the coming into force of the Treaty of Lisbon the Charter has acquired legally binding status, and of equal value to that of the

[337] The process is described under the TFEU, arts 258 and 260.
[338] TEU, art 7.
[339] For an analysis on article 7 TEU, see, indicatively, Wojciech Sadurski, 'Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2009) 16 Columbia Journal of European Law 385; Günter Wilms, Protecting Fundamental Values in the European Union Through the Rule of Law (RSCAS Books 2017); LFM Besselink, 'The bite, the bark and the howl: Article 7 TEU and the rule of law initiatives' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 128; Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 1, 127.
[340] See chapter 5 of this thesis, bridging prisons and article 7 TEU.
[341] Charter of Fundamental Rights of the European Union (2016/C 202/02).

EU Treaties.[342] The CFREU serves as the Union's own written bill of rights.[343] The objective of the Charter is to enhance the legal clarity and coherence of human rights law in the EU structure, and serve as a comprehensive source of rights in EU primary law.[344] It includes provisions relating to Human Dignity, Freedoms, Equality, Solidarity, Citizens Rights, and Justice.[345] The CFREU provides for an extensive list of rights – 50 in total.[346] The choice of term 'fundamental' reflects the broad scope of these rights, as they include civil, political, social, and economic rights, applying to natural and legal persons too. Symbolism aside, the general consensus is that the differentiation between the two terms (human vs fundamental) holds little substantive effect in practice.[347]

[342] See TEU, art 6 para 2. See, for an analysis, Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) 173 Fondation Robert Schuman https://ssrn.com/abstract=1628552 (accessed 24 July 2023); Steven Greer, Janneke Gerards and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press 2018) 1, 248ff; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646, 651; Jan Wouters and Michal Ovádek (eds) *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 1, 70ff.
[343] TEU, art 6 para 3; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 648; Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131.
[344] EO Eriksen, 'Why a Charter of Fundamental Human Rights in the EU?' (2003) 16 Ratio Juris 352, 356.
[345] CFREU, Titles I, II, III, IV, V, and VI respectively.
[346] The number of Titles and Articles is noteworthy, contrasted to merely 13 rights included in the main body of the ECHR. It has been noted that, due to the sheer number of provisions and themes covered, the CFREU expands the scope of rights protection even further than the ECHR. For an analysis see Stephen Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis' (2015) 11 European Constitutional Law Review 482.
[347] Jan Wouters, 'From an Economic Community to a Union of Values: the Emergence of the EU's Commitment to Human Rights' in Jan Wouters et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 1, 11. See also Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) 173 Fondation Robert Schuman https://ssrn.com/abstract=1628552 (accessed 24 July 2023); Steven Greer, Janneke Gerards and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press 2018) 1, 248ff; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646, 651; Jan Wouters and Michal Ovádek (eds), *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 1, 70ff.

Consequently, the terms 'human' and 'fundamental' rights are used interchangeably for the purposes of the analysis.

A series of CFREU provisions prove relevant to the detention context. These include articles which protect human dignity,[348] the right to liberty and security,[349] private and family life.[350] The Charter also includes a prohibition on torture and inhuman or degrading treatment or punishment.[351] Further, the Charter provides that no one shall be subject to discrimination,[352] and includes specific provisions regarding the rights of the child.[353] Regarding criminal justice- and punishment-oriented principles, article 47 CFREU provides the right to an effective remedy and to a fair trial.[354] Article 48 of the Charter sets out the presumption of innocence, 'until proved guilty according to law'.[355] Article 49 of the Charter contains the *lex mitior* principle, specifying that the most lenient law be applied between the time of the offence and the sentence.[356] All such rights are entrenched under article 52 CFREU, which provides that any limitation to the exercise of fundamental rights recognised therein must be provided for by law and must respect the essence[357] of those rights and freedoms as well as the principles of necessity and proportionality.[358]

[348] CFREU, art 1.
[349] CFREU, art 6.
[350] CFREU, art 7.
[351] CFREU, art 4.
[352] CFREU, art 21.
[353] CFREU, art 24.
[354] CFREU, art 47
[355] CFREU, art 48 para 1.
[356] CFREU, art 48.
[357] Understood as the very core, the part that may never be violated or legitimately restricted; see Armin von Bogdandy et al, 'Reverse Solange: Protecting the essence of fundamental rights against EU Member States' (2012) 49 Common Market Law Review 489; Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015).
[358] CFREU, art 52.

The place of dignity is central in the EU human rights *acquis*.[359] Post-Lisbon, human dignity constitutes the first right and principle found in the CFREU text. Article 1 of the Charter implies that human dignity is possessed by *everyone*, and that it is inviolable and indivisible.[360] Dignity forms the title of the Charter's first chapter. In this fashion, the EU confirms that all rights enshrined under chapter 1 CFREU [361] (and arguably all rights covered throughout the entirety of the Charter)[362] derive from the human nature of the individual, and constitute a concretisation of the right to dignity.

In consequence, all CFREU rights mirror dignity, in that they are also inherent and inalienable. This is confirmed by the CFREU Preamble, where the EU affirms its commitment "to place the individual at the heart of its activities".[363] Scholarship has noted that the position of dignity in the EU *acquis* is central. Dignity is understood as the right to claim rights,[364] and prohibits the use of individuals as

[359] Tobias Lock, 'Article 1 CFR Human dignity' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2098; Catherine Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 European Public Law 319.
[360] Case C-129/19 *Presidenza del Consiglio dei Ministri* v *BV* [2020] ECLI:EU:C:2020:375, Opinion of AG Bobek, paras 107-108; see also J Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281.
[361] Including the rights to life and integrity of the person, and the prohibitions of torture and inhuman or degrading treatment or punishment, slavery, and forced labour.
[362] Davor Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law 451, 457; Jackie Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?' (2004) Public Law 167.
[363] CFREU, Preamble.
[364] Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 252; Nika Bačić Selanec and Davor Petrić, 'Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law' (2021) 17 European Constitutional Law Review 498.

means to some other end.[365] This position is reflected in the Explanations to the CFREU, which observe:[366]

> It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

This has been further confirmed by the CJEU, which has recognised the right to dignity as part and parcel of the EU identity and its regulatory framework, and a general principle of EU law as well.[367] While dignity does not appear too often in the CJEU case-law as a standalone right, the Court nevertheless reads other CFREU articles in conjunction with the right to dignity.[368] In the landmark *Omega* case, the CJEU ruled that "the [Union] legal order undeniably strives to ensure respect for human dignity as a general principle of law".[369] In addition, the CJEU

---

[365] Paolo Becchi, 'Human Dignity in Europe: Introduction' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 1, 2; see further Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549, 557; Matthias Mahlmann, 'Human dignity and autonomy in modern constitutional orders' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of comparative constitutional law* (Oxford University Press 2012) 1, 371, 378.

[366] Official Journal of the European Union C 303/17 - 14.12.2007 Preamble - Explanations relating to the Charter of Fundamental Rights: These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter; Note from the Praesidium on Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in Charte 4487/00 Convent 50, Charte 4473/00 (2000) 1, 3.

[367] Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras 70-77.

[368] Davor Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law 451, 457; Jackie Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?' (2004) Public Law 167.

[369] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürger-meisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614, para 34. For an analysis, see Davor Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law 451, arguing that the Court 'arguably identified human dignity as a new imperative of the EU legal order, in addition to

has held that human dignity a special place in cross-border criminal proceedings,[370] *inter alia* demanding that vulnerable individuals be treated with special care;[371] that criminal sanctions strive to reintegrate the individual, a function "indissociable from the concept of human dignity"; [372] that double jeopardy (*ne bis in idem*) be avoided, as going against human dignity;[373] and that the conditions of detention should respect human dignity.[374]

While human dignity is not strictly defined at EU level,[375] it nevertheless serves as a common normative thread.[376] This reflects the centrality of dignity at national level,[377] while further recognising the plurality of EU legal systems. [378] In this

the four economic freedoms'; further referring to Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 1, 109.

[370] Davor Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law 451.

[371] Case C-105/03 *Pupino* [2005] ECR I-05285, paras 52 and 61.

[372] Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979, Opinion of AG Bot, para 50.

[373] Case C-150/05 *van Straaten* [2006] I–9331 Opinion of AG Ruiz-Jarabo Colomer, para 68; and Case C-436/04 *Léopold Henri van Esbroeck v Openbaar Ministerie* [2005] EU:C:2005:630 Opinion of AG Ruiz-Jarabo Colomer, para 52, and footnote 10.

[374] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 85 and 88; Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, paras 90 and 117.

[375] Case C 201/13 *Deckmyn and Vrijheidsfonds* [2014] ECLI:EU:C:2014:458, Opinion of AG Cruz Villalón.

[376] Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549; Borja Fernández Burgueño, 'The usefulness of the legal concept of dignity in the human rights discourse: literature review' (2016) 8 Oxímora Revista Internacional de Ética y Política 9.

[377] The only member states whose constitutional orders do not include explicit mention of dignity include Denmark, Netherlands, France, and Austria. See Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 11; see also M Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014) 1, 375

[378] For confirmation of the Omega ruling see Case C-244/06 *Dynamic Medien* [2008] ECR I-505, para 44, and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 63; for a discussion on the plural meanings of dignity, see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 24.

fashion, the protection of human dignity acts as precondition of legal pluralism, but also imposes limits on it.[379]

The brief overview of this subsection has identified a number of EU law provisions and mechanisms in play that seek to promote and protect individual prerogatives. The EU human rights framework is of direct relevance to the rights of detainees, as the entire framework rests on dignity, and promotes the inherent and inalienable nature of these rights, and the protection of their essence at all times.

In light of these findings, one may wonder why an analysis of prisons and EU law in conjunction has traditionally escaped the scholarly gaze. This point is addressed in the following section – for now, the analysis completes the EU detainee rights framework mosaic, by addressing the place of European and international human rights standards in the EU normative rights framework.

3.2.2 The special importance of CoE and UN standards in the EU *acquis*

The EU is currently comprising 27 member states, with every single one of them being a part to the UN, the CoE, and the core human rights treaties elaborated under their aegis,[380] including the ECHR, CPT, ICCPR,[381] ICESCR,[382] CAT[383]

[379] Matej Avbelj, 'Human dignity and EU legal pluralism' in Gareth Davies and Matej Avbelj (eds) *Research handbook on legal pluralism and EU law* (Edgar 2018) 1, 95, 108; see further chapters 5, 6, and 10 of this thesis.
[380] Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 European Journal of International Law 771.
[381] The UN International Covenant on Civil and Political Rights [1966] resolution 2200A (XXI).
[382] The UN International Covenant on Economic, Social and Cultural Rights [1966] resolution 2200A (XXI).
[383] The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [1984] resolution 39/46.

and OPCAT.[384] This membership imposes certain obligations on the states.[385] The UN Charter obliges its signatories to "promote… universal respect for, and observance of, human rights and fundamental freedoms for all without distinction",[386] rights which include all UN treaties to which states are parties.[387] Similarly, the ECHR underlines that states have the "primary responsibility"[388] to recognise, observe, and secure all rights and freedoms deriving under the CoE aegis, and are to be monitored in their task, "subject to the supervisory jurisdiction of the European Court of Human Rights".[389] The ECHR is particularly important, serving as the flagship human rights charter in the continent, and has aptly been described as "a constitutional instrument of European public order".[390] Previous ratification of the ECHR has become a prerequisite for any state wishing to join the EU.[391]

In this fashion, the UN and CoE ideals on individual rights and penal policy penetrate across all EU member states, creating a community of nodes with

[384] The UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [2002] resolution A/RES/57/199.
[385] In line with the principle of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties, in United Nations, *Vienna Convention on the Law of Treaties* (United Nations 1969) Treaty Series, 1155, 331.
[386] UN Charter, arts 55-56.
[387] See analysis of General Assembly resolutions from 1945-2005 in Israel de Jesús Butler, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law* (Intersentia 2007) 1, 31.
[388] ECHR, preamble.
[389] ibid.
[390] *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995), para 75; and *Banković and others v Belgium and sixteen other States* App no 52207/99 (ECtHR, 12 December 2001, para 80.
[391] TEU, art 49, and art 6 paras 2 and 3; European Commission, *Commission's Opinion of July 1997 on Bulgaria's EU membership application* [1997] 1, 11; European Council, Conclusions of the Presidency - Copenhagen, June 21-22 1993 https://www.consilium.europa.eu/media/21225/72921.pdf (accessed 11 October 2022); see also Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254, 255.

common normative and monitoring influence, and equivalent respect for these shared values – at least on paper.

The Union itself is also influenced by such international standards, especially regarding the CoE standards. Article 6 TEU places an obligation on the EU to accede to the ECHR.[392] The same article declares that ECHR rights constitute general principles of EU law.[393] In turn, the CJEU has acknowledged that EU action shall not infringe upon general principles of EU law, making respect for human rights a condition of legality of EU law.[394]

Turning to the importance of the international human rights order in regards specifically to prisons. The very essence of the ECHR is human dignity.[395] Unsurprisingly, then, the ECHR applies no less to detainees, and in fact includes several key provisions relevant to detention. Most of these were already mentioned previously, when examining the situation of EU prisons.[396] Indicatively, article 2 ECHR protects the right to life. Article 3 prohibits inhuman and degrading punishment, and allows further for the assessment of any issues arising from a "clearly disproportionate penalty".[397] Article 4 forbids forced or compulsory labour carried out outside the ordinary course of detention, while article 8 safeguards

[392] TEU, art 6 para 2.
[393] TEU, art 6 para 3.
[394] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769; see also C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] EU:C:2008:461, paras 280ff, particularly paras 284-5.
[395] *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002), para 90; *SW v United Kingdom* App no 20166/92 (ECtHR, 22 November 1995); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 1, 3; Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.
[396] See chapter 2 of this thesis.
[397] *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 09 July 2013), para 120.

the right to private and family life. Article 15 also proves of relevance, since it prohibits derogations of certain rights, including those safeguarded under articles 2, 3 and 4 ECHR, expressing their orthodox or "formally unqualified" nature.[398] Relevant for the purposes of this analysis proves Protocol no 7 ECHR too, which enshrines the *ne bis in idem* principle.[399]

As mentioned, the ECHR influences the CFREU. When the rights of the CFREU correspond to ECHR rights, the CFREU should be interpreted in the same fashion as the ECHR. This is stated in the CFREU itself, which declares that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and scope of those rights shall be the same as those laid down by the said Convention".[400] In similar fashion, the CJEU strives to align its human rights interpretation to follow the Strasbourg jurisprudence, maintaining a dialogic nexus. Declaration on article 6 of the TEU acknowledges "the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights".[401]

More indirectly, the EU acknowledges that all member states subscribe to the ECHR. The CJEU has acknowledged that ECHR rights, as belonging to the

[398] See Natasa Mavronicola, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 Human Rights Law Review 723; Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?' (2015) Human Rights Law Review 1; *Ilaşcu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 334; Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (Hart 2007) 1, 212.

[399] ECHR, Protocol no 7, art 4 para 1: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[400] CFREU, art 52 para 3. See also Case C-400/10 *PPU J McB v LE* [2010] ECR I 000.

[401] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences Official Journal C 326, 26/10/2012 P. 0001 – 0390.

constitutional traditions common to the member states, shall constitute principles of EU law; and that the EU cannot accept measures incompatible with the ECHR.[402] Indeed, when interpreting individual rights in EU law, the CJEU often looks at the ECHR interpretation and application under the Strasbourg jurisprudence.[403]

The ECtHR case-law proves then of particular relevance to the EU human rights framework. Ever since the seminal case of *Kudła*,[404] the ECtHR has provided for vast jurisprudence on detainee rights and detention standards.[405] The Court confirms the universal and inalienable nature of human rights, as they are taken to apply to all living persons, and irrespective of race, colour, gender, age, creed, or other characteristics.[406] In *Khodorkovskiy and Lebedev*, the Court clarifies that "the Convention cannot stop at the prison gate […] and there is no question that a prisoner forfeits all of his […] rights merely because of his status as a person detained following conviction",[407] whereas in *Klibisz* it states that detainees enjoy

[402] Case T-10/93 *A v Commission of the European Communities* [1994] ECRII-00179, para 48.
[403] On the application and influence of the ECHR in EU law, see cases 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; 36/75 *Roland Rutili v. Ministre de l'interieuŕ* [1975] ECR 1219; 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; 249/86 *Commission v. Germany* [1989] ECR 1290. See also Estelle Askew-Renaud and Katja Mirwald, 'Conference Report: A Critical Assessment of the EU Constitutional Treaty' (2005) 2 Essex Human Rights Review 79. The ECJ's adherence to the rights protected by the ECHR is also supported by the other EU institutions, see Joint Declaration by the European Parliament, the Council and the Commission, *Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1977] OJ C I03 1, 1.
[404] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 94.
[405] Dirk van Zyl Smit and Sonja Snacken, 'Shaping penal policy from above? The role of the Grand Chamber of the European Court of Human Rights' in Andrew Crawford (ed), *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 1, 168ff.
[406] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 1, 10.
[407] *Khodorkovskiy and Lebedev v Russia* App n. 11082/06 and 13772/05 (ECtHR, 25 October 2013), para 836.

full protection of their human rights, and any violations must be proportionate and justified.[408] This position is confirmed in *Hirst (no. 2)*:[409]

> [P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention […], they continue to enjoy the right to respect for family life […] the right to freedom of expression.

The Court has identified a clear connection between detention conditions and human rights, frequently convicting states for failing to provide their detainees with a suitable living environment.[410] As made evident in cases such as *Bouyid*[411] and *Vinter*,[412] detainees must be treated with respect, and in a manner that safeguards their rights. Prison authorities must take into account the well-being of the detainee, and avoid measures causing excessive distress or hardship.[413] Finally, and regarding specifically the use of pre-trial detention, the ECtHR has noted that, in accordance with the right to liberty,[414] PTD should be used as a measure of last resort, and in line with the principles of proportionality and necessity.[415]

---

[408] *Klibisz v Poland* App no 2235/02 (ECtHR, 4 October 2016), para 354.
[409] *Hirst v the United Kingdom (no. 2)* App n. 74025/01 (ECtHR, 6 October 2005), para 69.
[410] Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff; Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021).
[411] *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015), paras 89-90.
[412] *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013), para 113.
[413] *Muršić v. Croatia* App no 7334/13 (ECtHR, 20 October 2016), para 99; see further *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000), paras 92-94.
[414] ECHR, art 5.
[415] *Kurt v Austria* App no 62903/15 (4 July 2019), para 186; *S., V. and A. v Denmark* App nos 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018), paras 89 and 91; *Lawless v Ireland*

Human dignity proves of particular importance to ECtHR case-law. While the Strasbourg Court rarely acknowledges a standalone right to dignity,[416] it nevertheless refers to dignity in conjunction with ECHR provisions, especially in regards to article 3 ECHR.[417] In this fashion, the ECtHR has confirmed that dignity serves as the "very essence" of the ECHR.[418] Dignity proves key in ECtHR cases relating to criminal proceedings, including the use of interrogation techniques,[419] use of force against detainees,[420] use of restraint on vulnerable (particularly ill) individuals,[421] overcrowding,[422] limited sanitation facilities,[423] lack of natural light,[424] and generally poor conditions of detention.[425]

In its case-law, the Strasbourg Court often refers to CPT country-specific and annual reports.[426] The latter provide a general overview of "the substantive issues

(no. 3) App no 332/57 (ECtHR, 1 July 1961), paras 13-14; *Ladent v Poland* App no 11036/03 (ECtHR, 18 March 2008), paras 55-56; *Fernandes Pedroso v Portugal* App no 59133/11 (ECtHR, 12 June 2018), para 87. See also Sonja Snacken, 'A Reductionist Penal Policy and European Human Rights Standards' (2006) 12 European Journal of Criminal Policy and Research 143

[416] In contrast to EU law, such a right is absent from the ECHR; see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff.

[417] Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 7ff; Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021); *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 33 ("[…] he was treated as an object in the power of the authorities"); *Bouyid v. Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 90.

[418] *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002), para 90; Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

[419] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), para 78.

[420] *Ribitsch v Austria* App no 18896/91 (ECtHR, 4 December 1995).

[421] *Mousiel v France* App no 67263/01 (ECtHR 14 November 2002).

[422] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).

[423] *Isyar v Bulgaria* App no 391/03 (ECtHR, 20 November 2008).

[424] *Aliev v Georgia* App no 522/04 (ECtHR, 13 January 2009).

[425] 390 cases out of 1303 relating to Article 3 concern poor conditions. *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978); *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999); *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).

[426] See, indicatively, *Varga and Others v Hungary* App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015), paras 35ff.

which it pursues when carrying out visits to places of deprivation of liberty".[427] In turn, the most important sections of these reports have been collected and turned into a single document, aptly titled 'CPT Standards'. Their purpose is to highlight the minimum threshold that prisons across Europe should meet.[428]

In its case-law, the ECtHR also often relies on the European Prison Rules (EPR).[429] The EPR contain provisions regulating various aspects of prison life: these include nutrition, hygiene, healthcare, access to legal advice, work and education, contact with the outside world, freedom of thought, conscience and religion, and so on. While advisory in nature, the ECtHR frequently consults the EPR for interpretation when forming its reasoning. In this sense, they serve a similar function to the Mandela Rules.[430] The EPR apply in both pre- and post-trial detention, dictating that "the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment".[431] In addition, they devote an entire section proclaiming that PTD should be used only as *ultimum refugium,* and that remand prisoners should be treated with dignity and respect, and enjoy the same standards as post-trial detainees.[432] they thus encompass both negative and positive obligations.[433]

---

[427] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2011, p. 5.
[428] Dirk van Zyl Smit, 'Regulation of Prison Conditions' (2010) 39 Crime and Justice 503, 519.
[429] European Council, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, as amended* (Council of Europe 2020) < https://rm.coe.int/09000016809ee581> (accessed 24 July 2023).
[430] Christos Papachristopoulos, 'The tale of the European sandcastle: On the convergence and divergence of national prison systems across the European Union' (2019) 2 Freedom, Security & Justice: European Legal Studies 120, 125.
[431] European Council, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, as amended* (Council of Europe 2020) < https://rm.coe.int/09000016809ee581> (accessed 24 July 2023), rule 102 para 2.
[432] ibid section XIV.
[433] Positive obligations denote that a State has to engage in an activity to secure the effective enjoyment of a fundamental right (active protection), as opposed to the classical negative

Finally, the EU human rights normative framework is influenced by UN standards. This is evident in the following manners. Firstly, the ECtHR often refers to the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, thus "building a bridge between the universal instruments" and the ECHR.[434] Secondly, the CJEU has acknowledged that "the European Union is to contribute to the strict observance and the development of international law […] is bound to observe international law in its entirety".[435] This is explicitly codified under the Treaty framework, which reads that:[436]

> the Union shall uphold and promote its values and interests and contribute to […] the protection of human rights […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

This obligation dictates the Union's external and internal actions both. Hence, "respect for international law, particularly with regard to the UN […] is given a prominent place within the Treaties" and could form "a constitutional principle that can be used to guide the CJEU".[437] The same holds true at policymaking level, with EU institutions often citing CoE and UN standards, when devising plans of

obligation to simply abstain from violations (passive protection); see Jean-François Akandji-Kombe, *Positive obligations under the European convention on human rights* (Council of Europe 2007).

[434] Jean Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2014), 1, 400; Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 5.

[435] Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 101, referring also to Case C-86/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paras 9-10, and Case C-162/96 *Racke GmbH and Co. v Hauptzollamt Mainz* [1998] ECR I-3655, paras 45-46.

[436] TEU, art 3 para 5.

[437] Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 Cambridge Journal of International and Comparative Law 696, 702.

action for the Union.[438] The CFREU Explanations also refer explicitly to the UDHR, specifically noting that:[439]

> The dignity of the human person is not only a fundamental right in itself but constitutes the real **basis of fundamental rights**. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'

Further, the EU acknowledges that all member states subscribe to the UN international human rights treaties, which (similar to the ECHR) form part and parcel of the constitutional traditions common to the member states – consequently, the EU should strive to promote and respect relevant human rights norms, because of the very identity of its own states.[440]

Overall, and while the Union does not readily submit itself as a subject of international human rights norms, CoE and international human rights norms remain a core component in the EU *acquis,* shaping the meaning, scope, and interpretation of EU human rights law and values.

---

[438] Tore Vincents Olsen, 'Why and How Should the European Union Defend its Values?' (2023) 29 Res Publica 69, 82ff; see further European Parliament, *Draft report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (European Parliament 2017) EP-Document 2017/2131(INL); and European Commission, *A new EU framework to strengthen the rule of law* (European Commission 2014) COM (2014) 158 final/2.

[439] Official Journal of the European Union C 303/17 - 14.12.2007 Preamble - Explanations relating to the Charter of Fundamental Rights: These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union, emphasis added. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter; Note from the Praesidium on Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in Charte 4487/00 Convent 50, Charte 4473/00 (2000) 1, 3.

[440] Case T-10/93 *A v Commission of the European Communities* [1994] ECRII-00179, para 48,.

3.2.3 The EU penal imaginary

The following key points are to be drawn from this outline. Human rights mandates underpin the entire EU institutional architecture.[441] The EU human rights *acquis* rests on internal sources (TEU, TFEU, CFREU, CJEU jurisprudence), while drawing inspiration from external normative frameworks (CoE and UN standards). At the heart of this *acquis* lies human dignity and the protection of individual rights for all, including detainees. All EU member states subscribe to this *acquis,* and the EU itself.

In sum, it is maintained that there is a common pan-EU human rights *acquis* of relevance to detention – what I shall call the 'EU penal imaginary'.[442]

There is something distinct about prisons in the EU.[443] They are bound together by a common normative glue, due to their identity and membership: all belong to the same community of values. EU prisons (are supposed to) respect individual rights, dignity, and detain individuals only when absolutely necessary. Detention standards should be adequate and respect individual rights, for detention is in place "*as* punishment, not *for* punishment".[444] It has been widely regarded that

[441] Monika Mayrhofer, 'The EU's institutional human rights architecture' in Jan Wouters et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 1, 117; Gráinne de Búrca, 'New Modes of Governance and the Protection of Human Rights' in Philip Alston and Olivier de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart 2005) 1, 25.
[442] Inspired by Evi Girling and her terminology of the pan-European penal imaginary; see Evi Girling, 'European identity, penal sensibilities and communities of sentiment' in Sarah Armstrong and Lesley McAra (eds) *Perspectives on punishment: the contours of control* (Oxford University Press 2006) 1, 69, 70.
[443] Tom Daems, Dirk van Zyl Smit and Sonja Snacken (eds), *European Penology?* (Bloomsbury 2017); see also Marc Ancel, 'Principal Aspects of Modern European Penology' (1974) 118 Proceedings of the American Philosophical Society 254.
[444] To quote the adage of British penologist Paterson. See Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof.mr. Constantijn Kelk* (Boom Juridische Uitgevers 2008) 1, 575; referring further to SK Ruck (ed), *Paterson on Prisons: The collected papers of Sir Alexander Paterson* (Muller 1951) 1, 13; emphasis added.

"European prison law and policy based on fundamental human rights principles have become part of a wider European heritage".[445] Should one rely exclusively on an analysis of the law on paper, the following words, albeit written two centuries ago, would appear to echo true:[446]

> Each European nation formed and maintained its own prison system. In spite of distinct, national institutions, however, **the prison systems that developed throughout Europe […] were remarkably similar, reflecting a commonly held penal philosophy. Shared ideas about how to create prisons that were secure, sanitary, and rehabilitative** produced similar prison populations, architecture, work systems, and inmate subcultures.

Yet this is simply untrue, as uncovered previously in the analysis – judicial and empirical findings may not be ignored.[447] There is an obvious disparity between the EU penal imaginary, and the reality of prisons on the ground.

This invites the following consideration. In light of such a rich EU human rights *acquis* of relevance to detention, why would the nexus between the prison problem and EU law be a point that must still be proven, rather than undisputed common wisdom?

3.3 EU human rights: in need of a trigger

To prove that structural prisons posing systemic risks of human rights violations is an *EU problem* is a challenge. This is because the mere existence of an EU

[445] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2009) 1, 384.
[446] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2009) 1, 3; referring further to Patricia O'Brien 'The Prison on the Continent Europe 1865–1965' in Norval Morris and David J Rothman (eds), *The Oxford History of the Prison* (Oxford University Press 1995) 1, 199ff, emphasis added.
[447] As outlined in chapter 2 of this thesis.

penal imaginary is not sufficient. Instead, there must be a clear trigger that gives effect to the EU *acquis.* In the absence of an EU self-standing human rights or prison competence, the prison-EU link appears elusive.

The following subsections maintain that the Union has no self-standing prison or human rights competence, is not a human rights organization, nor has it ratified the international human rights framework.

3.3.1 No self-standing EU prison competence

Detention remains a state prerogative. In line with the Westphalian doctrine, the power to detain constitutes part and parcel of national sovereignty, and each EU member state retains its monopoly on detention.[448]

To unpack this statement.

The EU, as an organisation, shares characteristics similar to those of a state, in the sense that both state and Union have the power to act.[449] The state, through its branches, has the duty and exclusive right to plan, make policy, legislate, adjudicate, and enforce. The Union may equally adopt policies, soft-law documents,[450] or legally binding instruments in various forms (e.g. Directives or

[448] Emma Kaufman and Mary Bosworth, 'The prison and national identity: citizenship, punishment and the sovereign state' in David Scott (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170; Sonja Snacken, Kristel Beyens and Hilde Tubex, 'Changing Prison Populations in Western Countries: Fate or Policy?' (1995) 3 European Journal of Crime, Criminal Law and Criminal Justice 18, 40; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *1789*, (Jonathan Bennett 2017) <https://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf> (accessed 25 July 2023); David Garland, *Punishment and Modern Society: A Study in Social Theory* (The University of Chicago Press 1990) 1, 67-68.

[449] Though it should be noted that the EU wears two hats, functioning simultaneously as a supranational and intergovernmental organisation. See N Nugent, *Government and Politics of the European Union* (Palgrave Macmillan 2003).

[450] For an analysis see Fabien Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2014) 21 European Law Journal 68.

Regulations);[451] has a Court that is entitled to deliver binding judgments and opinions;[452] and various monitoring[453] and enforcement[454] mechanisms to ensure its will is respected, and its policies enforced on the ground.

While their powers appear broadly similar in nature, the key difference between EU and state lies in the source of such powers. The state draws its power from within, and is itself responsible for defining its own sovereign. In this fashion:[455]

> […] the state itself is distinguished by the fact that **its powers are not imputed but are native to it**. Hence it is the judge of its own legal competence, as well as of the legal competence of the corporations which it creates. The **state is the arbiter over both its own legal powers** and those of its subject.

Here, state and Union go their separate ways. Unlike the state, the EU does not draw its competence from any internally-selected source (such as constitution, monarch, god, or the will of the people); nor is the Union capable of according itself powers.[456] Instead, the Union's powers are granted to it by its very members.

---

[451] See in particular TFEU, arts 257 and 294; for a thorough analysis on the Union's legislative powers, see Phil Syrpis, 'The relationship between primary and secondary law in the EU' (2015) 52 Common Market Law Review 461.

[452] TEU, art 19.

[453] Monitoring comes from various actors, including the European Commission, the Court of Justice, but also the member states themselves; see Sibylle Grohs, 'Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 1, 65; see also TEU, art 17.

[454] TFEU, art 260; András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017); European Ombudsman, *Decision following the strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints* [2017] https://www.ombudsman.europa.eu/en/cases/decision.faces/en/83646/html.bookmark (accessed 21 July 2023).

[455] George H Sabine, 'The Concept of the State as Power' (1920) 29 The Philosophical Review 301, 302, emphasis added.

[456] At least in principle – though note CJEU doctrine of implied competence, and the power of the CJEU to interpret EU law in line with the *telos* of the EU. See Cases 281, 283–285 and 287/85 *Germany v Commission* [1987] ECR 3203, para 27; Case 176/03 *Commission v Council* [2005] ECR I–7879, para 48. See also Takis Tridimas, 'The Court of Justice and Judicial Activism' (1997) 22 European Law Review 199; Antony Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 Law Quarterly Review 95. Yet even then, heavy limitations.

It is external (rather than internal, in the form of e.g. the EU institutions themselves) actors that shape EU law, and determine what the EU may or may not do. This is known as the principle of conferral:[457]

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. **Competences not conferred upon the Union in the Treaties remain with the Member States.**

In accordance with this provision, the EU is an entity of conferred powers.[458] Its establishment and operation are dictated by its Treaties.[459] It is the member states themselves that hold the prerogative (and responsibility) of drafting and amending these Treaties[460] (fittingly, member states are referred to as the 'Masters of Treaties').[461] The EU cannot operate in areas outside of its competence. Before assuming action, the Union must have a clear mandate by the states, giving it clearance to act – the states grant and delimit the powers of the Union. The EU has what has been described as "attributed" competence.[462]

---

[457] TEU, art 5 para 2, emphasis added.
[458] For an analysis on the so-called *Kompetenz-Kompetenz* doctrine, see H Schermers and N Blokker, International Institutional Law (4th edn, Mārtiņus Nijhoff 2003) 1, 36ff; P Sands and P Klein, *Bowett's Law of International Institutions* (5th edn, Sweet & Maxwell 2001) 1, 16ff; Jurisdiction of the European Commission of the Danube (1927) PCI J. Series B, no 14, 64; A Campbell, 'The Limits of the Powers of International Organisations' (1983) 32 ICLQ 523.
[459] TEU and TFEU.
[460] TEU, art 48.
[461] Though, whether it is the states' governments or its people who actually control EU law, and whether the EU has the power to actually act against the interest of its masters, is a contested question. For an interesting discussion on the topic, see Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2020); see also Karen J Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (2003) 52 International Organization 121.
[462] In overview, the competences of the Union are generally laid out in TFEU, art 3. The article distinguishes between four areas of competence: exclusive, shared, supporting, and special.

In practice, the principle of conferral manifests itself as follows. The heads of state or government of the (currently) 27 member states (Masters of Treaties) get together and draft primary EU law.[463] Via this process, they confer the Union with its powers. On the basis of these conferred powers, then, and via an expressly codified legislative procedure,[464] the EU institutions[465] draft secondary EU law.[466] While secondary EU law constitutes the majority of EU law, it draws its legitimacy from primary EU law, which is crafted by and expresses the will of the member states. Any legal act adopted by the EU institutions must refer to a legal basis. The legal basis takes the form of a number included in the body of the secondary act. This number refers to the primary provision that provides the EU with the power to act. In accordance with the principle of conferral, any legal act undertaken by the EU institutions not expressly referring to a legal basis, or referring to an incorrect legal basis, is not justified. Instead it is to be found *ultra vires*, exceeding its powers, and for that reason procedurally void, and annulled *ex tunc*.[467]

The member states dictate the legal bases, delimiting the Union's competence – and neither prison law nor *ius puniendi* form a competence that has been conferred to the EU.

[463] TEU, art 48; for a discussion on the principle of conferral, and also subsidiarity and proportionality, see further chapter 10 of this thesis.
[464] TFEU, arts 289 and 294, and art 289, respectively.
[465] Primarily the European Parliament, Commission, and Council of the EU.
[466] Examples of EU secondary law include Directives, Regulations, and, importantly for the purposes of this thesis, Framework Decisions; see chapters 4, 7 and 11 of this thesis, for a discussion on FDs and Directives of relevance.
[467] TFEU, art 263; Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395; Case C–376/98 *Germany v European Parliament and Council* [2000] ECR I–8419.

Under no Treaty provision will one find reference to criminal detention. This remains a prerogative of the sovereign state. Criminal justice is very much linked to the notion of *locus*: "criminal justice should be local justice",[468] and notions surrounding delinquency are to be left up to the national governors. This is because, the argument goes, it is exactly these local powers that know and relate to the identity of their people that comprise the state.[469] In the words of Garland, "the rituals of criminal punishment – the court-room trial, the passage of sentence, the execution of punishment [is] the formalised embodiment and enactment of the conscience collective"[470] – a collective which, by general consensus, and in a clear expression of the principle of subsidiarity,[471] does not (should not?) belong to the EU, but rather the member states.

In practice, the Union has no self-standing competence to place individuals behind bars at pre- or post-trial level. Neither has the EU the self-standing competence to dictate, regulate, or enforce any standards relating to the detention regimes in which detainees will be held. Of the traditional elements, with which the penal scholar is well-acquainted, none are to be found at the EU level. In vain shall one look for an EU penal code, corrections officer, or prison,

[468] Mireille Hildebrandt, 'European criminal law and European identity' (2007) 1 Criminal Law and Philosophy 57, 66.
[469] Samuli Miettinen, *Criminal Law and Policy in the European Union* (Taylor & Francis Group 2012) 1, 9; Erik Luna, 'Sentencing', in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1, 964.
[470] David Garland, *Punishment and Modern Society: A Study in Social Theory* (The University of Chicago Press 1990) 1, 67; the collective consciousness defined by Durkheim as "the totality of beliefs and sentiments common to average citizens of the same society"; see Emile Durkheim, *The Division of Labour in Society* (George Simpson transl, The Free Press of Glencoe 1993) 1, 79.
[471] The philosophy and legal imperative that any action should take place as close to the EU citizen as possible. See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439; protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the treaties; see further chapter 10 of this thesis.

as one may look for an English, German, or Polish penal code, corrections officer, or prison. Instead, it falls principally to the member states to criminalise behaviours, define procedures, prosecute, try, sentence, and imprison individuals.[472] Accordingly, it is the member states themselves that plan and pass laws, in the form of criminal and penal codes, that determine who should be sent to prison, for how long, and under which circumstances; it is the member states that initiate criminal proceedings by granting power to their prosecutors and police officers to investigate, prosecute and bring people to justice; criminal trials occur before national tribunals and courts, who decide on guilt, and impose sentences that may be appealed or reviewed before national bodies; and it is the member states that are responsible for the execution of sentences imposed, providing for and maintaining their own detention centres, where their own corrections personnel is employed. To paraphrase the Commission, "criminal detention *as such* […] remains within the jurisdiction of the individual Member States".[473]

Such an arrangement is in line with the overall spirit and the very *raison d'être* of the Union's foundation, in the 1950s. The Founding Treaties[474] made no mention to criminal (nevermind detention) matters whatsoever.[475] Detention wholly

[472] Though, especially as regards the criminalization (definition of the *actus reus*), pre-trial detention, and prosecution stages of the criminal justice process, the EU has been exerting considerable influence – see chapters 7 and 11 of this thesis.
[473] Paraphrasing the European Commission, where it was stated that 'criminal law as such'…see European Commission, *Eighth General Report on the Activities of the Community* (European Commission 1975), para 145 http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/ EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB0174064 (accessed 05 November 2022). See also René Guldemund, Christopher Harding and Ann Sherlock, 'The European Community and Criminal Law' in C Harding et al (eds), *Criminal Justice in Europe: a Comparative Study* (1st edn, Clarendon Press 1995) 1, 107.
[474] European Coal and Steel Community Treaty in 1952 (now expired), and the European Economic Community Treaty and the Atomic Energy Community Treaty in 1957.
[475] Excluding a brief note concerning judge immunity from national criminal proceedings; see protocol on the Statute of the Court of Justice expressly limited domestic criminal law in so far as

escaped the Treaty framework. This was no accident. The EU commenced as an economic project, to make war materially impossible.[476] The Union's *raison d'être* has been linked to issues surrounding the Single Market and economic integration,[477] matters of little relevance to prisons or detainee rights.[478]

In sum: the EU has no self-standing competence to develop prison law or *ius puniendi.* Consequently, structural problems in prison systems fall outside the scope of Union competence and law – for prison systems themselves fall outside the scope of EU competence.

Nevertheless, and while the Union may not have the self-standing power to act in regards to structural prison problems, it was previously noted that these problems give rise to systemic risks of individual rights violations. In this light, one may argue that the nature of the EU as a Union of Values, and the existence of the EU penal imaginary, should suffice. Indeed, the Union may not be in a position to regulate or enforce prison standards – yet, if such standards violate individual prerogatives, the Union of Values should step in, goes the argument.

---

it would otherwise be applied to judges of the Court. Article 3 observes that judges were to be immune from legal proceedings during their term of office.

[476] See generally Walter Lipgens (ed), *Documents of the History of European Integration* (De Gruyter 1985); Jean-Michel Guieu and Christophe Le Dréau (eds), *Le « Congrès de l'Europe » à La Haye (1948-2008) (*Peter Lang 2010); and Walter Lipgens, *A History of European Integration: 1945–1947* (Oxford University Press 1983).

[477] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 155-176; Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) Common Market Law Review 1307, 1308; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45, 46; Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849, 856.

[478] Antonio Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Anthony Arnull, Piet Eckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Francis Jacobs* (Oxford University Press 2008) 1, 125.

While this line of reasoning has merit, it is challenging on the basis of the following two points: the EU is not a human rights organization, and its normative human rights framework is limited; and the EU has not ratified international human rights law. Both points are analysed in turn.

3.3.2 The ancillary scope of EU human rights

The EU is not a human rights organization.

This is easy to understand upon comparing the EU to the UN and the CoE. The protection of human rights constitutes their core mission and *raison d'être* of both UN and CoE, and the focus of both organisations has historically lied on safeguarding and promoting rights. To this end, both UN and Council have made use of their mandate to produce a plethora of legally binding or declaratory documents that lay out human rights standards, nudging states towards a common understanding of values – in this fashion, developing a "substantive sense of justice",[479] and normatively converging national human rights orders. The values established at UN and CoE level apply in transnational and purely domestic situations both. Further, both CoE and UN have established a number of bodies that operate with a self-standing human rights mandate, which seek to monitor and further develop human rights standards. Both institutions have stressed the importance of extending human rights into the realm of criminal detention, providing for specific standards on detainees – and while such standards do not substitute the state's carceral monopoly, they nevertheless substantially delimit it. Such limitations are legitimate, since both the UN and the

[479] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 678.

CoE hold a clear, predetermined human rights mandate, of which states have been aware *ab initio*.[480]

The EU, in contrast, was never meant to be the ethos of Europe – and "to suppose otherwise is to engage in mythology".[481] While both CoE and UN adopted human rights treaties immediately after their inception, the Union's Founding Treaties make no explicit reference to human (much less detainee-specific) rights. While the ECtHR is a human rights court, the CJEU does not serve the same purpose.[482] Individuals may submit their case directly before the Strasbourg court, which will subsequently examine that case as a human rights court focused on human rights provisions. The Luxembourg Court examines human rights incidentally,[483] in a "collateral or tangential manner".[484] This reflects the historic division of labour between EU and CoE, dictating that the latter focus on values, including human rights, democracy, and the rule of law, and the former on more practical issues, namely the market and its resources.

---

[480] Jonathan Sharpe, *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Council of Europe 2010); Birte Wassenberg, *History Of The Council Of Europe* (Council of Europe 2013); Kanstantsin Dzehtsiarou and Vassilis P Tzevelekos, 'The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights' (2020) 1 European Convention on Human Rights Law Review 1.

[481] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

[482] Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649; Antonio Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Anthony Arnull, Piet Eckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Francis Jacobs* (Oxford University Press 2008) 1, 125.

[483] Via the preliminary ruling procedure, see TFEU, art 267. Granted, there is the possibility for individuals to directly go before the CJEU, following the procedure outlined under the TFEU, art 263; though the Plaumann test has considerably delimited the power of any EU citizen to seek justice directly before the CJEU. See Case 25/62 *Plaumann and Co v Commission* [1963] ECLI:EU:C:1963:17; for an analysis, see Noreen O'Meara, 'Plaumann v Commission (Case 25/62), EU:C:1963:17, [1963] ECR 95 15 July 1963' in Noreen O'Meare, *Essential Cases: EU Law* (5th edn, Oxford University Press 2021).

[484] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 680.

The Union's mission has focused on the Single Market and economic integration.[485] While it may true that, progressively, the Union encompassed human rights in its *acquis,* rights and values have constantly functioned "epiphenomenally in the EU, an offshoot of the EU's more central, market led functions".[486] Such a piecemeal approach hardly proves apt ground to justify establishing the Union as a human rights organization. Any attempts to secure a result to the contrary have been shut down by the CJEU[487] or the member states themselves.[488]

The Union lacks the normative imperative and legal competence to act towards protecting or promoting individual prerogatives *as a self-standing objective.* While both UN and CoE are designed to proactively pursue and monitor the protection of human (including detainee) rights as a public good, the EU lacks such a

[485] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 155-176; Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR-I 11767; Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) Common Market Law Review 1307, 1308; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45, 46; Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849, 856.

[486] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 679.

[487] See, indicatively, Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Maduro, para 19, where AG Maduro interpreted TEU art 6 as meaning that the very existence of the European Union is predicated on respect for fundamental rights. This approach was not adopted by the Court. For an analysis, see Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 679.

[488] As evidenced by the failure to adopt the Treaty establishing a Constitution for Europe. See Nicholas William Barber, Maria Cahill and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019). Nevertheless, the currently in force Treaty of Lisbon provisions are largely based on those of the unratified Treaty establishing a Constitution for Europe; see Ingolf Pernice, 'The Treaty of Lisbon and Fundamental Rights' in Stefan Griller and Jaques Ziller (eds) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), and also Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649.

mandate.[489] One may not ignore this reality, as this would go against fundamental EU law principles, especially conferral.[490] Consequently, any calls for EU action in detention for the sake of it would raise tremendous legitimacy concerns, and rebarbative reactions from EU scholarship, member states, and the European people.

Since the Union is not a human rights organisation, it follows that the scope of EU human rights law is limited. Article 2 TEU states the Union's values, yet it has traditionally been viewed as a provision lacking any direct effect and self-standing applicability, needing instead some trigger to give it effect.[491] A concrete manifestation of the EU values is the CFREU, the Union's own bill of rights.[492] However, and as stated in the CFREU itself: "The provisions of this Charter are addressed […] to the Member States only when they are **implementing** Union law."[493] When not implementing EU law, the member states have no obligation to respect the Charter.[494] The CFREU "shadows" EU competence.[495] When a situation is governed by EU law, then (and only then) is the CFREU applicable.[496]

---

[489] Andrew T Williams, *The Ethos of Europe: Values, law and justice in the EU* (Cambridge University Press 2010); see also Sionaidh Douglas-Scott, 'The Problem of Justice in the EU' in Julie Dickson and Pavlos Eleftheriadis (eds), *The Philosophical Foundations of the EU* (Oxford University Press 2012) 1, 412ff; Tony Judt, *A Grand Illusion? An Essay on Europe* (New York University Press 2011) 1, 119.

[490] See chapter 10 of this thesis as well.

[491] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para 32; see Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182.

[492] TEU, art 6 para 3; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 648; Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131.

[493] CFREU art 51 para 1, emphasis added.

[494] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' [2012] 8 Eu Const L Rev 375, 377.

[495] Koen Lenaerts and J Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Steve Peers et al (Eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2013) 1, 1559.

[496] See further to Case C-260/*89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas*

To invoke the CFREU provisions against member states, one would have to identify specific, concrete "triggering rules",[497] which would bring prisons under the EU gaze, and allow for the application of the Charter. Yet the analysis already demonstrated that the EU has no self-standing competence in regards to prisons. Consequently, prisons *in abstracto* escape the scope of EU competence and law, and the CFREU may not be deemed applicable.

The argument that the EU penal imaginary should be automatically triggered when individual rights violations occur at state level holds little merit, unless one may identify a concrete link that would bring prisons under the scope of EU law.[498]

3.3.3 The EU as a *sui generis* order

The EU has not ratified the international human rights framework.

To determine the place of the Union in the international community has proven a rather tedious task.[499] The EU is an entity with legal personality, that much is clear.[500] Nevertheless, perspectives on what the EU as an entity actually *is* range

and Others [1991] ECR I-2925, para 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, para 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, para 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, para 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, para 72; and Case C-27/11 *Vinkov* [2012] ECLI:EU:C:2012:326, para 58.

[497] Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267, 1280.

[498] The very task of chapters 4 and 5.

[499] T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389, 403–404; D. Wyatt, 'New Legal Order, or Old?' (1982) 7 European Law Review 147; Bruno de Witte, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources' in Jean d'Aspremont, and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 1, 769; O Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 European Journal of International Law 763, 770; Jed Odermatt, 'The European Union in International Law', in Jed Odermatt (ed) *International Law and the European Union* (Cambridge University Press 2021) 1, 9ff.

[500] TEU, art 47.

from conceptualising it as a self-contained sub-regime of the international legal order,[501] a regional economic integration organisation,[502] or an international organisation in the more classic sense, no more than a group of states.[503]

Yet, the EU itself subscribes to none of these analyses, having instead adopted its own self-definition.[504]

According to the internal EU-centric understanding, adopted by EU judges, officials, and scholars,[505] the Union is *sui generis*, unique in nature amongst all international actors, a new legal order to be set apart from other creatures of international law.[506] As stated by the CJEU in the landmark *Van Gend* judgment, the Union:[507] "constitutes a new legal order for the benefit of which the states have limited their sovereign rights".[508] This reasoning has persisted in the language of the CJEU.[509] In *Costa* the CJEU again stressed the *sui generis*

[501] E Klein, 'Self-contained Regime', Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn). https://opil.ouplaw.com/home/EPIL; B Simma and D Pulkowski, 'Leges Speciales and Self-contained Regimes, Responsibility in the Context of the European Union Legal Order' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 1, 152.
[502] Joseph HH Weiler and Ulrich R Haltern, 'The Autonomy of the Community Legal Order: Through the Looking Glass' (1996) 37 Harvard International Law Journal 411, 419.
[503] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 1, 192ff; GD Triggs, *International Law: Contemporary Principles and Practices* (Butterworths 2006) 1, 175ff.
[504] Which understandably may attract criticism from international law scholars. See indicatively Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 1, 67; René Barents, *The Autonomy of Community Law* (Kluwer Law International 2004) 1, 112.
[505] Jed Odermatt, 'The European Union in International Law', in Jed Odermatt (ed) *International Law and the European Union* (Cambridge University Press 2021) 1, 9ff.
[506] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2422; Olivier Jacot-Guillarmod, *Droit communautaire et droit international public* (Librairie de l'université Georg 1979) 1, 258; Jed Odermatt, 'The European Union in International Law', in Jed Odermatt (ed) *International Law and the European Union* (Cambridge University Press 2021) 1, 11.
[507] At the time still Community, as per the language of the CJEU.
[508] See the doctrine of direct effect in Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1, para 12.
[509] For an overview analysis see Torkuler Isikiel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 European Journal of International Law 565.

nature of the Union: "[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system".[510] In *Kadi* the Luxembourg Court "regarded the constitutional framework created by the EC [EU] Treaty as a wholly autonomous legal order, not subject to the higher rules of international law".[511] In its *Opinion 2/13,* the CJEU denounced the authority of any international court "outside the institutional and judicial framework of the EU […] to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights".[512]

A *sui generis,* autonomous Union, with its own legal system, and a Court that has the monopoly to adjudicate on the legality and interpretation of this system. Does this then mean that the Union is not bound by the international human rights principles discussed previously? Not quite. The EU is not *automatically* bound by such norms, unless it has transposed or incorporated such an international norm into its own legal order.[513]

Here exactly lies the issue. The EU may be inspired by international norms, such as those deriving from the ECHR and the UDHR; and the CJEU does often look to the interpretation of such norms as provided by other Courts, such as the

[510] Case C-6/64 *Costa v ENEL* [1964] EU:C:1964:66.
[511] Case C-584/10 P (Joined Cases C-584/10 P, C-593/10 P, C-595/10 P) *Commission v. Kadi* [2013] ECLI:EU:C:2013:518, para 119.
[512] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 256; referring also to *Opinion 1/09* [2011] EU:C:2011:123, paras 78, 80 and 89; see also *Opinion 1/00* [2002] EU:C:2002:231, para 12.
[513] TFEU, art 216 para 2; See indicatively Case 181/73 *Haegeman v Belgian State* [1974] EU:C:1974:41; Case C-179/97 *Spain v Commission* [1999] EU:C:1999:109; Case C-162/96 *Racke GmbH and Co. v Hauptzollamt Mainz* [1998] ECR I-3655, para 45; and Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECLI:EU:C:1990:322. In this sense the EU represents a dualist, rather than monist, entity; see Ramses A Wessel, 'The EU and International Law' in Ramses A Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2nd edition, Hart 2020).

ECtHR.[514] Yet, unlike its own member states, the Union itself is neither a UN nor a CoE member. With very limited exceptions,[515] the EU has not ratified any international human rights treaty.[516] It is altogether doubtful whether the EU even has the competence to ratify the UN regulatory framework.[517] The CJEU in *Kadi* explicitly noted that the EU is not bound to UN Treaties and the Charter.[518] As for the CoE, the TEU explicitly obliges the EU to accede to the ECHR,[519] yet this is something that has yet to occur.[520] Three decades ago, the possibility for the Union to accede to the ECHR was denied by the CJEU. In its *Opinion 2/94,*[521] the Court found that such a course of action would have "fundamental institutional implications for the Community and for the Member States".[522] The Treaty on European Community, as was then in force, did not foresee such a possibility. To bring about such implications, the Court opined, would only be legally possible

[514] See subsection 3.2.2 of this thesis.
[515] Such as the UN Convention on Rights of Persons with Disabilities (CRPD), and the CoE Istanbul Convention. See United Nations, *Convention on the Rights of Persons with Disabilities*, (New York 2006) United Nations Treaty Series vol. 2515 1, 3; Council of Europe, Convention on preventing and combating violence against women and domestic violence (Council of Europe 2011) Treaty Series no. 210..
[516] Monika de Silva, *Accession of the European Union to the United Nations Human Rights Treaties: Explaining the Reasons for Inaction* (College of Europe 2020) EU Diplomacy Papers 7/2020 1.
[517] ibid 1, 8.
[518] Case C-584/10 P (Joined Cases C-584/10 P, C-593/10 P, C-595/10 P) *Commission v. Kadi* [2013] ECLI:EU:C:2013:518; particularly Case T-315/01 *Kadi v Council and Commission* [2005] E.C.R. II-3649, para 192. For an analysis, Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 SMU L. REV. 707, 709. Subsequent CJEU case-law has traditionally refused to grant any effect to various UN treaties; see Katja S Ziegler, 'Autonomy: From Myth to Reality: or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds) *Research Handbook on EU Human Rights Law* (Edward Elgar 2017) 1, 267, 281ff; see further Katja S Ziegler, 'International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International* Law (Edward Elgar 2011) 1, 268; and C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aix apatrides* [2014] ECR I-(nyr).
[519] TEU, art 6 para 2.
[520] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454.
[521] *Opinion 2/94* Accession to ECHR (ECHR I) [2014] EU:C:1996:140.
[522] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 34-35.

and legitimate via Treaty amendment.[523] Today, the EU constitutional landscape has changed. The possibility to accede to the ECHR is explicitly provided in article 6 TEU. In fact, accession constitutes no mere possibility, but rather an obligation of the Union. Nevertheless, the possibility of accession was once more shut down by the CJEU in *Opinion 2/13.*[524] In its reasoning, the CJEU focused primarily on the autonomy of the EU legal order.[525] The Court denounced the authority of any international court "outside the institutional and judicial framework of the EU […] to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights".[526] The CJEU declared that the CFREU precludes member states from enforcing human rights standards that undermine the primacy, unity, and effectiveness of EU law, and that accession to the ECHR would undermine EU law.[527] This is because the ECHR explicitly allows national authorities to law down human rights protection standards that go above and beyond the standards provided in the ECHR itself.[528]

The EU remains outside the CoE/UN fold, not readily departing from its *sui generis* autonomous legal order (as per its own self-determination).

[523] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 35.
[524] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454.
[525] For an analysis, see Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) Public Law and Legal Theory Research Paper no 432 https://iow.eui.eu/wp-content/uploads/sites/18/2015/04/Spaventa-09-Halberstam.pdf (accessed 24 September 2023).
[526] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 256; referring also to Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89. See also Opinion 1/00, EU:C:2002:231, para 12.
[527] Referring also to *Melloni,* as examined under section 9.3 of this thesis; Spanish Constitutional Court. Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.
[528] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 187-195.

In sum: one could make the following argument. Individual prerogatives are protected under the CoE and UN standards, and the EU has acknowledged the influence and devoted itself to the protection and promotion of such standards – hence the EU should act when faced with structural shortcomings that give rise to systemic violations. However, in light of the preceding discussion, and the fact that EU law is not directly subjected to nor bound by the UN and CoE norms, such an argument is not convincing.

3.4 Conclusion

The chapter has met two burdens: establishing the existence of an EU penal imaginary, or human rights *acquis* of relevance to detention; and proving that, in the absence of a specific trigger that would bridge prisons and EU human rights law, the mere existence of the *acquis* is insufficient ground to argue for a necessity of EU action in prisons.

Identifying triggers that bring prisons under the EU gaze constitutes the task of the following chapters.

CHAPTER 4

THE CROSS-BORDER DIMENSION OF DETENTION IN EU LAW: MUTUAL TRUST AND RECOGNITION AS CFREU TRIGGERS

4.1 Introduction

Chapter 2 showcased the structurally poor state of many EU detention systems, and the resulting systemic risks for individual prerogatives – as safeguarded also under the EU penal imaginary. In this fashion, the analysis has established that there is a problem. It has nevertheless yet to show that this is a problem *for the EU.* Bridging the gap between prisons and EU law, and showing how the state of the former is a problem for the latter, is the task of this and the following chapter.

It is submitted that the current detention reality undermines the very purpose of the EU, by threatening its integration process, values, and the well-being of its peoples.[529] This occurs in two ways. Firstly, the current detention reality undermines the principles of mutual recognition and trust, and the functioning of the Union's judicial cooperation regulatory framework. Secondly, the same reality systemically undermines the EU values, particularly the protection of individual rights and dignity.

Both of these points were aptly demonstrated in the seminal joined cases of *Aranyosi and Căldăraru* (henceforth referred to in singular as *Aranyosi/Căldăraru*).[530] Utilising this case as anchor, this chapter demonstrates the fashion in which criminal detention poses a problem for the mutual recognition

[529] TEU, arts 1-3.
[530] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198.

and trust principles. Chapter 5 shall focus on prisons systemically breaching EU values under article 2 TEU, while chapter 6 shall outline the significance of this problematic nexus between prisons and Union, by closely examining the impact of detention on the EU as AFSJ and as a Union of Values.

For now, the analysis turns to prisons in light of mutual recognition and trust.

4.2 The principles of mutual recognition and trust in the AFSJ

The first bridge between EU and prisons may be summarised as follows. The EU has adopted its own regulatory framework in regards to cross-border judicial cooperation. Two Framework Decisions (FDs) constitute part and parcel of this framework. These are the FD on the European Arrest Warrant (EAW), [531] and the FD on the Transfer of Prisoners (ToP). [532] Both FDs initiate judicial proceedings that conclude with the detention of the individual.

The FDs function on the basis of the mutual recognition and trust principles. Mutual recognition obliges EU states to effectively enforce the FDs (leading to the detention of the individual), while mutual trust obliges EU states to presume that all other EU states equivalently respect the EU human rights norms (including the EU penal imaginary). When giving effect to the mutual recognition and trust principles, member states act as agents of the Union. In this fashion, the EAW

[531] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

[532] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

and ToP FDs act as "triggering rules",[533] bringing mutual recognition and trust under the CFREU umbrella. Since mutual recognition and trust extend to detention, the latter is also brought under the CFREU scope.

4.2.1 *Aranyosi/Căldăraru* considering prisons in surrender proceedings

As mentioned, prisons have traditionally escaped the competence and study of both Union and EU law scholar.[534] This drastically changed in 2016, with the seminal judgment of the CJEU in *Aranyosi/Căldăraru.*[535] In that case, the CJEU brought prisons firmly within the gaze of EU law, by explicitly acknowledging the nexus between EU and criminal detention. The basis of this nexus lies on the principles of mutual recognition and trust.

The case concerned Mr Aranyosi and Mr Căldăraru. Both individuals were EU citizens, Hungarian and Romanian respectively. Aranyosi was wanted by the Hungarian authorities, prosecuted for crimes that carried a potential custodial sentence. Căldăraru already had a final custodial sentence pending, delivered by the Romanian judiciary. Both individuals were arrested and detained in Germany. The German judiciary received a request to surrender Mr Aranyosi to Hungary for the purposes of prosecution and trial.[536] Similarly, the German judiciary

[533] Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267, 1280.
[534] See chapters 1 and 3 of this thesis.
[535] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198.
[536] Under the European Arrest Warrant regulatory framework; the analysis resumes this point promptly, see subsection 4.2.3 of this thesis.

received a request to surrender Mr Căldăraru to Romania, so that he could be sent to prison.[537]

The German judiciary hesitated to comply. This is because it had knowledge of the judicial and monitoring findings identified previously. It was aware that both the Hungarian and the Romanian prison systems suffer(ed) from structural shortcomings that pose systemic violations to individual rights. It was consequently reluctant to surrender. This was because, in case of surrender, it was likely that both individuals would end up in prison, in Hungary and Romania respectively. The German judiciary feared specifically that both individuals might be subjected to detention conditions that "are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU".[538]

In this light, the German judiciary referred the case to the CJEU.[539]

The Luxembourg Court did not challenge the evidence revealing structural shortcomings in both prison systems. More importantly, it admitted that "compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding […] on the Member States […] where they are implementing EU law".[540] The CJEU also stated that the prohibition of inhuman treatment is "absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter",[541] and this "is confirmed

[537] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 2.
[538] ibid paras 42 and 59, emphasis added.
[539] Via a preliminary ruling request; see TFEU, art 267.
[540] ibid para 84.
[541] ibid para 85.

by Article 3 ECHR, to which Article 4 of the Charter corresponds".[542] Finally, the CJEU acknowledged that "[a]rticles 1 and 4 of the Charter and Article 3 ECHR enshrine one of the fundamental values of the Union and its Member States".[543] In its reasoning, the CJEU went on to examine individual prerogatives, as safeguarded particularly under article 3 ECHR and article 4 of the Charter, in relation to surrender proceedings.

The analysis shall expand further in the clash between detention conditions and individual prerogatives as part and parcel of the EU normative *acquis*. For now, it is important to place this exact tension in the context of surrender proceedings, as regulated by the principles of mutual trust and recognition.

Much has been written about these principles and the respective FDs.[544] In this light, a holistic analysis escapes the scope of the thesis. Instead, the following sections seek to sketch the core tenets and mechanisms at play, so that the problematic relationship between detention and mutual recognition instruments becomes apparent.

4.2.2 Mutual recognition as freedom of movement of judicial products

[542] ibid para 86.
[543] ibid para 87.
[544] The same holds true for its twin principle of mutual trust. For an extensive analysis see, among others, Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart 2022) 1, 116; Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (All Souls College University of Oxford 2015) 1; Ester Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law* (Hart 2014) 1, 36; Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405; Lars Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 1, 140.

Succinctly, mutual recognition obliges all EU member states to acknowledge and enforce (certain) judicial orders issued by fellow states *as if* they originated within their own domestic jurisdiction. The rationale behind this obligation is to facilitate judicial cooperation in criminal matters, and enhance crime prevention and suppression in the AFSJ.[545]

Mutual recognition is a judicially created principle, forged by the CJEU. Despite its importance for criminal cooperation in the AFSJ, mutual recognition does not trace its origins in the AFSJ. Instead, the principle may be characterised as a 'legal transplant': a piece of law that originated elsewhere, in a different context and for different purposes, and later got transferred ('transplanted') to another area.[546] While the term usually refers to laws imported from one state to another, the transplant here occurs from one sphere of competence to another. Mutual recognition in the AFSJ traces its origins to an altogether different branch: that of the Single Market. Specifically, the principle came at the forefront of EU integration via the landmark *Cassis de Dijon* case,[547] delivered in the late 1970s.

The *Cassis* case revolves around the Single Market and free movement of goods in EU law, both points substantially unrelated to this thesis. Nevertheless, it is useful for the analysis to briefly revisit the core points raised in *Cassis,* alongside

[545] See chapter 6 of this thesis.
[546] Terminology first employed by Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).
[547] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltungfiir Branntwein (Cassis de Dijon)* [1979] ECR-1979-00649; see for an analysis Karen Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comp. Pol. Stud. 535.

the Court's judgment. Understanding mutual recognition in the Single Market shall allow us to better comprehend its functioning in the AFSJ.[548]

In *Cassis*, the issue was whether the homonymous Cassis de Dijon, a beverage produced in France, containing around 15 per cent alcohol by volume (ABV), and sold as liqueur, could be imported and sold in Germany under the same 'liqueur' label. The point of friction was that German laws stipulated that, for a product to be sold as a liqueur, it had to contain over 25 per cent ABV. This was obviously not the case with Cassis. The question submitted to the CJEU was whether, by imposing such standards that effectively disallowed the sale of Cassis within its territory, German law violated free movement of goods. The Luxembourg Court responded in the affirmative. The CJEU declared that a product (a 'good') lawfully produced, marketed and sold in one EU state may, in principle, be allowed to circulate in any other member state. Free circulation should occur, as long as the product complies with the technical requirements of the producing country. Whether the product complies with the technical requirements of the importing state is irrelevant.[549]

[548] Note Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 2, 311, observing that mutual recognition "should not be seen as a concept of an intrinsically economic nature, but rather as a modus operandi for the EU in both economic and non-economic areas".

[549] For the principle's origins there, see Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltungfiir Branntwein (Cassis de Dijon)* [1979] ECR-1979-00649; see also Caspar Behme, 'The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies' (2016) 13 European Company and Financial Law Review 31, 37; and Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart 2022) 1, 116, quoting the UK Home Secretary: "one could be inspired from the way in which the internal market was unblocked in the 1980s and, instead of opting for total approximation, conceive a situation where each Member State recognises the validity of decisions of courts from other Member States in criminal matters with a minimum of procedure and formality".

In its judgment, the CJEU noted the following.[550]

> In the absence of common rules relating to the production and marketing of alcohol […] it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.
>
> It therefore appears that the unilateral requirement imposed by the rules of a member state of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with […] the Treaty.
>
> There is therefore **no valid reason why**, provided that they have been lawfully produced and marketed in one of the member states, alcoholic beverages **should not be introduced into any other member state; the sale of such products may not be subject to a legal prohibition** […]

The *Cassis* rule, in a nutshell, dictates that if one member state lawfully produces a good, all other member states must recognise that good as lawful, and allow circulation within their own territory. The justification behind the operation of mutual recognition in the Union's Single Market lies in delimiting state-imposed trade restrictions on foreign products, hence facilitating free movement of goods.[551]

Two decades after *Cassis,* EU member states[552] chose to transplant mutual recognition from the Single Market onto the AFSJ. The reasons behind this

[550] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltungfiir Branntwein (Cassis de Dijon)* [1979] ECR-1979-00649 para 8, emphasis added.
[551] This becomes apparent upon further examination of later codifications of the mutual recognition principle in the EU regulatory framework. Characteristically, the Regulation on free movement of goods explicitly states that its aim "is to strengthen the functioning of the internal market by improving the application of the principle of mutual recognition and by removing unjustified barriers to trade". See Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (Text with EEA relevance.) PE/70/2018/REV/1 [2019] OJ L 91/1, art 1.
[552] With the UK at the forefront, and Jack Straw, then UK Home Secretary, leading the initiative. See Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal

decision and marriage between mutual recognition and anti-crime cooperation shall be analysed later.[553] For now, it is important to understand the functioning of the principle in the context of judicial cooperation within the AFSJ. This proves a rather straightforward task, in light of *Cassis*, since the same logic applies – though the discussion now moves from alcoholic products, technical production requirements, and the Single Market, onto judicial orders, values, and the AFSJ.[554]

Essentially, mutual recognition in criminal matters dictates that a judicial order or judgment issued by the authorities of one member state is to, in principle, be recognised and enforced by the authorities of another EU state. The underlying rationale proves identical with *Cassis.* In this instance, however, the principle serves a different freedom of movement: not of goods as products of the market, but of judicial orders and judgments, as products of the judiciary.[555] Further, and if free movement of commercial products facilitates trade and allows for the functioning of the EU as a Single Market, the justification of free movement of

Matters in the EU' (2006) 43 Common Market Law Review 1277, 1279; referring further to *La Documentation Francaise, Ministère de la justice, L'Espace Judiciaire Européen. Actes du Colloque d'Avignon* (Paris 1999) 1, 89.

[553] See chapter 6 of this thesis.

[554] Though it has been rightly noted that mutual recognition manifests itself differently in the AFSJ and the Single Market: in the latter, mutual recognition obliges states to relinquish border control, in the former, mutual recognition compensates states for the lack of borders. See K Hamenstädt, 'Mutual (dis-)trust in the Area of Freedom, Security and Justice?' (2021) 14 Review of European Administrative Law 5, 8.

[555] In this sense, freedom of movement of judicial acts may be regarded as a fifth fundamental freedom within the Union, alongside the four core ones (goods, services, capital, and persons, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019). See also Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 4.

judicial products lies in facilitating cross-border cooperation against crime, and allowing for the functioning of the EU as an AFSJ.[556]

4.2.3 The EAW and the ToP as mandating rules

The principle of mutual recognition in AFSJ judicial cooperation is codified at Treaty level, with article 82 TFEU stating the following:

> Judicial cooperation in criminal matters in the Union shall be based on the principle of **mutual recognition** of judgments and judicial decisions […]
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
>
> (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; […]
>
> (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

The TFEU itself does not provide us with further details on the operation of mutual recognition on the ground. To this end, it proves useful to study in more detail specific mutual recognition instruments. The thesis does not concern itself with mutual recognition *in abstracto*, nor does it account for the entirety of mutual recognition instruments relevant to criminal policies in the AFSJ. Instead, the focus is grounded firmly on mutual recognition instruments that directly relate to

[556] See chapter 6 of this thesis.

criminal detention. These are the Framework Decision (FD) on the European Arrest Warrant (EAW);[557] and the FD on the Transfer of Prisoners (ToP).[558]

The purpose of each of these instruments is to regulate the transfer of detainees from one EU state to another. In more detail, the EAW regulates the "arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".[559] Essentially, it allows convicts or suspects of crime to be surrendered to another member state, to be tried before a court of law, or to carry out a custodial sentence already imposed by one. As for the ToP FD, it regulates "the rules under which a Member State […] is to recognise a judgment and enforce the sentence".[560] Essentially, it allows member states to enforce a prison sentence issued by another EU member; further, it allows for already convicted individuals who are spending time in a cell of some EU state, to be transferred to their country

[557] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

[558] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

[559] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24, art 1 para 1.

[560] ibid art 3 para 1.

of nationality, habitual residence, or the one to which they have close ties, to spend the remainder of their custodial sentence there.[561]

The regulation of intra-EU detainee[562] movement constitutes the objective of these FDs. To achieve this objective, each FD encompasses a legal demand. This may be understood as follows: "*X* has to acknowledge and enforce *Z* as issued by *Y*". As for the variables:

Z refers to the mutual recognition instrument itself, specifically the EAW or ToP FD. *X* refers to the EU state receiving and executing the FD. *Y*, finally, refers to the EU state issuing the FD.

In this fashion, mutual recognition instruments establish a multi-level regulatory framework, which involves the following key actors. These are: the EU itself, which put in place the regulatory framework, pursuing a policy (the surrender and/or transfer of the individual); the member states enforcing this policy, either as the issuing (requesting) or the executing (arresting, surrendering, and/or transferring) state; and the concerned individual, as the object of the surrender and/or transfer proceedings, bearing the consequences.

Each of the 27 EU member states is equal to one another, and each of the 27 member states may make use of the mutual recognition instruments by choosing

[561] European Commission, *Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention* (European Commission 2014) COM 57 final.

[562] I refer to 'detainee' including both pre- and post-trial detention. Indeed, and while the EAW applies in regards to non-convicted individuals too, surrendering a suspect of a crime that carries a custodial sentence equals, more likely than not, surrendering the person to be put on remand detention.

to initiate surrender or transfer proceedings. It should nevertheless be noted that the relationship between issuing and executing state, once these roles are assigned and the nexus is crystallized, proves rather asymmetrical. This is because each mutual recognition instrument encompasses a command, serving as transmitter of legal demands. The issuing member state produces a judicial order, and the executing state has to comply, and give effect to the request of the former.[563] Due to the doctrine of EU law supremacy, the executing state *has to* enforce the will of the issuing state – it has no choice on the matter.[564] At its core, mutual recognition creates extra-territoriality, since it allows EU state to expand their judicial will beyond their own borders,[565] so as to encompass the entirety of the Union.[566] In other words, the issuing EU state remains free to 'export' its judicial products, while the executing state has to 'import and consume'.[567]

[563] Naturally, mutual recognition is not entirely without barriers. These may be categorised in three distinct categories: national discretion, public-policy considerations, and proportionality (de minimis) rules and concerns. See Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013); Dan Helenius, 'Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?' (2014) 5 New Journal of European Criminal Law 349.

[564] On the doctrine of supremacy (primacy) of EU law, see Monica Claes, 'The Primacy of EU Law in European and National Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 1, 178ff; Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

[565] Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805, 809.

[566] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 Law and Contemporary Problems 263; Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy 682; Valsamis Mitsilegas, The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust; JG Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 International Organization 139, 165; Cecilia Rizcallah, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25 European Law Journal 37.

[567] To utilize the *Cassis* terminology.

Framed in this manner, mutual recognition in the AFSJ may be construed as the fifth freedom of movement of EU law.[568]

To recap, mutual recognition in judicial cooperation in criminal matters imposes an obligation on all EU states to acknowledge the validity of judicial orders and judgments lawfully issued in fellow member states, and grant them full effect, as if they originated within their own domestic legal order. In the specific context of the EAW and ToP FDs, the order is one of surrender or transfer, and the likely result and outcome of the proceedings is the (pre- or post-trial) detention of the individual. In this fashion, the EAW and ToP FDs serve as "mandating rules",[569] since they oblige member states to act in a specific manner, to give effect to the mutual recognition principle.

Such an obligation may strike an outside observer as rather peculiar, if not outright unrealistic and far from feasible. Indeed, allowing for the will of a sovereign to be unequivocally imposed on another state in such a unilateral manner may be a common occurrence in other areas of law.[570] However, in the area of criminal law, an area that has such a profound effect on individual rights, and serves as an expression of both state sovereignty and societal conscience,[571] mutual recognition seems ill-suited. It has been accurately observed that every time the executing state recognises and executes a mutual recognition

[568] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019). See also Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 4.
[569] Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267, 1280.
[570] Such as e.g. private international law.
[571] For the symbolic effect of (EU) criminal law see also chapter 11 of this thesis.

instrument issued in a foreign state, it embarks on a "journey into the unknown".[572] One may thus legitimately wonder why EU members would ever accept such an obligation, and how the Union legitimises such an intruding policy.

Within the EU, the mutual recognition principle is justified on the basis of mutual trust.

4.2.4 Mutual recognition relying on the presumption of equivalent rights protection

The analysis now turns to the concept of mutual trust, and its link to mutual recognition. Mutual trust is understood as the (legally binding) presumption of equivalent rights protection – a presumption that justifies mutual recognition.[573] Once explained, this statement will allow us to finally conceptualise the exact nexus between mutual recognition, mutual trust, and detention.

Unlike mutual recognition, mutual trust is not found nor defined in the EU Treaties as such. Instead, early references to this principle are found in a series of EU Commission policy documents on the topic of mutual recognition. There, it is stated that mutual recognition "*presupposes* mutual trust in the member states' legal systems and a shared fundamental basis".[574] Subsequently, the European

---

[572] Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, 1282.

[573] Hans G Nilsson, 'Mutual Trust or Mutual Mistrust?' in Gilles de Kerchove and Anne Weyembergh (eds), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles 2005) 1, 29. See also Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?' (2004) 41 Common Market Law Review 5.

[574] European Commission, *Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters* [2000] COM/2000/0495 final 1, 18. See also European Commission, *Communication from the Commission to the Council and the European Parliament: Towards enhancing access to information by law enforcement agencies* [2004] COM/2004/429 final 1, 12; European Commission, *Communication from the Commission to the Council and the European Parliament:*

Council has described mutual trust between states as "*mutual confidence* in each other's legal systems" due to a "shared commitment to the principles of freedom, democracy and a respect for human right[s], fundamental freedoms and the rule of law".[575]

Primarily, however, and similar to its twin principle of mutual recognition, mutual trust is at its core a judicially forged notion. Mutual trust was first underlined in *Gözütok and Brügge*,[576] where the Court found that "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".[577] In the subsequent *Radu* case,[578] the Court confirmed that the operation of mutual recognition instruments "is based on a high level of confidence between Member States".[579] In *Jeremy*,[580] the CJEU concludes that the principle of mutual recognition is founded on "the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at European Union level, particularly in the Charter".[581] In delivering its *Opinion 2/13*,

Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations [2004] COM/2004/401 final 1, 12.
[575] European Council, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* [2001] OJ C12/10.
[576] Joined cases C-187/01 and C-385/01 *Gözütok* and *Brügge* [2003] ECR I-01345.
[577] Joined cases C-187/01 and C-385/01 *Gözütok* and *Brügge* [2003] ECR I-01345, para 33. See, further, the Opinion of A.G. Ruiz-Jarabo Colomer, delivered on 19 Sept. 2002, para 55, and paras. 119–124; and Maria Fletcher, 'Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge' (2003) 66 The Modern Law Review 769.
[578] Case C-396/11 *Radu* [2013] ECLI:EU:C:2013:39.
[579] Case C-396/11 *Radu* [2013] ECLI:EU:C:2013:39, para 10.
[580] Case C-168/13 *PPU Jeremy F. v Premier ministre* [2013] ECR I-0000.
[581] ibid para 50.

the CJEU describes mutual trust as requiring EU member states "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law."[582]

An analysis of the above yields the following observations. Mutual trust forges a relationship between the trustee and the trustor.[583] *In vitro*, each member state assumes both roles simultaneously. It is only when called upon to fulfil mutual trust through a mutual recognition instrument that their roles solidify, with the executing state expected to stand as *trustee* towards the issuing state (the *trustor*). Further, and if the subjects of the principle are the member states, its object is EU law itself, including (and of special relevance to our analysis) EU fundamental rights provisions.[584] Mutual trust demands that the relationship between trustee and trustor be governed by a (trustor-directed) presumption, or a "condition to be assumed":[585] the condition being that the trustee complies with EU law, and particularly its values.

On the basis of this presumption, mutual trust dictates that, when implementing EU law (particularly, for our purposes, mutual recognition instruments), the executing state has a series of legal obligations. Firstly, the state has a positive (*must*) obligation to presume that their peers (fellow member states) adhere to a

[582] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 191.
[583] Michael Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 European Law Journal 124, 130
[584] Massimo Fichera, 'Mutual Trust in European Criminal Law' (2009) University of Edinburgh School of Law Working Paper 10/2009, 13 <https://ssrn.com/abstract=1371511> (accessed 22 June 2023).
[585] Evelien Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU law* (Cadmus 2016) 1, 59.

common fundamental rights framework. Secondly, states also have two negative (*may not*) obligations. They may "not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law",[586] and, "save in exceptional cases", they are not allowed to "check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[587]

Consequently, all EU member states have to trust in the quality of all 27 legal systems in the Union. Further, they must also trust that the rules within these systems are interpreted and applied correctly.[588] The presumption of equivalent compliance gives rise to judicially enforceable decisions and standards (enforced through mutual recognition instruments).[589] Mutual trust is more than an abstract notion. Indeed, the principle has rightly been deemed as "structural"[590] for the AFSJ, since it serves as the normative glue that allows for judicial cooperation via mutual recognition between member states.

The practical implications of the principle emerge clearly. Mutual trust imposes the obligation on member state *A* to trust member state *B* to abide by the common framework of values *X*. The argument appears (and is) straightforward: since all EU states provide for equivalent levels of human rights protection, bound together by a common normative glue, and respecting the same values and principles,

[586] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 192.
[587] ibid para 192.
[588] Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 1, 167; see also European Commission, *Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters* [2000] COM/2000/0495 final.
[589] Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (All Souls College University of Oxford 2015) 1, 5.
[590] Alexandra (Sacha) Prechal, 'Mutual trust before the court of justice of the European Union' (2017) 2 European Papers 75.

then they are not to be considered so foreign to one another after all. In this light, the obligation to acknowledge and enforce judicial 'products' between EU states is not such an outlandish or harsh demand, since the member states are only enforcing judicial 'goods' produced in a church not unlike their own.[591]

To utilise an analogy.[592] Assume that the EU is an orchestra, and each of its 27 members is a musician. The objective is to cooperate and produce music (a suitable representation of justice). In the context of criminal cooperation, it is the principle of mutual trust that allows the orchestra to perform. Mutual trust achieves this goal by granting each instrument the confidence that their fellow peers are in the same key, and of similar virtuosity. After all, they all are *professional* musicians. Without this confidence, without the mutual trust between peers, the orchestra could never perform. Further, it should be noted that musicians trust their peers to be and carry themselves as professionals without having to check their credentials or qualifications before every performance – such efforts would not do. Instead, they presume them to be so. Otherwise they would have never made it in the orchestra.

The concept of community proves paramount. Mutual trust stems from the recognition that EU members are all part of the same community. Within this community, any decision taken by the judicial authorities of one state should, in

[591] The use of church here refers to its original understanding as 'assembly', 'society', or simply 'community'.

[592] This analogy has been partly inspired by Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 29 <http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021) – I should also acknowledge feedback received by my own supervisor, Dr Javier Eskauriatza, who invited me to consider the full significance of the point of trust 'to the conductor' (the EU itself).

theory, respect the same values, adhere to the same principles, and offer equivalent protection, as a decision taken in any other member. Due to common membership and EU identity, the 'foreignness' of judicial decisions is largely mitigated, and mutual recognition becomes feasible. In this fashion, mutual trust in the AFSJ does not constitute a complete leap of faith, since EU states all trust their fellow members.[593]

Under the principle of mutual trust, EU law establishes two types of states: those belonging to the EU, and those outside the Union. Further, the interaction between such states is to differ, according to the group to which they belong. If the state is an EU one, it is to be *a priori* trusted:[594]

> [...] whilst EU Member States are, in principle, to be considered equals before the law of the EU **by virtue of the set of common values that they share**, the same does not hold true as regards an EU Member State and a third country. An EU Member State and a third country may be equals before international law, but they are not equals before the law of the EU as only the former is part of the EU, understood as a **Union of values**.

In the Union – of Values – we trust.

4.3 Detention as subject of, and hurdle to, mutual recognition and trust

It is clear that mutual recognition does not function in isolation, but instead intertwines with two more core concepts: mutual trust, and fundamental rights. It has been argued that the framework of judicial cooperation within the AFSJ is

[593] Lars Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 1, 140.
[594] TEU, art 4 para 2; Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805, 809, emphasis added.

built as a pyramid comprising three levels: mutual recognition being the apex, mutual trust serving as the edifice's middle storey, and fundamental rights comprising the pyramid's base.[595] The simile serves the purpose well, though it is perhaps incomplete, since mutual recognition, when functioning properly, safeguards and promotes fundamental rights in turn.[596] One may therefore argue that the pyramid's apex is directly connected with its base, and thus the line loops back on itself: from rights to trust, from trust to recognition, from recognition back to rights, and so forth. A cycle may ultimately serve as a more appropriate depiction.

Semantic representations notwithstanding, the point stands. The chain of judicial cooperation within Europe's AFSJ consists of three links, inextricably intertwined: mutual recognition, mutual trust, and fundamental rights.

In light of these observations, the functional nexus between criminal detention and EU law manifests on the basis of the following two pylons. Firstly, criminal detention constitutes a subject of mutual trust. Secondly, criminal detention undermines mutual trust.

Criminal detention constitutes a subject of mutual trust. This point has been largely proven in previous sections. As already stated, the EU has crafted its own penal imaginary, and all EU states are bound by this framework, when

[595] Tia Cormon, *A Utopia of Mutual Trust: Fundamental Rights in the European Arrest Warrant* (University of Ghent 2015) <https://lib.ugent.be/fulltxt/RUG01/002/213/622/RUG01-002213622_2015_0001_AC.pdf> (accessed 4 December 2019).

[596] Judicial cooperation rests on and simultaneously promotes human rights, an interplay similar to that between criminal law and human rights; see Mattia Pinto, 'Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht Journal of International and European Law 161; and Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.

implementing EU law – simultaneously, all EU states subscribe to the CoE and UN ideas relating to detainee rights and prisons, and the EU itself is influenced by and promotes these norms.[597]

Due to common membership, then, all member states are supposed to abide by the same human rights framework. The EU has equipped this presumption of equivalent rights protection with legal effect, transforming it to the mutual trust principle, which subsequently gives rise to the mutual recognition principle. Granted, it is doubtful whether the member states or the EU bodies explicitly considered and accounted for rights in the specific criminal detention setting, when choosing to transplant mutual recognition from the Single Market into the AFSJ, and justify it on the basis of mutual trust. Yet mutual recognition and trust was their choice nonetheless.

Mutual trust translates to a presumption of equivalent protection of individual rights. In the EU human rights framework, individual rights apply no less in detention. Consequently, the presumption of mutual trust translates also to a presumption of equivalent protection of detainee rights. As such rights are directly affected by the detention regimes and conditions, mutual trust also translates to a presumption of equivalent detention conditions – detention conditions that safeguard and promote detainee rights and dignity in an equivalent manner.

In this manner, equivalent detention standards, deriving from the EU penal imaginary, constitute part and parcel of mutual trust. All EU member states are presumed to comply with the EU penal imaginary, and A is to trust B on the basis

[597] See section 3.2 of this thesis.

of this presumption. This consequently turns equivalent detention standards into a justification of mutual recognition.

Turning to the latter point: the current detention reality undermines mutual trust.

Assume the following hypothetical. Member state MSA seeks to impose a custodial sentence on individual X, who is residing in member state MSB. To this end, MSA submits a mutual recognition request, requesting the surrender of X.[598] In principle, both states MSA and MSB (are presumed to) abide by the EU human rights framework, as extending in detention. Consequently, the executing state MSB has to recognize the judicial will of MSA, and surrender X to be detained. Yet, it may be that MSB is aware of certain deficiencies in the detention system of the issuing state, and thus concerned that, in case of surrender, the rights of X shall be endangered. In other words, the executing state is aware of structural failings of the issuing state's prison system, which consequently raises doubts as to whether the individual X's rights as a detainee will be adequately respected.

EU law presumes detainee rights to be equivalently protected – yet what if this abstract notion of equivalence is challenged? In such a scenario, the executing state will be faced with a difficult choice. On the one hand, it can proceed with the request, and give effect to the mutual recognition instrument (EAW or ToP). The negative effects of such a choice and consequent exposure to structurally problematic prisons for the normative human rights framework of the executing

[598] On the basis of a European Arrest Warrant (EAW); see Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

state and, more importantly, the individual, are obvious.[599] The alternative for the executing state, however, is to refuse recognition. Such a refusal would simultaneously undermine the effective functioning of the mutual recognition instruments, risk to suffer the judicial and enforcement repercussions from the EU, and release a potentially dangerous criminal – or be left with an individual that is held in detention until the clash is resolved, while the individual is stuck in a rather dystopian state of judicial limbo.[600]

The facts of this specific, concrete case, go against the abstract notion of mutual trust – what is to be done in such a scenario?

One would perhaps expect that, within a Union "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights",[601] the EU legislator would have foreseen such a scenario of mutual recognition instruments clashing with human rights, and would consequently have equipped the mutual recognition instruments with a human rights refusal ground, to be triggered when required.[602] Such an arrangement would have indeed solved the conundrum at its root – however, it was never incorporated. Indeed, both the EAW and ToP FDs acknowledge the place of rights in the EU *acquis*, stating that their provisions "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal

[599] See chapter 6 of this thesis.
[600] A point further explored further under chapters 6 and 8 of this thesis.
[601] TEU, art 2.
[602] Then again, one may argue that there should never have been such a need to begin with, since mutual recognition and trust rest on the presumption of equivalent protection, and the fact that all EU states belong to the same community.

principles" as protected under EU law.[603] Yet nowhere amongst the factors that allow the executing state to refuse a ToP or EAW request are human rights concerns addressed explicitly. Recital 13 of the FD on EAW proves noteworthy, acknowledging that "[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"[604] – however, the concern of the legislator here lies on persons 'removed, expelled or extradited', nor to those 'surrendered' or 'transferred' under EU law. The terminology is important.

In practice, this means that even if the execution of the EAW/ToP request raises concerns that detainee rights may be violated, the executing state still has to acknowledge and enforce the FD – yet simultaneously it cannot, as this would go against the EU penal imaginary, and particularly the CFREU address to all states when implementing EU law.

Consider, now, that such a scenario became reality in *Aranyosi/Căldăraru,* where the CJEU was faced exactly with the hypothetical described above. Germany was

[603] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24, art 1 para 3; FD ToP, art 3 para both declaring "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

[604] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24, Recital 13.

reluctant to execute the EAW requests received by its Hungarian and Romanian peers. Instead of presuming compliance to the EU penal imaginary, the German judiciary feared a potential violation of individual prerogatives. Concrete evidence showing structural issues giving rise to systemic risks undermined the principles of mutual recognition and trust in the abstract, and the EU regulatory framework on judicial cooperation.

The likelihood of this occurring again is far from minor – as future chapters will showcase, more cases similar to *Aranyosi/Căldăraru* have reached the Luxembourg court.[605] EU detention regimes, while convergent in theory, actually diverge, and provide for disparate and all too often structurally inadequate protection of detainee rights and human dignity.[606] There seems to be a distance between regulation and practice, resembling the face of Janus. In their duality, detention systems pose a grave issue for the functioning of the EU. To utilise the music analogy, the orchestra finds itself in disharmony. This conclusion is backed by data, which reveals the risk of prisons undermining judicial cooperation based on mutual trust and recognition is very much a reality:[607]

> Available statistics on the European arrest warrant demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk

[605] See chapter 7 of this thesis.
[606] See chapter 2 of this thesis.
[607] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, Recital 11; referring further to Period covered 2016-2019. See European Commission, *Commission Staff Working Documents Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant years 2014,2015,2016, 2017, 2018 and 2019 – reference SWD(2017)319 final, SWD(2017) 320 final, SWD(2019) 194 final SWD(2019) 318 final, SWD(2020) 127 final, SWD(2021) 227 final* https://ec.europa.eu/info/publications/replies-questionnairequantitative-information-practical-operation-european-arrest-warrant_en. (accessed 05 September 2023), emphasis added.

> of breach of fundamental rights in close to **300 cases**, including on the basis of inadequate material conditions of detention.

Unfortunately, there is no similar comprehensive dataset regarding the ToP FD. Nevertheless, and since the two instruments are built on the same basis, one may safely assume the same problems apply.[608]

There is a distance between the legal presumption of mutual trust, and the reality of detention conditions on the ground, something that generates an inherent tension. All the pieces are in place for the perfect storm to happen – and it has happened already.[609]

Two final points should be noted.

In *Aranyosi/Căldăraru,* the CJEU focused on the structural problem of overcrowding, and its impact on article 4 CFREU – the prohibition of torture and inhuman treatment, as corresponding to article 3 ECHR. Yet is has already been revealed that there are more structural problems at EU prisons, systemically undermining more rights.[610] It is therefore likely that the challenge that emerged in *Aranyosi/Căldăraru* will resurface. This only stresses the potentially broad impact and extent of the issue, and showcases the need for an EU response that deals with the prison problem holistically and comprehensively.[611]

---

[608] See for a discussion, amongst others, Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and comparative law 704.
[609] This is something that was foreseen by many from the very beginning, with EU action in criminal matters, and the principle of mutual recognition itself, criticised for its marked lack of legislative embedding and harmonisationIn marked contrast to the EU Single Market, the 'parent' field of mutual recognition; see Steve Peers, 'Mutual Recognition and Criminal law in the European Union: Has the Council Got it Wrong?' (2004) 41 Common Market Law Review 5.
[610] See chapter 2 of this thesis.
[611] See also chapter 6 of this thesis.

It shall also be reminded that mutual trust obliges *all* EU states to trust in *all* of their peers. Similarly, mutual recognition obliges *all* EU states to give effect to a mutual recognition request received from *any* EU state. In this light, it becomes clear that even a single EU prison system faced with structural shortcomings that give rise to systemic rights violations poses a grave threat to the principles of mutual trust and recognition, and the Union's judicial cooperation framework. An EU response should address all structural shortcomings across all EU prison systems, rather than focus on a select few.[612]

4.4 Conclusion

The EU penal imaginary becomes relevant and applicable in regards to domestic prisons, when member states are executing mutual recognition and trust instruments that result in the detention of the individual. In such cases, the states are clearly implementing EU law, and the CFREU is triggered. The EAW and ToP FDs thus serve as a bridge that links prisons to the EU human rights *acquis.* Member states are presumed to provide for equivalent protection of detainee rights. With this presumption rebutted by virtue of structural problems posing systemic risks, EU action in prisons becomes an imperative. The Union should act, ensuring that all domestic prison systems actually provide for equivalent protection of fundamental rights, so as to safeguard the application of its mutual recognition and trust instruments, in particular the EAW and ToP FDs.

[612] ibid.

Via the examination of the mutual recognition and trust principles, the chapter has established the first bridge between EU law and prisons. The analysis turns to uncover the second link, in the form of systemic violations breaching EU values.

CHAPTER 5

THE DOMESTIC DIMENSION OF DETENTION IN EU LAW: STRUCTURALLY PROBLEMATIC PRISONS AS A SYSTEMIC BREACH OF EU VALUES, ARTICLES 2 AND 7 TEU

5.1 Introduction

The previous chapter demonstrated how the principles of mutual recognition and trust in cross-border judicial cooperation proceedings may be used as triggers to bring detention under the scope of the EU penal imaginary, specifically the CFREU provisions of relevance.

This chapter identifies the second hook between EU and prisons, which may be summarised as follows. The reality of national prison systems characterised by structural shortcomings that give rise to systemic risks of rights violations constitutes a serious and persistent breach of EU values, and falls under the scope of articles 2 and 7 TEU, read in conjunction.

To this end, the chapter proceeds as follows. It is argued that structural prison problems and detainee rights violations occurring outside the judicial cross-border cooperation context do not fall under the CFREU scope. Nevertheless, the scope (*ratione materiae*) of articles 2 and 7 TEU is broader than the scope of the CFREU, and structurally problematic prison systems giving rise to systemic rights violations fall under its umbrella, regardless of any mutual recognition or cross-border dimension.

The next chapter concludes the part, by highlighting the importance of addressing the prison issue.

5.2 Purely domestic prison issues outside the CFREU scope

At the outset, the analysis examines whether the CFREU could ever apply in purely domestic situations. If such a point can be proven, then *any* violation of detainee rights would trigger the application of the Charter, regardless of whether or not states are acting in the context of mutual recognition proceedings, or independently. I contend that such an argument falls short, and that the nature of the CFREU does not allow for such an expansive reading.

Member states act as agents of the Union, when implementing mutual recognition instruments that result in the detention of the individual. Consequently, mutual recognition proceedings that result in detention fall clearly under the CFREU umbrella. Could the same be said for detention-related matters when detached from mutual recognition proceedings?

We have already demonstrated the fundamental importance of individual prerogatives for the EU, and the inherent tension between such prerogatives and structurally inadequate detention regimes, as acknowledged in *Aranyosi/Căldăraru*.[613] Yet the focus of the CJEU in *Aranyosi/Căldăraru* lied on human rights within the mutual trust and recognition context. This is natural, since the questions posed to the Luxembourg Court by the domestic authorities concerned surrender proceedings. The CJEU was asked to deal with the specific facts and legal problems arising out of the specific case. It was not asked to engage in a normative analysis surrounding the place of individual prerogatives and criminal detention in EU law *in toto*.

[613] Chapters 3 and 4 of this thesis.

These sections fill in this gap. It is submitted that the state of detention poses an issue for EU law also outside the context of mutual recognition proceedings. The EU has established its own human rights *acquis*, drawing influence from international and CoE human rights. This is undermined by the systemic risks posed by structurally inadequate detention regimes. Further, this threat is holistic, and independent of mutual recognition proceedings in the AFSJ.

In light of these observations, the second bridge between criminal detention and EU law manifests on the basis of the following two pylons. Firstly, criminal detention regimes constitute a subject of the EU penal imaginary. Secondly, any structural inadequacy that gives rise to systemic risks of human rights violations contradicts said imaginary.

The latter point is straightforward to prove. Structurally poor detention regimes generate systemic risks of human rights violations, undermining their protection. This very protection of human rights forms part and parcel of EU law. This was made explicit in *Aranyosi/Căldăraru*: the reason behind Germany's reluctance to surrender was its awareness of structural shortcomings, and the possibility that subjecting individuals to such detention conditions would be "in breach of Article 3 ECHR and the **fundamental rights and general principles of law enshrined in Article 6 TEU**".[614] It should also be remembered that the Luxembourg Court did not challenge the evidence revealing structural shortcomings and systemic risks arising from the Hungarian and Romanian prison systems. More importantly, it admitted that "compliance with Article 4 of the Charter, concerning the

[614] ibid paras 42 and 59, emphasis added.

prohibition of inhuman or degrading treatment or punishment, is binding […] on the Member States […] where they are implementing EU law".[615] The CJEU also stated that the prohibition of inhuman treatment is "absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter",[616] and this "is confirmed by Article 3 ECHR, to which Article 4 of the Charter corresponds".[617] Finally, the CJEU acknowledged that "[a]rticles 1 and 4 of the Charter and Article 3 ECHR enshrine one of the fundamental values of the Union and its Member States".[618]

In sum, *Aranyosi/Căldăraru* found structurally poor detention regimes as contradicting the EU penal imaginary – in particular the CFREU.

Yet, could the Charter be applicable across all EU detention regimes at all times, even outside mutual recognition proceedings? Chapter 3 demonstrated that the Union has (re)defined itself as Union of Values, yes – yet it also noted that the EU no self-standing prison competence, is not a human rights organisation, nor has it acceded to the ECHR or any other international human rights treaty of relevance to detention.

More importantly, the CFREU scope is limited, auxiliary to EU law. The CFREU states that its provisions "are addressed […] to the Member States only when they are **implementing** Union law."[619] When not implementing EU law, the member states have no obligation to respect the Charter. In this light, it has been

[615] ibid para 84.
[616] ibid para 85.
[617] ibid para 86.
[618] ibid para 87.
[619] CFREU art 51 para 1, emphasis added.

rightly noted that the CFREU has not altered the nature of the EU, nor transformed it into a human rights organisation.[620]

The term 'implementing' may appear overly strict at face value.[621] It is uncontested that member states are implementing EU law when they are applying a specific EU law provision, for instance, when enforcing an EU regulation, directive, or FD.[622] Another case where the CFREU is deemed applicable is when member states are giving effect – or derogating from – the EU fundamental freedoms of people, services, goods, and capital.[623]

There are, then, two clear rationales for accepting the applicability of the Charter: implementation *stricto sensu*, and free movement.

According to this restrictive approach, when detention conditions are examined under mutual trust and recognition, the CFREU should apply. This is because the member states are, in this context, acting as agents of the Union, giving effect to EU law (a EAW or a ToP FD).[624] Consequently, the *stricto sensu* implementation rationale is clearly relevant in mutual recognition proceedings. In my view, should

---

[620] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' [2012] 8 Eu Const L Rev 375 (377).

[621] See, indicatively, Anthony Arnull, 'From Charter to Constitution and Beyond: Fundamental Rights in the New European Union' [2003] Public Law 774, 780; Allan Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudencija 1269, 1281.

[622] See also Case 5/88 *Hubert Wachauf v. The State (Bundesamt für Ernährung und Forstwirtschaft) (Federal Office for Food and Forestry)* [1989] ECR 2609.

[623] See Tobias Lock, 'Article 51 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2241; also Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECR I-2925. For the four freedoms see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019).

[624] Filippo Fontanelli, 'Implementation of EU Law Through Domestic Measures After Fransson: The Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large' (2014) 39 EL Rev 682, 684.

one accept free movement of judicial products as the fifth fundamental freedom of EU law, then the free movement rationale may also apply.[625] This is even more evident if we account for the objective of mutual recognition instruments relating to the protection of free movement of people in a borderless AFSJ.[626]

Nevertheless, and given that there is no EU law self-standingly regulating detention regimes, one may not very convincingly argue that member states are acting as Union agents in all aspects of prison regulation and enforcement. Similarly, since prison systems are in no clear way connected to the EU freedoms, there is no room for an interpretation that would allow for CFREU applicability on the basis of the free movement rationale. Therefore, the argument for framing the current detention reality as problematic for EU values outside the realm of mutual trust and recognition is less convincing, as a restrictive approach based on article 51 of the Charter leaves no room for debate.

5.2.1 The potential of an expansive interpretation based on citizenship

Before dismissing the application of the CFREU outside mutual recognition proceedings altogether, it is first important to address arguments based on an expansive interpretation of the Charter, and the potential of EU citizenship to serve as a CFREU trigger. This is an argumentative line that has been steadily gaining traction, with many scholars and practitioners strongly advocating for such an expansive, citizenship-based reading of the CFREU.[627] It is important to

[625] Note also the CJEU Case C-390/12 *Pfleger and Others* [2014] ECLI:EU:C:2014:281; and Case C-60/00, *Carpenter* [2002] I-06279, where the Court found the existence of a cross-border element to suffice for the Charter to be deemed applicable.
[626] See chapter 6 of this thesis.
[627] For an overview of the argument on citizenship allowing self-standing rights in purely domestic situations, see Armin von Bogdandy et al, 'Reverse Solange: Protecting the essence of fundamental rights against EU Member States' (2012) 49 Common Market Law Review 489. D

consider whether such a reasoning could apply in detention. I first make the argument, before dismissing it on grounds of illegitimacy and unfairness.

As proven, a restrictive interpretation of article 51 CFREU does not allow for purely domestic matters to fall under the CFREU scope.

In the seminal *Fransson* case, however, the CJEU endorsed a somewhat broader interpretation of the term 'implementation'.[628] The Court stated that "[..] the fundamental rights guaranteed in the legal order of the European Union are applicable in **all situations governed by European Union law**, but not outside such situations."[629] This interpretation corresponds to the CFREU

Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J L Dunoff and J P Trachtman (eds), Ruling the World? Constitutionalism, International Law, and Global Governance (Cambridge University Press, 2009); Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Maduro, paras 20 ff. For an update, see Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391; Armin von Bogdandy and Luke Dimitrios Spieker, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case Law' in M Bobek and J Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart, 2020). For criticism of this approach see Koen Lenaerts, 'EU Citizenship and Democracy' (2016) 7 New J. Eur. Crim. L. 164, 171; Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Year of International Law 145, 165; Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182; Allan Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudencija/Jurisprudence 1269, 1282; A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 Common Market Law Review 367; see also Alexandra (Sacha) Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5.

[628] Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105.

[629] ibid para 19, emphasis added. Referring further to Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECR I-2925, para 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, para 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, para 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para25; Case C-349/07 *Sopropé* [2008] ECR I-10369, para 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, para 72; and Case C-27/11 *Vinkov* [2012] ECLI:EU:C:2012:326, para 58.

Explanations.[630] In such a light, the CFREU is relevant if we accept that domestic detention regimes may fall within the scope of EU law.[631] If, on the other hand, we find detention regimes as falling outside the scope of EU law, the Charter should not apply.[632]

The question then becomes: is the current reality of criminal detention across member states an area that may fall under the scope of EU law?

It could be argued that the absence of EU legislation in the field of criminal detention is irrelevant.[633] Any material link and any potential law making suffices to bring something under the scope of EU law, thus making the CFREU applicable.[634] Indeed, one could argue that detention falls under the scope of EU law (as per *Fransson*), for detention has the potential to affect the rights of any EU citizen – and EU citizenship clearly falls under the scope of EU law.

To expand on this point.

---

[630] Official Journal of the European Union C 303/17 - 14.12.2007 Preamble - Explanations relating to the Charter of Fundamental Rights.
[631] Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105, para 21.
[632] ibid para 22.
[633] Cases Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECR I-2925, para 42; Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] I-4685, para 31. See also Case C-394/07 *Gambazzi* [2009] I-2563, Opinion of AG Kokott, point 43; and Case C-420/07 *Apostolides* [2009] I-3571, Opinion of AG Kokott, point 108.
[634] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 954, 993; H Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P Cardonnel et al (eds), *Constitutionalising the EU Judicial System* (Hart 2012) 1, 291; Juliane Kokott and Christoph Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon' (2010) EUI Working Paper No. 6, 7, http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf? sequence=3 (accessed 19 August 2023).

In the case of *Ruiz Zambrano,* AG Sharpston in her Opinion claimed that all EU citizens should benefit from the EU human rights *acquis* and the CFREU at all times, noting the following:[635]

> It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the **existence and scope of a material EU competence**. To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights **should protect the citizen of the EU even if such competence has not yet been exercised.**

It has been argued that this approach does not alter the nature of the EU, nor does it extend its competences.[636] This would, after all, be contrary to the second paragraph of article 51 CFREU, which explicitly prohibits an extension of EU competences through the CFREU: "[T]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".[637] Indeed, the EU remains without a self-standing human rights

[635] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177, Opinion of AG Sharpston, para 163. See also M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 Common Market Law Review 1201, 1226. For an analysis of the case itself, see K Hailbronner and D Thym, 'Case C-34/09 Gerardo Ruiz Zambrano v. Office National de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 CML Rev. 1253; H van Eijken and S de Vries, 'A New Route Into the Promised Land? Being a European Citizen After Ruiz Zambrano' (2011) 36 Eur. L. Rev. 704; Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2011) 37 Euro. L. Rev. 369.
[636] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 253.
[637] CFREU, art 51 para 2.

competence. [638] Simultaneously, this interpretation falls in line with the requirements of article 53 CFREU.[639] This provision states that the interpretation of the Charter cannot result in a diminished level of fundamental rights protection.[640] Allowing for a broad application and extended scope of the Charter would respect this obligation. On the contrary, delimiting its scope would result in the paradoxical situation where the EU human rights *acquis* actually undermines the ECHR, as applying throughout all EU member states.[641]

On this basis, one may argue the following.

All EU citizens equally deserve to enjoy their EU fundamental rights, because they are all citizens of the EU,[642] and the EU is a Union of Values. The enjoyment of such EU rights should be independent from free movement and cross-borderness, autonomous, and enforceable at all times.[643] The EU citizen should be able to rely on the EU human rights *acquis* "even in the absence of a cross-

[638] Xavier Groussot, Laurent Pech, and Gunnar Thor Petursson, *The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication* (Eric Stein Working Paper 2011).
[639] C Nowak, 'Grundrechtsberechtigte und Grundrechtsadressaten' in F Sebastian, M Meselhaus, and C Nowak (eds), *Handbuch der Europäischen Grundrechte* (Beck 2006) 1, 212, 244–5.
[640] CFREU, art 53. See also András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 253.
[641] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review.
[642] The EU citizens should be able to thus proclaim 'Civis europaeus sum', echoing Cicero's *cīvis Rōmānus sum* plea. See Koen Lenaerts, '"Civis europaeus sum"' in Pascal Cardonnel et al (eds), *Constitutionalising the EU Judicial System* (Hart 2012) 1, 213ff.
[643] Stephen Coutts, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 Cambridge Y.B. Eur. Legal Stud. 318, 323; P Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law' (2011) Legal Issues of Economic Integration 263.

border element, against **any** national measure causing the deprivation of those rights".[644]

If we apply this logic in the context of detention, then all EU citizens in detention should enjoy the protection of the EU penal imaginary and specifically the CFREU, both inside and outside the scope of mutual recognition proceedings.

Indeed, such an argument is strengthened once one considers the alternative. Imagine a scenario where the CFREU is relevant to situations involving the detention of an individual in the aftermath of a successful EAW or ToP FD implementation, but irrelevant at all other times. This would give rise to reverse discrimination.[645] This is because individuals who ended up in detention as a result of exercising their free movement right would enjoy a more enhanced fundamental rights protection compared to detainees who never left their member state. Indeed, it would be more beneficial for an e.g. Irish citizen to cross the borders and engage in criminal activities in Portugal, rather than committing the same crimes in Ireland. This is because the former scenario entails an element of cross-borderness, and invites judicial cooperation between the Portuguese and Irish authorities. The issuing of a EAW or ToP request would trigger the application of the CFREU. Had the individual stayed in Ireland, no cross-border cooperation element would be present, nor would a mutual recognition instrument ever be issued. The CFREU would be deemed irrelevant, and the individual

[644] Koen Lenaerts, 'EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach' (2015) 1 Int'l Comp. Jurisprudence 1, 2, emphasis added.
[645] Reverse, since the domestic situation is linked to less favourable treatment, compared to the same situation containing a cross-border element – individuals who do make use of their free movement have it worse compared to those who do; see Valérie Verbist, *Reverse Discrimination in the European Union: A Recurring Balancing Act* (Cambridge University Press 2018) 1, 197ff.

would not benefit from the EU penal imaginary. Such a concession would be unfair, paradoxical, and discriminatory. As noted by AG Sharpston, "[i]f such were not the case […] there would be reverse discrimination against […] nationals who had not exercised rights of free movement under EU law."[646]

All in all, such arguments definitely have merit. I concur with the conclusion that all EU citizens should be able to rely on the EU penal imaginary to escape exposure to structurally problematic prison systems at all times and regardless of the application of a mutual recognition instrument.

However, I disagree with the reasoning and scope of such a line. I contend that the EU penal imaginary should expand to all *detainees,* not just EU citizens, I also maintain that arguments based on EU citizenship and calling for a self-standing application of the CFREU do not constitute proper argumentative means to achieve this objective. This is for three key reasons.[647]

Firstly, the nature of the CFREU itself does not invite such considerations. The CFREU was developed and implemented primarily to keep the EU in check, rather than serve as a constitutional flag of a Federalised Europe with a self-standing human rights competence.[648] The EU is a Union of pluralism, and the will of its nodes (the member states) is to be taken seriously, and in line with the

[646] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177, Opinion of AG Sharpston, para 39; see also Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2011) 37 Euro. L. Rev. 369.
[647] For further criticism note the discussion in Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182.
[648] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 945; Armin von Bogdandy, 'The European Union as a human rights organization? Human rights and the core of the European Union' (2000) 37 Common Market Law Review 1307.

principle of conferral. The national will is expressed explicitly in primary law, the text of the Treaties and the CFREU itself. Article 51 CFREU is clear: it is addressed to the states *only* when implementing EU law. Overly broadening the Charter's application and allowing it to be enforced in purely domestic situations would go against the very text of the Charter, and this would be unacceptable, and largely illegitimate.[649]

Secondly, the citizenship argument, if accepted, would undoubtedly have a positive impact on the rights of EU citizens-detainees.[650] Yet, 1 in 5 detainees in EU prisons are foreign citizens.[651] A citizenship-rights based approach would leave 20% of the concerned population behind. This is grossly unfair. Such exclusionary policies that result in 'othering', 'us vs them'[652] treatment on the basis of passport colour do not coincide with the EU spirit.[653] On the contrary, a Union of Values based on dignity should expand its protection to all those deserving of dignity: all humans, regardless of citizenship.[654]

---

[649] Matej Avbelj, 'Pluralism and Systemic Defiance in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 44.

[650] For this reason (equal human rights protection of all individuals in Europe) others have argued against excluding entire member states from the EU community, or against the EU and the CoE proceeding separately; see András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 255; and In light of this, Dirk van zyl Smit has argued against the EU proceeding alone, advocating instead for a joint EU-CoE Prison Charter. See Dirk van zyl Smit, 'Humanising Imprisonment: A European project?' (2006) 12 European Journal on Criminal Policy and Research 107.

[651] See chapters 1 and 2 of this thesis; and Eurostat data, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023).

[652] Martijn van den Brink, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (2019) 25 eur. l.j. 21, 28.

[653] Samantha Besson and André Utzinger, 'Towards European Citizenship' (2008) 39 j. soc. phil. 185, 187, 191.

[654] Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 icon 9 (2010).

Thirdly, the *Zambrano* Opinion and judicial reasoning is simply no good anymore. In its more recent case-law[655] the CJEU has adopted a restrictive approach in regards to the power of EU citizenship to grant rights at all times and situations.[656] *Zambrano* represents an "extraordinary"[657] occasion. While commendable, it fails to account for EU detainees (rather than EU citizens only), and it may not convincingly be utilised to construe a bridge between EU law and prison issues manifesting at purely domestic level. The CFREU remains inapplicable, unless a concrete nexus may be identified – in the absence of a mutual recognition instrument, the hook remains lacking.

5.3 Prisons within the scope of articles 2 and 7 TEU

Having dismissed the application of the CFREU in purely domestic situations, the analysis proceeds to examine the significance of articles 2 and 7 TEU. It is maintained that the current prison reality constitutes an assault against EU values, and that the EU has the competence to monitor and safeguard its values against such persistent and systemic breaches, independently of the existence of any EU law or the application of the CFREU.

[655] Case C-333/13, *Dano* [2014] ECLI:EU:C:2014:2358; Case C-67/14, *Alimanovic* [2015] ECLI:EU:C:2015:597; Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436; Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756, paras 180–181; Case C-198/13 *Hernández* [2014] ECLI:EU:C:2014:2055, para 36.

[656] Eleanor Spaventa, 'Earned Citizenship' in Dimitry Kochenov (ed) *EU Citizenship and Federalism* (Cambridge University Press 2017) 1, 204, 205. See also Daniel Thym, 'Introduction: The Judicial Deconstruction of Union Citizenship' in Daniel Thym (ed), *Questioning EU Citizenship* (Bloomsbury 2017) 1, 5ff; Anastasia Iliopolou-Penot, 'Deconstructing the Former Edifice of Union Citizenship?' (2016) 53 Common Market Law Review 1007; Steve Peers, 'Benefits for EU Citizens: A U-Turn by the Court of Justice' (2015) 74 cambridge l.j. 195, 196.

[657] Delia Ferri and Giuseppe Martinico, 'Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for Its Extensive Application' (2021) 27 European Public Law 685, 693.

It shall be remembered that article 2 TEU states that the EU is founded on the values of respect for human dignity and human rights.[658] Article 7 TEU is meant to protect these values. It achieves this objective by allowing the European Council to suspend the rights of a member state in case that state is found to violate the EU values enshrined under article 2 TEU in a serious and persistent manner.[659]

The following sections prove that the current prison reality constitutes exactly such a serious and persistent (in the spirit of article 7 TEU) breach of the values safeguarded under article 2 TEU.[660] This is precisely the second hook between EU and prisons.

5.3.1 Prison breaches meeting the 'serious and persistent' threshold

It is maintained that the current prison reality amounts to a *serious and persistent breach* of EU values.

Article 7 TEU may be broken down in three procedures, each reflecting one of the article's three provisions.[661] The first procedure grants the Council (of Ministers) the power to declare the existence of a "clear risk of a serious breach" of the EU values by a member state, and invite the state to address such a breach.[662] The second procedure allows the European Council to acknowledge

[658] TEU, art 2.
[659] TEU, art 7.
[660] In this fashion, article 7 serves to 'trigger' or express the values safeguarded under article 2 TEU; similarly to how article 19 TEU serves as an expression of article 2 TEU in the rule of law saga. See *Associação Sindical dos Juízes Portugueses*, Case 64/16, particularly para 36; for an analysis, see Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395.
[661] For an analysis see Dimitry Kochenov, 'Article 7 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 88.
[662] TEU, art 7 para 1.

and declare the existence of a "serious and persistent breach" of the EU values.[663] The third procedure allows the Council to sanction the member state for a breach of the nature identified previously, namely "serious and persistent".[664]

In this fashion, article 7 TEU provides the EU institutions with a possibility to politically respond to systemic threats to the EU values.[665] Yet this provision has proven notoriously difficult to trigger, both in theory and in practice. In theory, the thresholds included within the very article are high and challenging to meet. In practice, successful employment of article 7 TEU is widely regarded as a "nuclear option",[666] with the sanctioning mechanism of the third procedure (suspension) deemed excessive – and requiring unanimity to be triggered anyway.[667]

The analysis shall not expand on this latter point, regarding the practical difficulties of triggering article 7 TEU and enforcing its effects on the ground. I do not wish to advocate that article 7 TEU will be successfully invoked in the case of prisons, nor that any state providing for a structurally inadequate prison system could or should be sanctioned via the process outlined in that article. The purpose of this section is instead to highlight how prisons meet the threshold of article 7 TEU, and hence fall under the gaze of the EU.

[663] TEU, art 7 para 2.
[664] TEU, art 7 para 3.
[665] Andrew T Williams, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion to Iraq' (2006) 31 EL Rev 27.
[666] President Barroso, *State of the Union Address* (EP, 2012, Speech/12/596).
[667] fellow-traveller veto see Kim Lane Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (2016) Verfassungsblog https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/ (accessed 04 October 2023).

Now, the threshold required for triggering article 7 TEU is *serious and persistent* breaches of EU values. Academic consensus understands this threshold to hold the following meaning.

The term 'serious' presupposes a 'systemic' nature of the breach.[668] An analysis[669] of EU policy documents and CJEU case-law reveal 'systemic' to be understood as 'general, structural, essential',[670] as opposed to 'isolated, single or local'.[671] The systemic breach must be such as to pose a threat, actual and serious enough to undermine the existing order.[672] The threat here is not to be understood necessarily as an urgent situation that must be addressed immediately, nor as one affecting the entirety of the EU *acquis.* On the contrary, it suffices that the breach is confined within a single area of EU law. Similarly, it suffices that the breach originates from state behaviour (acts or omissions) that occurs regularly, or is otherwise "widespread or deep-rooted".[673] In other words, the breach is *systemic* because it originates from and characterises the very legal

[668] Though this has been disproved by academics, the notion persists in political discourse nevertheless. See Dimitry Kochenov, 'Article 7 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 88; see also Zoltán Szente, 'Challenging the Basic Values: Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 1, 456.
[669] Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 718.
[670] See Case C-455/15 PPU, P, EU:C:2015:763, para 39; European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism* (2012) COM(2012)411 final 1, 5; European Commission, *Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States* (European Commission 2018) COM(2018)324 final, art 2.
[671] Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 718.
[672] Armin von Bogdandy and Michael Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51 Common Market Law Review 298ff.
[673] Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 718.

or political system of the state itself. An individual, isolated breach of human rights will not suffice, unless it betrays the existence of such a systemic risk. Indeed, breaches that seek to trigger article 7 TEU must "go beyond specific situations and concern a more systematic problem".[674]

To provide an example. A single instance of an individual tortured in Greece (or any member state) will most certainly be deemed a breach against EU values. However, such a behaviour will not necessarily amount to a systemic breach, if the Greek authorities can prove that the Greek state has adopted a strong regulatory framework, and is institutionally robust to generally and adequately steer away, prevent, and condemn torture practices. If, however, torture is a common phenomenon in Greece; or if a single instance of torture suffices to expose the indifference or incapability of the Greek state to provide for adequate safeguards against torture (or, worse, it betrays the endorsement of such practices by the state), then Greece may be found as systemically breaching the EU values.[675]

It should be further noted that, in assessing whether a breach is systemic or otherwise ordinary, the pluralist nature of the EU should be taken into account. The EU is not a federal state, nor a human rights organisation. The EU member states may be a family, a community of values. Nevertheless, they remain sovereign, and form their own nodes – albeit interconnected in the EU

[674] Jan Wouters, Revisiting Article 2 of the TEU: A True Union of Values?' (2020) 5 European Papers 255, 261; and European Commission, *Communication COM (2003) 606 final of 15 October 2003 from the Commission on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based* (European Commission 2003) 1, 7.
[675] Example loosely inspired by Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 718.

archipelago.[676] It follows that the EU states all "breath life into the EU *acquis*"; [677] however, they simultaneously enjoy a wide margin of appreciation in the manners and methods they choose to use so as to achieve this objective. The Treaty framework declares that any EU action must respect "the different legal systems and traditions of the Member States".[678] This is aptly demonstrated by the Union's very own leitmotif: *'In varietate concordia'*, 'United in Diversity'. In other words, EU states (have to) abide by the same values – yet are entitled to do things their own way, long as they respect these values.

This philosophy applies equally in prisons. All EU states have to (are presumed to, on the basis of mutual trust) abide by the same normative framework, the EU penal imaginary. Yet, in practice, this does not mean that all EU prison systems should look, feel, or function identically. Some degree of disparity is inevitable, and even welcome in a pluralist Union – long as equivalent protection is ensured.

Yet, "where is the point beyond which this diversity ceases to be simply the individual expression of general truths and begins to call into question the very existence of a community?".[679] Posed as early as 1958, this question retains its relevance today, in regards to prison systems. *Aranyosi/Căldăraru* focused on the violation of specific CFREU rights in the context of judicial cooperation and surrender proceedings – yet it also precisely identified the existence of "systemic

[676] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995); M Avbelj, 'Theorizing Sovereignty and European Integration' (2014) 27 Ratio Juris 344; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 361.
[677] Matej Avbelj, 'Pluralism and Systemic Defiance in the EU' in András Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 1, 44.
[678] TFEU, art 67 para 1; see also TEU art 4 para 2, and TEU Preamble.
[679] W Hallstein, The Unity of European Culture and Policy of Uniting Europe (1958) University of Pittsburgh aei.pitt.edu (accessed 02 March 2021) 1, 5.

or generalised" deficiencies in the Hungarian and Romanian prison systems.[680] As evidenced by previous findings of this thesis, there are a series of persisting, structural issues that affect a *numerus apertus* of rights of detainees at pre- and post-trial level both.[681]

It is submitted that "a system failure looms large".[682] EU states characterised by structural prison deficiencies may be deemed as "backsliding"[683] in regards to the protection of EU values, particularly individual prerogatives and human dignity. To present contemporary EU prison systems as compliant with article 2 TEU "would be unfair to the very idea of the values the Union is built upon".[684] On the contrary, the prison reality undermines the very values of the EU, as safeguarded under article 2 TEU.

Consequently, the EU prison reality characterised by structural shortcomings giving rise to systemic risks fulfils the article 7 TEU threshold of 'serious and persistent' breach.

5.3.2 The broad scope of article 7 TEU encompassing domestic situations

The analysis turns to the scope of article 7 TEU, proving that its *ratione materiae* is far broader that the CFREU, and allows *any* serious and persistent breaches, even if they arise from purely domestic situations, to be considered and

[680] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 89 and 93.
[681] Chapter 2 of this thesis.
[682] Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705, 718.
[683] Terminology from Jan-Werner Müller, *Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order* (Transatlantic Academy 2013) Working Paper No 3.
[684] András Jakab and Dimitry Kochenov, 'Introductory Remarks' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 3.

addressed by the EU. Further, the same 'all-or-nothing' philosophy raised in regards to mutual recognition[685] applies here: even if but one member state systemically assaults the EU values, the problem persists all the same.

The threshold required for triggering article 7 TEU refers to serious and persistent breaches *of EU values*. The scope of application of article 7 encompasses the entirety of EU values as enshrined under article 2 TEU. This is a markedly different scope compared to that of the CFREU, which is applicable only when triggered by concrete proceedings involving the application of substantive EU provisions.[686] In other words: the CFREU stresses all the way to the very boundaries of EU law. Article 7 TEU surpasses these boundaries. Article 7 TEU is applicable whenever the EU values are threatened[687] – even if no EU law is present or applicable. Article 7 TEU is triggered as long as the values of article 2 TEU are concerned. No other nexus to EU law is required.[688] "Article 7 thus gives

[685] Chapter 4 of this thesis.
[686] Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395.
[687] Though this should not be taken to mean that EU values are not law – on the contrary, EU values constitute simultaneously EU law. See to this point Armin von Bogdandy, 'Founding Principles', in Jürgen Bast and Armin von Bogdandy (eds), *Principles of European Constitutional Law* (2nd edn, Bloomsbury 2010) 1, 11, 21, 22; Rudolf Streinz, 'Principles and Values in the European Union' in Armin Hatje and Lubos Tichý (eds), *Liability of Member States for the Violation of Fundamental values* (2018) 1, 11ff; Salvatore Nicolosi, 'The Contribution of the Court of Justice to the Codification of the Founding Values of the European Union' (2015) 51 rev. der. com. eur. 613, 637; Stelio Mangiameli, 'The Union's Homogeneity and Its Common Values' in Hermann-Josef Blanke and Stelio Mangiameli (eds) The European Union after Lisbon (Springer 2012) 1, 21ff; Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182.
[688] Allan Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudencija/Jurisprudence 1269,1282.

the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law."[689]

The EU Commission has made this explicit:[690]

> The scope of Article 7 is **not confined to areas covered by Union law**. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously.

This is due to the rationale of article 7 TEU. Indeed, the article "seeks to secure respect for the conditions of Union membership".[691] To utilise the orchestra analogy once more: regardless of whether or not the musicians are performing in any given moment, they must nevertheless abide by the agreed upon professional standards imposed by the conductor, and presumed/expected by their peers. The alternative would result in a rather paradoxical situation, where musicians perform adequately within the orchestra, yet inadequately at all other moments. This would diminish mutual trust, and go against the very identity of the orchestra. In lieu of musicians, one may instead consider lawyers, or doctors, or any other profession that has to abide by a specific morality and code of conduct. The point stands: member states must respect EU values, as they are of the EU community. A Union of Values remains thus at all times, has no switch off button.

---

[689] European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based* (COM(2003) 606 final) 1, 5.
[690] ibid 1, 5, own emphasis.
[691] European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based* (COM(2003) 606 final) 1, 5.

This is confirmed by the Commission again:[692]

> There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, **this is likely to undermine the very foundations of the Union and the trust between its members**, whatever the field in which the breach occurs.

Such a line of reasoning has been endorsed by the CJEU in *Aranyosi/Căldăraru*, with the Court stating that "the mechanism of the European arrest warrant may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU".[693] Even though the EU legislator never incorporated an explicit refusal ground in the EAW (or ToP) FD, it is nevertheless admitted that the execution of such mutual recognition instruments may yield in case of article 7 TEU violations.

It is important to understand this point: even if the CFREU never existed as a legally binding document, the structural problems in national prisons would suffice to suspend the execution of mutual recognition. I fail to see why the mere absence of a cross-border element should suffice to diminish the importance of such structural problems, and their problematic impact on the EU.

In the specific prison context, considering structural deficiencies within the context of mutual recognition, yet ignoring its impact on EU values, would result

[692] ibid 1, 5, emphasis added.
[693] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 81.

in the following paradox, reminiscent of the reverse discrimination argument raised before.[694] Failing to consider domestic prison issues would mean that it would be adequate for member states to maintain prisons that violate the EU values. All these states would have to do is ensure that the specific individuals detained in the aftermath of a successful EAW or ToP implementation are provided with adequate conditions that safeguard their individual prerogatives.[695] This would be unacceptable, as it would result in two classes of detainees, which would go against the very foundations of the EU. Fundamental rights should apply "equally and universally" throughout the Union.[696] More practically, it would create the rather paradoxical scenario where it criminals would rather commit to cross-border criminality, as it would be safer for them, in case of prosecution and detention, to be caught in a member state other than their own, so that they could expect the use of the EAW or ToP, and abuse the double standards.

It was previously noted that the EU prison imaginary has to be respected when states perform in the judicial cooperation orchestra.[697] It is now submitted that all members should abide by and equivalently respect the same standards at all times, and regardless of whether or not they are performing with the EU orchestra. Even if the EU decided to strike down the mutual recognition instruments and dismantle its judicial cooperation network, the prison problem would persist. The

[694] Section 5.2 of this thesis.
[695] I shall resume this point later in this analysis, see chapter 8 of this thesis; note also André Klip, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 109, 112.
[696] TEU, art 2; see also Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468, 491.
[697] Chapter 4 of this thesis.

systemic violation of EU values is not dependent on any cross-border element or specific EU law provision.

The section has proven that structural issues arising in purely domestic situations fall under the scope of article 7 TEU. Before concluding the chapter, it is important to address a final argument.

5.4 Articles 2 and 7 TEU as CFREU triggers?

There is a final consideration to address: could articles 2 and 7 TEU loop back to the CFREU, and serve as doctrinal triggers for the Charter's application?

Using articles 2 and 7 TEU as springboard, one could make the following argument, to make the CFREU applicable in purely domestic situations. The CFREU requires states to be acting within the scope of EU law, if it is to be found applicable. When states are allowing structural, systemic deficiencies to manifest in their prison systems, they are undermining articles 2 and 7 TEU. The relevance of these two articles would bring domestic prisons under the scope of the Charter, as prisons and EU law would enjoy a certain degree of connection.[698]

In more detail:

On the basis of the formula developed in *Fransson*, proving that structurally problematic prisons contradict EU values would arguably suffice to trigger application of the Charter. Prisons give rise to serious and persistent breaches of EU values, thus relating to articles 2 and 7 TEU. The application of these articles,

[698] For an analysis of this reasoning, see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 Cambridge Yearbook of European Legal Studies 239.

constituting substantive EU law, would mean that the CFREU should be triggered too.[699]

The argument is more convincing than the citizenship argument, presented before.[700] It does not rely on outdated CJEU case-law, nor does it result in the othering of certain detainees on the basis of nationality. Granted, allowing "basically all human rights violations"[701] to trigger the CFREU via a use of articles 2 and 7 TEU as doctrinal triggers would be, in my view, unjustified, and contrary to the pluralist nature of the EU.[702] In addition, it would be highly risky, as the legitimacy of such an interpretation would be rather disputed.[703]

Yet, allowing specifically structurally problematic prisons that give rise to systemic rights violations would be worthy of consideration.

This line of reasoning is only strengthened upon examination of the recent EU rule of law saga.[704] It is useful to refer explicitly to the wording of the Commission and the Council itself.

---

[699] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 256; see also Armin von Bogdandy, 'Grundrechtsgemeinschaft als Integrationsziel?' (2002) 56 JuristenZeitung 157, 158; András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 Cambridge Yearbook of European Legal Studies 239, 254.

[700] Subsection 5.2.1 of this thesis.

[701] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 256.

[702] Matej Avbelj, 'Pluralism and Systemic Defiance in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 44.

[703] Csongor István Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States' (2017) 27 Indiana International & Comparative Law Review 1.

[704] For an overview analysis, see Kim Lane Scheppele, Dimitry Kochenov, and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic

The Commission, in discussing rule of law breaches, acknowledged that article 7 TEU is in place to ensure that all member states respect the common EU values, as safeguarded under article 2 TEU.[705] In addition, it noted that the scope of article 7 TEU is not confined to areas specifically covered by the EU *acquis.* On the contrary, article 7 is applicable at all times, when systemic violations are "likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs".[706] The Commission concluded that such systemic violations, as examined under article 7 TEU, "**empower[s] the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously**".[707] The Commission did not clarify whether article 7 TEU may ever be used as a triggering rule for the Charter.

The Council, on its part, acknowledged that "article 2 TEU does not confer any material competence upon the Union".[708] Indeed, it yielded that human rights violations occurring at state level are no concern for the EU, unless the Union has a specific competence to act in that area. Yet, it followed immediately after by stating that article 7 TEU constitutes the exception, since "this legal basis provides for a Union **competence to supervise** the application of the rule of law,

Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3.

[705] European Commission, *A New EU Framework to Strengthen the Rule of Law* (European Commission 2014) COM(2014) 158 final 1, 5.

[706] ibid 1, 5.

[707] ibid 1, 5, emphasis added.

[708] Council of the European Union, *Opinion of the Legal Service: Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties* (2014) 10296/14. For this reason, I do not subscribe to the argument that article 2 TEU could ever suffice on its own to bridge prisons and EU law; however, for a thorough argument on the application of article 2 TEU, see Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182.

as **a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope**."[709]

In light of such findings, the argument emerges clearly. The EU has no self-standing prison competence that could trigger the application of the CFREU. Nevertheless, article 7 TEU grants another specific competence to the Union: the competence to supervise the application and protection of its own values. Granted, the threshold for such a competence to emerge is high. For article 7 TEU to be relevant, the member states must be undermining EU values in a systemic manner, made evident by the manifestation of 'serious and persistent' breaches. It follows that the EU may not infer a competence to supervise every single violation of individual rights that occurs at state level.

Nevertheless, when faced with prison systems that are structurally problematic, posing systemic risks to detainee rights, article 7 TEU is triggered, granting the Union with the competence to supervise the protection of detainee rights. This is because such rights form part and parcel of the EU penal imaginary, and fall within the remit of article 2 TEU. Consequently, and in light of this article 7 TEU competence, the CFREU may be triggered, as there is sufficient nexus between prisons and EU law.

While commendable, such a line of reasoning fails short. Ultimately, the textual boundaries of the CFREU are clear. Allowing for articles 2 and 7 TEU to operationalise the Charter would effectively result in reading article 51 CFREU as if it stated that "'[t]he provisions of this Charter are addressed to the […] Member

[709] ibid emphasis added.

States **as far as necessary for the enforcement of the values enshrined in Article 2 of the Treaty on European Union**".[710] The friction between such an interpretation, and the principle of conferral encapsulating the will of the pluralist member states, is apparent.[711] Only a Treaty reform would allow such an interpretation – until that occurs, the argument remains unconvincing.

5.5 Conclusion

While relevant in cross-border mutual recognition and trust proceedings, the CFREU may not ultimately be read as applicable in purely domestic problematic prison situations.[712] However, the Charter is but a mere component of the EU penal imaginary – other provisions may be utilised to bridge domestic settings to EU values.

The second bridge between prisons and the EU emerges on the basis of articles 2 and 7 TEU read in conjunction. States have an obligation to respect and promote the EU values at all times. The absence of a self-standing prison competence prohibits the application of the CFREU in purely domestic situations. Yet such a competence is not a prerequisite for the purposes of article 7 TEU. The scope of this article is broader than EU law, encompassing all EU values, as safeguarded under article 2 TEU. With national prison systems representing

[710] As admitted by the advocates of such a line themselves; see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 Cambridge Yearbook of European Legal Studies 239, 249, emphasis added.
[711] See further CFREU, art 51 para 2: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".
[712] While the nexus between TEU arts 2 and 7 and prisons was proven, a series of arguments relating to the CFREU applicability were dismissed. Nevertheless, it is important to address such arguments – even if currently untenable, as they highlight the imperative of EU action in prisons. See chapter 12 of this thesis.

systemic breaches of these values, it becomes apparent that prisons pose a problem for the EU regardless of the existence of a cross-border element.

CHAPTER 6

THE PRINCIPLED AND FUNCTIONAL IMPERATIVES FOR EU ACTION

6.1 Introduction

The nexus between EU and prisons has been established. Structurally problematic detention regimes undermine article 2 TEU as read in conjunction with article 7 TEU, alongside the mutual trust and mutual recognition principles in cross-border judicial cooperation proceedings. The legal significance of the problem, and the perils this situation raises for the EU regulatory framework, have been laid clear.

The legal dimension of the issue, however, is far from the only one (or the most important, for that matter). Proving that a situation is problematic for the EU normative and regulatory framework invites the consideration: why should prisons adapt to EU norms, and not the EU norms to prisons? In other words: perhaps prisons should remain as they are, and the EU Treaties and principles should be revised. Law and reality (law in the books vs the law in action) are often disparate.[713] Yet the nexus between them is reciprocal. It may be that the reality is problematic, yet this does not necessarily translate to a necessity to rescue the current law. Perhaps a new regulatory framework is in order.[714] Perhaps the EU should no longer rely on the mutual recognition and trust principles, for the

[713] A classic problem aptly summarised over a century ago: "But if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction […] is often a very real and a very deep one"; Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12, 15.

[714] Law practitioners and scholars all too often presume that the answer for any issue is to be found in the law.

purposes of judicial cooperation. Perhaps the EU should retract its article 2 TEU claims, and reverse to its Single Market core, as per the original design.

To address such considerations, this chapter underlines the dual imperative for EU action in prisons. It is submitted that there is both an axiological (principled) and a functional need for the Union to intervene. Axiologically, the EU has to respond, in order to safeguard its constitutional foundations, and its very identity as an AFSJ and a Union of Values. Functionally, the EU has to respond to the problem, to safeguard the unhindered free movement of people, and ensure the effectiveness and legitimacy of EU law, specifically its judicial cooperation framework.

The following sections underline the significance of the problem from a legal, but also constitutional, ontological, and practical perspective, showcasing what is in line for the EU, its member states, and, most importantly, the individual. Comprehending what we stand to lose underlines the relevance of the thesis and the gravity of the issue, while simultaneously revealing the objectives for EU action – the subject matter of the subsequent Part.

6.2 The axiological imperative: securing the EU as Union of Values and AFSJ

By undermining articles 2 and 7 TEU, and the EU anti-crime judicial cooperation framework, structurally inadequate detention regimes pose an issue for the EU at ontological level. Such regimes assault the very identity and constitutional order of the EU as a Union of Values, and as an Area of Freedom, Security, and Justice (AFSJ).

6.2.1 The constitutional dimension of the EU as Union of Values

The EU is a Union of Values. This is more than a mere aspiration; the EU human rights *acquis,* as expanding into detention, is of fundamental ontological import. This is directly threatened by the current prison reality.

As stated in the CFREU Preamble, the EU is "founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", placing the individual "at the heart of its activities".[715] Article 2 of the TEU declares that "the European Union is founded on the values of respect for human dignity, freedom, […] and respect for human rights".[716] These values are taken to be "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[717] These provisions are enshrined at the very start of the TEU, and are to be regarded of fundamental importance[718] for the entire EU apparatus.[719] Since the TEU constitutes primary EU law, article 2 is no mere declaration or "constitutional iconography",[720] but rather a legally binding clause to be given full primacy and effectiveness in the EU legal order.[721] Consequently, the commitment of the EU

[715] CFREU, preamble.
[716] TEU, art 2.
[717] ibid.
[718] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549; Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 22ff; Koen Lenaerts and Marlies Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27 European Law Review 377.
[719] Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 1 European Papers 255, 257.
[720] Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391, 412.
[721] M Potacs, *Wertkonforme Auslegung des Unionsrechts* (Nomos 2016) 1, 165, 176; Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 1 European Papers 255, 258.

to such values "is not only a political and symbolic statement. It has concrete legal effects".[722]

In practice, article 2 TEU serves to provide the Union its identity as a community of values or "destiny".[723] Commitment to the EU values constitutes a prerequisite for EU membership,[724] and states wishing to become an EU member must first prove itself as one that "respects the values referred to in Article 2 and is committed to promoting them".[725] A "serious and persistent breach"[726] of the EU values may lead to a suspension of rights resulting from EU membership.[727] EU values are "the rules of the club and, as such, are part of the club identity, and members are expected to respect them".[728]

EU institutions have a duty to safeguard and promote such values,[729] no less since they simultaneously constitute an objective of EU integration.[730] Article 13 TEU proclaims that the EU's institutional framework "shall aim to promote its values".[731] Similarly, article 3 TEU maintains that the Union seeks "to promote

[722] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (1st edn, Cambridge University Press 2010) 1, 71.
[723] *Schicksalsgemeinschaft*. The EU was described in this manner by the former German Minister of Foreign Affairs, HD Genscher, declaring "Die EU ist eine Schicksalsgemeinschaft": see Felix Hackenbruch, Julius Betschka and Valerie Höhne, *Der Asylkompromiss der Ampel* (Der Tagesspiegel 2010) www.tagesspiegel.de (accessed 05 September 2023); see further Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 1 European Papers 255, 257.
[724] See European Council, C*onclusions of the Presidency - Copenhagen, June 21-22 1993* https://www.consilium.europa.eu/media/21225/72921.pdf (accessed 11 October 2022); Ronald Janse, 'The Evolution of the Political Criteria for Accession to the European Community, 1957-1973' (2018) 24 European Law Journal 57; and European Commission, *Communication COM(2016) 715 final of 9 November 2016 from the Commission on EU Enlargement Policy* [2016] 1, 17.
[725] TEU, art 49.
[726] TEU, art 7 para 2.
[727] TEU, art 7 para 3.
[728] Csongor István Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne' (2020) 21 German Law Journal 838, 856.
[729] TEU, art 13 para 1.
[730] TEU, art 3 para 1.
[731] TEU, art 13 para 1.

peace, its values and the well-being of its peoples".[732] The terms *respect* used under article 2 TEU, in conjunction with the term *promote* used under articles 13 and 3 TEU, suggest a simultaneously negative and positive human rights commitment. The EU is bound to ensure that action at EU level does not violate human rights norms, while also seeking to advance such norms via positive action.[733]

The CJEU has recognised that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In this sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the common code of fundamental rights accordingly constitutes an "existential requirement" for the EU legal order.[734]

In light of these points, all the elements of article 2 TEU, including the protection of fundamental rights and human dignity, "go as deep as the very foundations of [EU] legal order".[735] Failure in part of the member states to enforce the EU values undermines the very heart or *raison d'être*[736] of the EU.[737] Its very existence is

[732] TEU, art 3.
[733] Andrew T Williams, 'Human Rights in the EU' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 1, 249.
[734] Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Maduro, para 19.
[735] N Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles', in F Fontanelli et al. (eds), Shaping Rule of Law through Dialogue: International and Supranational Experiences (Europa Law 2010) 119.
[736] Gráinne de Búrca, *Europe's Raison d'Etre* (NYU School of Law 2013) Public Law Research Paper No 13-09.
[737] Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the EU' in András Jakab and Dimitry Kochenov (eds), The Enforcement of EU Law and Values: Ensuring Member States' Compliance (Oxford University Press 2017) 1, 10.

jeopardised.[738] Further, the argument that each member state is distinct, and therefore has a right to self-manage its own prisons (especially since prison matters escape the EU competence), can only go so far. The EU may be a pluralist constitutional order, yet such pluralism is "*conditional* on common respect" for the EU values.[739] A disregard of EU values on the part of either member states or EU institutions would shake the whole identity and legal foundations of the EU.

Yet it is clear that member states find themselves in exactly such a state of disregard, having divorced themselves from the principles that tie the EU together, the principles that make the EU what it is.[740] Structurally problematic prison systems reveal something disturbing about the identity of the EU states. "Countries' prisons serve as the moral equivalent of canaries in coal mines. Dead canaries attest to the presence of poisonous gases; overcrowded, squalid prisons, to an absence of respect for human dignity".[741] The reality of criminal detention *de facto* challenges article 2 TEU, placing prison systems opposed to the EU. The distance between *presumed* (under EU law) and *current* reality in detention violates a number of CFREU rights, while also fostering the creation of two classes of EU detainees: those detained in a prison system that will treat them in

[738] Martina Coli, 'Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?' (2018) 10 Perspectives on Federalism 272.
[739] Tom L Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 German Law Journal 431.
[740] Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European* Union (Cambridge University Press 2016).
[741] Michael Tonry, 'Punishments, Politics, and Prisons in Western Countries' (2022) 51 Crime and Justice 7; see also Fyodor Dostoyevsky, *House of the Dead* (Ronald Hingley (ed) and Jessie Coulson (trans), Oxford World's Classics 2008).

a humane manner, and those placed in systems reaching breaking point.[742] In this fashion, structurally problematic prison systems also challenge the principle of equal treatment, as enshrined under article 20 CFREU as well – and, most importantly, the foundational values of the Union as enshrined under article 2 TEU.

Should the prison crisis remain unresolved, the Union may no longer claim to form a community of values – its entire identity must be called into question.

6.2.2 The constitutional dimension of the EU as AFSJ

Article 3 TEU sets the objectives of the Union, stipulating the intended effects of the European project.[743] The article is structured in the form of a list, with each provision introducing a new target.[744] The very first provision of the article stipulates that the EU shall "promote peace, its values and the well-being of its peoples", thus setting the overarching aspiration of the Union.[745] The following provisions each provide for a sub-goal, which, once realised, shall contribute towards the overall purpose. Paragraphs 3 to 5 refer to the Single Market, the

[742] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Greek Government on the ad hoc visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 November 2021 to 1 December 2021* (Council of Europe 2022) CPT/Inf 16.

[743] Though article 3 TEU has been interpreted as imposing no obligations on the member states in and on itself. See Case C-339/89, *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] EU:C:1991:28, para 9; Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] EU:C:2010:309, paras 46–7.

[744] The exception to this rule is the sixth and final point, which submits the principle of conferral as both tool and ceiling for the realisation of these objectives. The principle essentially dictates that the Union must pursue its objectives by exercising the powers granted to it by the member states (as specified under TFEU arts 3-7); at the same time, the Union may exercise *only* these powers, and no more. A further analysis of the principle to follow under chapter 10 of this thesis; see also Rober Schütze, *European constitutional law* (Cambridge University Press 2012).

[745] TEU, art 3 para 1.

Eurozone, and the Union's external relations, respectively.[746] Already before introducing any of these objectives, paragraph 2 notes that:[747]

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the **free movement of persons** is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the **prevention and combating of crime**.

The very in-text arrangement of the AFSJ provision as the first specific objective to be realised – preceding even the Single Market, a much older and 'EU distinctive' pursuit –[748] reveals the importance assigned to this goal by the EU legislator (that is, the member states themselves).[749] Article 67 TFEU elaborates on the specifics of the objective, by stating the following:[750]

> 1. The Union shall constitute an **area of freedom, security and justice with respect for fundamental rights and the different legal systems** and traditions of the Member States.
>
> 2. It shall ensure the **absence of internal border controls** for persons […].
>
> 3. The Union shall endeavour to ensure a high level of security through measures to **prevent and combat crime** […] and through measures for coordination and **cooperation** between […] **judicial** authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

---

[746] TEU, art 3 paras 3-5.
[747] TEU, art 3 para 2, emphasis added.
[748] Stefano Micossi, *Thirty Years of the Single European Market* (College of Europe 2016) 1; see also Paul Craig, 'The evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart 2003) 1, 1.
[749] See the commentary by Christina Eckes, 'External Relations Law: How the Outside Shapes the Inside' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 186.
[750] TFEU, art 67, emphasis added.

The AFSJ objective is "loaded with social contract connotations",[751] and escaping the economic nature of the EU in its origins.[752] In this fashion, the AFSJ constitutes very much a sign of the changing nature of the Union.[753] Connotations relating to values, justice, and security used to be a mere "accompaniment to economic integration between member states of the European Community".[754] Today, the AFSJ has escaped such confinements, and evolved into an objective in its own right.[755]

The first term featured in the AFSJ is that of Freedom. A textual analysis of articles 3 TEU and 67 TFEU invites the dissection of (the internal dimension of) this area in two interrelated concepts: i) the free movement of persons, and ii) the absence of internal frontiers.

[751] Christina Eckes, 'External Relations Law: How the Outside Shapes the Inside' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 186. See also Kenneth E Boulding, 'The Boundaries of Social Policy' (1967) 12 Social Work 3; Heinz Lampert, 'Economic Policy and Social Policy' (1970) 5 Intereconomics 351; V Špidla, Social aspects of the Lisbon Treaty, Speech at the Conference of European Churches, European Parliament – Brussels, 29 April 2009, available at http://www.ceceurope.org/wp-content/uploads/2016/01/CSCsocialconflisbontready.pdf (accessed 30 September 2020).

[752] See paragraphs 3 and 4, focusing on the Single Market and the Eurozone. As regards provision 5 (external relations), it holds a mixed nature, since it establishes objectives of both economic and social character. More generally, this duality of economic and social objectives serves to underline the departure of the EU from its original purely market-driven aspirations; see Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) Common Market Law Review 1307; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

[753] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 155-176; Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) Common Market Law Review 1307; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

[754] Olivier De Schutter, 'The Balance Between Economic and Social Objectives in the European Treaties' (2006) 5 Revue française des affaires sociales 119, 119.

[755] Jörg Monar, *The External Dimension of the EU´s Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon* (SIEPS 2012) 1, 11.

Free movement of persons translates to the right[756] to move freely between EU states, and reside in another member state, without restrictions (such as visas or residence permits).[757] Originally, this right was granted solely to workers, employees and service providers. As the Union developed further from its trade-oriented core, so did the concept of free movement, expanding so as to include all Europeans.[758] Free movement of *persons* constitutes but an aspect of the multifaceted right of free movement in the EU, which also encompasses movement of *goods, services,* and *capital*. Collectively, these "four freedoms"[759] have been pursued since the foundation of the European Economic Community (EEC).[760] They have since been elevated and granted legal status, and enshrined both in the Treaties and secondary EU law.[761]

[756] The principle applies to both citizens of EU member states, and third-country nationals, under conditions (e.g. they must prove they have entered the EU territory lawfully, and hold a valid visa). See The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 – 0062, arts 19ff.

[757] See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, 77–123; alongside its current consolidated version of 16/06/2011. Furthermore, it should be noted that the member states retain the power to retract the right of free movement, respecting the principle of proportionality, and on grounds of public policy, public safety, or public health (the recent experience of borders closing due to the Covid-19 pandemic serve as an example); see Articles 27 et seq. of the Directive.

[758] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019).

[759] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (6th edn Oxford University Press 2019); see also August Reinisch, *Essentials of EU Law* (2nd edn, Cambridge University Press 2012) 1, 164.

[760] Treaty of Rome articles; see also Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022) 1, 5; Jean-Claude Piris, *The Lisbon Treaty: a Legal and Political Analysis* (1st edn, Cambridge University Press 2010) 1, 167.

[761] The narrative of their evolution has been gradual and, often, slow-paced; yet, free movement has retained its centrality throughout the advancement of the integration project. See, inter alia, Directive 2004/38/EC; Directive 2014/54/EU, Regulation (EU) No 492/2011.

The right to free movement is supported by practical safeguards and mechanisms that allow for its effective exercise on the ground. A key milestone towards this purpose has been the incorporation of the Schengen agreement[762] in the *acquis communautaire*. Initially an intergovernmental initiative, over the past decades Schengen has been signed by the overwhelming majority of member states[763]. In practice, Schengen results in the abolition of identity controls (such as visa or passport checks and police searches) at the internal borders of the Union – that is, the common borders of EU states. Schengen has established the Union as the largest borderless area in the globe, a historical achievement in its own right.[764] By removing physical barriers, Schengen complements and allows for the effective exercise of free movement rights.[765]

The Area of Freedom may be considered a great and unique achievement – it is often the first trait someone thinks of, when thinking of the EU. In a world where international law still abides firmly by the Westphalian principles, EU member states have taken a "quantum leap"[766] towards pooling their sovereignty towards establishing such an Area for the common good, and to advance the socio-

[762] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000.
[763] EU states outside Schengen include the Republic of Ireland, Bulgaria, Romania, and Cyprus – with the latter three legally obliged to join, and Bulgaria and Romania in the process of doing so. It should further be recalled that all EU members participate in the AFSJ, excluding Ireland and Denmark.
[764] Michal Piechowicz, 'Evolution of Schengen: An Example of Enhanced Cooperation and Differentiated Integration Model within the Area of Freedom Security and Justice' (2017) 46 Polish Political Science Yearbook 121.
[765] Florica Brasoveanu, Alexandru Petru and Lisievici Brezeanu, 'The Schengen Agreement and the Free Movement within the European Union' (2010) 10 Ovidius University Annals 376.
[766] Emilio De Capitani, 'The Schengen system after Lisbon: from cooperation to integration' (2014) 15 ERA Forum 101, 115.

economic rights and interests of the EU people.[767] It is no surprise that the Area of Freedom has been welcomed by the vast majority of the European public.[768]

Simultaneously, the benefits of the Area of Freedom have proven its biggest weakness, giving cause for concern.[769] Enhancing the potential of free movement comes with a considerable drawback, since it raises the risk of misappropriation and abuse of this freedom. By facilitating legitimate and beneficial movement, the Area of Freedom also facilitates illegitimate and harmful movement. Where tourists, students, and workers may freely go, so may criminals.[770] Frontiers have historically functioned as the "outer limits of the power of a sovereign […] upon a population in a specific space",[771] serving as *de facto* systems of division between those in and those out, "designed to determine whether and how to include individuals as members of society or exclude them from it".[772] The establishment of the Union as an Area of Freedom greatly affected and delimited national control over mutual borders, curbing the inclusionary-exclusionary discretion of EU states towards their fellow states.[773] "Border control is a very effective instrument

[767] See, generally, Joanna Apap (ed), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Edward Elgar 2004) 1.
[768] European Commission, Standard Eurobarometer 91: European Citizenship report (2019) < file://adf/storage/C/P/CXP993/Downloads/eb91_citizenship_en.pdf> (accessed 24 May 2023).
[769] Joanna Apap (ed), *Justice and Home Affairs in the EU; Liberty and Security Issues after Enlargement* (Edward Elgar 2004).
[770] Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, 1283; Elspeth Guild, 'Citizens, Immigrants, Terrorists and Others', in Steve Peers et al (eds), *The EU Charter of Fundamental Rights, Politics, Law and Policy* (Hart 2004) 1, 231.
[771] Malcolm Anderson and Didier Bigo, 'What are EU frontiers for and what do they mean?' in Kees Groenendijk, Elspeth Guild and and Paul Minderhoud, *In search of Europe's borders* (Kluwer Law International 2003) 1, 7, 8.
[772] Michal Piechowicz, 'Evolution of Schengen: An Example of Enhanced Cooperation and Differentiated Integration Model within the Area of Freedom Security and Justice' (2017) 46 Polish Political Science Yearbook 121. In their power to create groups of 'us' vs 'them', borders operate similarly to (EU) criminal law – see chapter 11 of this thesis.
[773] No more are the frontiers of Germany defined by the Alps, or those of Poland by the Baltic Sea; instead, all EU member states now mark their effective end in the Mediterranean, the Urals, the Atlantic, and the Balkan Peninsula. Consequently, alterations in the geopolitical landscape

for stopping those who you don't want coming in"[774] – and the EU states have largely surrendered such control.

Internally, the potential of illegitimate mobility manifests itself primarily in the form of cross-border criminality. In comparison to regionally-confined crime, its cross-border counterpart offers a series of advantages to the aspiring delinquent. This holds especially true in the borderless EU, as it provides for a larger area of operation, more potential targets, and greater prospects of profit. The Area of Freedom facilitates collaboration between criminals across space, by removing physical checks and barriers in their way.[775] Simultaneously, operating in this Area poses less risk for the perpetrator, who may be unknown and remain largely untraceable to the authorities of the foreign target-state, utilising the absence of border controls to enter and flee from her *locus operandi* at will.[776] What proves

signal a shift on the nature of outsiders. Migrants, refugees and asylum seekers arriving in Lesvos or Lampedusa used to be a concern for the Greek or Italian society and sovereign. Now, such individuals are regarded as crossing the EU external border, and hence become relevant for all member states. For an analysis, see Thomas Prosser, 'Insiders and outsiders on a European scale' (2016) 23 European Journal of Industrial Relations 135.

[774] *Border Controls Vanish in Eastern Europe* (Spiegel Online 2007) https://www.spiegel.de/international/europe/momentous-day-border-controls-vanish-in-eastern-europe-a-524887.html (accessed 04 September 2020); see further Dora Kostakopoulou, 'An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm' (2010) 19 European security 151.

[775] Similar to the internet – a borderless Union allows delinquents to operate in a single, interconnected arena.

[776] For an analysis on the cross-border criminality risks and challenges facing the Area of Freedom, see, among others, Elspeth Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice' (2004) 10 European Law Journal 218; Valsamis Mitsilegas, Jörg Monar and Wyn Rees, The European Union and internal security: Guardian of the people? (Palgrave Macmillan UK 2003); Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, 1283; Eberhard Bort, *Illegal Migration and Cross-Border Crime: Challenges at the Eastern Frontier of the European Union* (European University Institute Working Paper 2000/9); Marianne L Wade, 'Cross-Border Crimes', in Kai Ambos and Peter Rackow (eds), The Cambridge Companion to European Criminal Law (Cambridge University Press 2023) 1, 182; Eberhard Bort, 'The Frontiers of Mitteleuropa: Problems and Opportunities at the Eastern Frontier of the European Union' in Monica den Boer (ed), Schengen Still Going Strong: Maastricht (European Institute of Public Administration 2000) 1, 85; Pia Wassmann, *Do Open Borders Tempt a Saint? Evidence from Schengen on Crime Rates in German Border Regions* (Beiträge zur Jahrestagung des Vereins für Socialpolitik 2016: Demographischer Wandel - Session: Spillover Effects 2016)

a perk to the cross-border criminal, hinders domestic authorities. The EU is a heterotopia, comprising various different legal orders. Traditional cross-border cooperation is slow, inefficient, and cumbersome. This gives rise to forum shopping opportunities, understood as the manipulation of this legal diversity by the criminal, who may choose to act in whichever state best suits their interests, and abuse the Area of Freedom to escape justice.[777] By way of example, consider an Italian national who commits a crime and wishes to escape detention in the *Torreggiani*-style prisons – all she has to do is travel to the Netherlands, and make sure she is arrested there, to benefit from more humane detention conditions.[778]

<https://www.econstor.eu/handle/10419/145878> (accessed 24 July 2023); Cian C Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"' (2015) 6 Transnational Legal Theory; Miroslav N Jovanovic, 'Enlargement of the EU: a Topsy-Turvy Endgame or Permanent Disillusionment' (2004) 19 Eastern Journal of Economic Integration 830; Sionaidh Douglas-Scott, 'The Rule of Law in the European Union: Putting the Security into the Area of Freedom, Security and Justice' (2004) 29 Security and Justice 219; Claribel de Castro Sánchez, 'Security, Migrant Flows, and Terrorism in the European Area of Freedom, Security and Justice' (2006) 72 Radicalism and Terrorism in the 21st Century 231 Wouter van Ballegooij, 'European Implementation Assessment 2004–2020 on the EAW', (2020) eucrim 149; The Secretary of State for Foreign and Commonwealth Affairs, Prospects for the European Union in 2006 and retrospective of the UK's Presidency of the EU, 1 July to 31 December 2005 [2006] Cm 6735 1, 4; *Passport-free travel from Estonia to Portugal* (Spiegel Online 2007) «https://www.spiegel.de/international/europe/security-fears-as-borders-vanish-passport-free-travel-from-estonia-to-portugal-a-524170.html (accessed 04 September 2020). See also Gijs de Vries, 'The European Union's Role in the Fight Against Terrorism: Opening Address - The Role of the EU in the Fight Against Terrorism' (2005) 16 Irish Studies in International Affairs 3, declaring that cross-border criminality and particularly terrorism is a scourge for the EU. For the problematic aspect of such language, see Richard Jackson, 'Security, Democracy, and the Rhetoric of Counter-Terrorism' (2005) 1 Democracy and Security 147.

[777] Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 57. Whether or not criminals actually made use of such opportunities is arguably of little importance, since there is the public fear to account for, populist policies and political cost, and symbolism. See Hans G Nilsson, 'From classical judicial cooperation to mutual recognition' (2006) 77 Dans Revue internationale de droit pénal 53.

[778] See the example also in Gwen Jansen, 'The need for a new roadmap of procedural safeguards: a lawyer's perspective' 22 (2021) ERA Forum 279, 284. I should also note that the Italian criminal of the example could benefit even further from detention in the Netherlands, as there is a chance that the Dutch will refuse to cooperate with the Italian judicial authorities, should the latter submit a surrender or transfer request. For the two-tiered test, see section 7.2 of this thesis.

In light of such concerns, EU and national authorities realised that, for the functioning of the Union as an Area of Freedom, it must be accompanied by a safety net against criminal activity and impunity.[779] The alternative is for the Area of Freedom to collapse in the face of increasing concerns and pressure for more security and control over national borders.[780] As was rightly observed, "freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all EU citizens and residents can have confidence."[781] To put it simply, the Area of Freedom must also become an Area of Security and an Area of Justice, and pick up the fight against cross-territorial criminality. [782] Crime prevention and suppression constitute a precondition for high levels of safety, while ensuring the non-infringement of citizens' fundamental rights; freedom of movement may only prove beneficial when its criminal side-effects are kept in check; and justice necessarily dictates the delivery of judgment and the enforcement of criminal sanctions to perpetrators.[783]

---

[779] Jörg Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs' (2001) 39 Journal of Common Market Studies 747; Steve Peers, *EU Justice and Home Affairs Law* (4th edn, Oxford European Union Law Library 2016); European Commission, *Convention: Final Report of the Working Group X 'Freedom, Security and Justice* (European Commission 2002) Conv426/02.

[780] Steve Peers, *The Hague Programme: Annotation of final version, approved 5 November 2004* <http://www.statewatch.org/news/2004/nov> (accessed 5 November 2021).

[781] European Commission, *Commission Communication: Towards an Area of Freedom, Security and Justice* (European Commission 1998) COM (1998) 459 1.

[782] Valsamis Mitsilegas, Jörg Monar and Wyn Rees, *The European Union and Internal Security: Guardian of the People?* (Palgrave-Macmillan 2003) 1, 42; Jörg Monar (ed), *The institutional dimension of the European Union's area of freedom, security and justice* (Peter Lang 2010); Ester Herlin-Karnell, 'Constitutional principles in the Area of Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 38; Valsamis Mitsilegas, 'The Transformation of Criminal Law in the Area of Freedom, Security and Justice' (2007) 26 Yearbook of European Law 1.

[783] Emil Kirchner and James Sperling, EU Security Governance (Manchester University Press 2007) 1, 163ff. See also European Commission, *The abolition of internal border controls cannot come at the expenses of security* (European Commission 2018).

Having provided an overview sketch of the AFSJ objective, the analysis maintains the following.

The AFSJ is more than a mere aspiration, or yet another objective for the EU. Instead, the AFSJ is an area of constitutional importance, for it demonstrates the Union's commitment to the EU public[784] goods of freedom, security, and justice. Freedom, security, and justice constitute *goods,* for they benefit the EU demos, by facilitating free movement, and ensuring its enjoyment in a secure and just area.[785] Such goods are *public,* [786] for they are in principle to be enjoyed by all individuals in the EU.[787] Finally, they are of the *EU*, for it is the Union that has assumed responsibility and competence to serve as provider, in lieu of the member states.[788] Granted, freedom, security and justice are not codified under article 2 TEU, in the same fashion as human rights and dignity. However, the very preamble of the CFREU – which constitutes primary EU law, post-Lisbon – declares that the EU "places the individual at the heart of its activities, by […] by creating an area of freedom, security and justice".[789]

---

[784] Alternatively dubbed 'constitutional' or 'institutional'; see e.g. Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Taylor and Francis Group 2011) 1, 45ff; Pedro Caeiro, 'Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-reference and Attribution' (2022) 27 European Law Journal 441.
[785] See for a discussion on the inherent beneficial and worthwhile nature of goods Charles Taylor, *Irreducibly Social Goods: Philosophical Arguments* (Harvard University Press 1997) 1, 131ff.
[786] Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Taylor and Francis Group 2011) 1, 45ff.
[787] See further the discussion regarding EU criminal law and EU public goods in Jörg Monar, 'Reflections on the Place of Criminal Law in the European Construction' (2022) 27 European Law Journal 356; Pedro Caeiro, 'Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-reference and Attribution' (2022) 27 European Law Journal 441.
[788] Jacob Öberg, 'Normative justifications of EU criminal law: European public goods and transnational interests' (2023) 27 European Law Journal 408, 418; Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Taylor and Francis Group 2011) 1, 45ff; Alun Howard Gibbs, 'Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice' (2010) 17 European Law Journal 121.
[789] CFREU, preamble.

It is maintained that prisons undermine the goods of freedom, security, and justice, and the foundational significance and very identity of the EU as AFSJ. This occurs both indirectly and directly.

Indirectly, prisons sabotage the effective functioning of mutual trust and recognition, undermining anti-crime cross-border judicial cooperation, which is in place for no other reason than to safeguard the continuous existence of the Union as an AFSJ.[790] Simultaneously, structurally problematic prisons undermine the AFSJ directly. This is because they have been proven to serve as revolving doors, failing to reintegrate detainees,[791] instead breeding further criminality.[792] Poor[793] detention conditions have the potential to lead to and facilitate radicalisation by criminal and terrorist organisations.[794] By contributing to (or at least not

[790] As proven under chapter 4 of this thesis.
[791] Indicatively, see Katherine M Auty and Alison Liebling, 'Exploring the relationship between prison social climate and reoffending' (2020) 37 Justice Quarterly 358; Charles E Loeffler and Daniel S Nagin, 'The impact of incarceration on recidivism' (2021) 5 Annual Review of Criminology 133; William D Bales and Alex R Piquero, 'Assessing the impact of imprisonment on recidivism' (2012) 8 Journal of Experimental Criminology 71; Todd R Clear, 'The Effects of High Imprisonment Rates on Communities' (2008) 37 Crime and Justice 97.
[792] Paul Gendreau, Claire Goggin and Francis T Cullen, *The Effects of Prison Sentences on Recidivism*, (Solicitor General 1999) <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf> (accessed 21 July 2023); and Francesco Drago, Roberto Galbiati and Pietro Vertova, 'Prison Conditions and Recidivism' (2009) CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 2009.
[793] Granted, even in countries that provide for relatively humane and dignified detention environments that respect the EU penal imaginary, a considerable number of inmates move on to recidivate. Indicatively, and referring back to the Dutch prison system, as was brought up at the very start of this thesis to serve as a 'good example' of an EU prison system: nearly half of the detainees released in the Netherlands are reconvicted within two years. There is simply no such thing as a fully effective prison. See Gijs Weijters et al, *Recidive onder justitiabelen in Nederland: Verslag over de periode 2006-2018 [Recidivism among justice-involved persons in the Netherlands: Report over 2006-2018]* (Wetenschappelijk Onderzoeks- en Documentatiecentrum 2019); Esther FJC van Ginneken and Hanneke Palmen, 'Is There a Relationship Between Prison Conditions and Recidivism?' (2022) Justice Quarterly 106.
[794] Council of Europe, *Prison: a breeding ground for radicalisation and violent extremism?* (Council of Europe 2018); Peter R Neumann, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*. (International Centre for the Study of Radicalisation and Political Violence and the National Consortium for the Study of Terrorism and Responses to Terrorism 2010); and Joe Illardi, 'Prison radicalisation: The devil is in the detail' (2010) Paper presented at the ARC Linkage Project on Radicalisation – Conference, Understanding Terrorism from an Australian Perspective: Radicalisation, De-Radicalisation and Counter Radicalisation, Monash University, Australia, 2010.

sufficiently tackling) criminality concerns, structurally problematic prisons directly undermine the EU public good of security. In addition, and if we conceptualise justice not only as punishment *stricto sensu* (as in retribution), but also reintegration and adequate protection of individual prerogatives and dignity,[795] another problem emerges. Structurally poor detention conditions clearly fail to respect and adequately safeguard the rights and dignity of their detainees, while also failing to advance the purpose of reintegration. Finally, and if we consider that the entire purpose of the Union's existence as an Area of Security and Justice is largely justified on it being a precondition for the functioning of the Union as an Area of Freedom, it becomes apparent that freedom as an EU public good is also at peril. Overall, structurally problematic prisons undermine the goods of freedom, security, and justice, or at the very least fail to ensure "the absence of threats to acquired values".[796]

In sum, this section maintains that structurally poor detention regimes undermine human rights, dignity, freedom, security, and justice, and jeopardise the existence and very identity of the EU as an AFSJ and Union of Values. The EU has an axiological imperative to respond, or lose its own identity.

6.3 The functional imperative: safeguarding the legitimate, effective, and necessary EU judicial cooperation framework

It was previously contended that the EU must respond to the prison crisis because of its very identity and constitutional foundations. This section completes

[795] As proven in chapter 2 of this thesis.
[796] Arnold Wolfers, '"National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 481, 485; see further David A Baldwin, 'The Concept of Security' (1997) 23 Review of International Studies 9, 13.

the narrative, by showcasing the functional objective. It is submitted that addressing systemic risks and structural problems in prisons is paramount to ensure the effectiveness and legitimacy of EU law, specifically the operation of mutual trust and recognition in the borderless AFSJ – principles which, in turn, ensure the efficiency, effectiveness, and legitimacy of cross-border anti-crime judicial cooperation.

The EU values constitute ends in themselves. Simultaneously, the EU values fulfil an important functional objective, by justifying and allowing the EU judicial cooperation regulatory framework to exist in its current form, as resting on the principles of mutual recognition and trust. It is paramount to ensure the smooth operation of these principles, for they address in an effective and legitimate manner the lacunae arising from the heterotopic nature of the AFSJ, and the drawbacks of traditional cooperation mechanisms. The difficulties relating to the AFSJ as heterotopia have already been examined.[797] To expand on the drawbacks of traditional cooperation:

Traditional cooperation structures prove inadequate to match the needs of the AFSJ. EU states were cooperating in the fight against cross-border crime long before the establishment of the AFSJ.[798] Such non-EU cooperation has

[797] See subsection 6.2.2 of this thesis; also Valsamis Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust' (2019) 5 Revista Brasileira de Direito Processual Penal 565; Christina Eckes, 'External Relations Law: How the Outside Shapes the Inside' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 186, 188; Michael Foucault, *Des Espace Autres* (1967) <foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html> (accessed 24 February 2021).

[798] In fact, the first seed towards a system of international legal cooperation was planted already during the 12th century BC, with the Treaty between the Egyptian Pharaoh Ramses II and the Hittite King Hattusvili providing for extradition arrangements between the two sovereigns. See Hans G Nilsson, 'From classical judicial cooperation to mutual recognition' (2006) 77 Dans Revue internationale de droit pénal 53.

traditionally occurred on the basis of CoE or UN treaties, or bilateral/multilateral agreements.[799] Cooperation on the basis of these instruments presents a series of shortcomings. Succinctly, this form of cooperation relies primarily on the interaction between political actors, such as diplomats or ministries, who enjoy broad discretionary powers.[800] Furthermore, its effectiveness and efficiency is limited by certain conditions which have to be met, such as respect for the principles, including those of reciprocity, double criminality, and speciality – not only have these conditions to be met before cooperation may take place, national authorities also have to check and ensure that these conditions have indeed been met.[801] Such characteristics detract valuable time and resources away from the cooperation process itself.[802]

Outside the AFSJ, such mechanisms may suffice. In light of the special characteristics, nature, and importance of the AFSJ, the challenges of traditional cooperation mechanisms are simply too significant. If the AFSJ is to be preserved, anti-crime cross-border cooperation between EU authorities must be construed in such a manner that allows member states to overcome differences in their

[799] For an extensive analysis of the traditional cooperation framework, see Hans G Nilsson, 'From classical judicial cooperation to mutual recognition' (2006) 77 Dans Revue internationale de droit pénal 53; see also Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 8 < http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021).
[800] ibid.
[801] See to this point Kende-Szűcs, *Introduction to the policies of the European Union* (Complex Publishing Company 2011) 1, 696; Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 9 < http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021).
[802] European Commission, *Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters* [2000] COM/2000/0495 final; see further Suzanne Andrea Bloks and Ton van den Brink, 'The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant' (2021) 22 German Law Journal 45.

domestic systems, and collaborate in an effective, efficient, rapid, quasi-automatic manner.[803]

In theory, there are two ways to approach this task, two ways to govern heterotopia: convergence, or effective cooperation despite the existing divergence. Convergence refers to positive harmonisation, or the approximation of national legal standards, definitions, and procedures, towards a single, common, EU-defined standard.[804] Cooperation in spite of (or through) divergence refers to negative harmonisation, as enshrined in the principle of mutual recognition.[805] Harmonisation is perceived as negative, as it seeks to set limits and boundaries for national systems, rather than prescribing any common, harmonised solutions.[806]

The EU member states chose to construct judicial cooperation in the EU on the basis of negative, rather than positive, harmonisation. During a 1999 summit held in Tampere, the European Council had the opportunity to contemplate on the approach to be adopted, towards establishing a novel anti-crime cooperation

[803] Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 1, 167ff; Hugo Brady, The EU and the fight against organized crime (2007) 1, 14 <https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/wp721_org_crime_brady-1484.pdf> (accessed 24 July 2021).
[804] Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144, 145.
[805] Jörg Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs' (2001) 39 Journal of Common Market Studies 747; Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 9 < http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021). Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022) 1, 116; Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (All Souls College, University of Oxford 2015); Ester Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 36; Lars Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 1, 140.
[806] See for a discussion M Dougan, *National Remedies before the Court of Justice* (Hart. 2004).

framework within the newly-established AFSJ. The overarching goal was to manage cross-border crime, so as to allow EU citizens to enjoy their EU right to free movement within the internally frontierless Area of Freedom "in conditions of security and justice accessible to all".[807] The discussions yielded a series of results,[808] reflected in the drafting of several elaborate political guidelines, which constitute the Tampere programme. The following provisions prove of particular relevance:[809]

> 6. People have the right to expect the Union to **address the threat to their freedom and legal rights posed by serious crime**. To counter these threats a common effort is needed to **prevent and fight crime** and criminal organisations throughout the Union.
>
> 33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the **principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation** in […] criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

---

[807] European Parliament, *European Council Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999* (1999), para 2 <https://www.europarl.europa.eu/summits/tam_en.htm> (accessed 24 July 2023).

[808] In this fashion, Tampere essentially confirmed the Cardiff European Council Presidency Conclusions, which had already paved the way a year in advance, declaring that "The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others' courts." European Council, *Cardiff European Council Presidency Conclusions of 15–16 June 1998* (European Council 1998), point 39; see also Case C-227/97 *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711, para 19, that "Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, it does not follow that this branch of the law cannot be affected by Community Law…".

[809] ibid para 6, emphasis added.

> 37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition.

A conscious choice was made to regulate anti-crime cross-border judicial cooperation in the AFSJ by "borrowing from concepts that have worked very well in the creation of the Single Market",[810] and implementing the mutual recognition principle, which has since served as the cornerstone of cooperation between judicial authorities in the AFSJ.[811] This choice of establishing mutual recognition as the main mode of governing crime and free movement side-effects[812] in the AFSJ has been, first and foremost, a political compromise.[813] While effectiveness considerations naturally played in the decision of the Council members, the main advantage of mutual recognition stems from its non-intervening nature. Contrary to its harmonisation counterpart, mutual recognition does not call for substantive changes in national legislation. This has been deemed as a highly advantageous trait by national authorities.[814] Mutual recognition allows matters of security and justice, alongside substantive and procedural criminal law, to remain under state

[810] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM(2000)495 final, Brussels 26 July 2000 1, 2.
[811] Cian C Murphy and Diego Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 1; Ester Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 38.
[812] SK Schmidt, 'Mutual Recognition as a New Mode of Governance' 92007) 14 J. EUR. PUB. POL'Y 667.
[813] Willem Thomas Eijsbouts and Jan-Herman Reestman, 'Editorial - Mutual Trust' (2006) 2 European Constitutional Law Review 1, 1; Auke Willems, 'Mutual trust as a term of art in EU criminal law: revealing its hybrid character' (2016) 9 European Journal of Legal Studies 211; Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021).
[814] Cian C Murphy and Diego Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 9.

sovereignty. Mutual recognition allows the AFSJ to reflect "the differences in ideology in Member States' attitudes to freedom, security and justice".[815] Granted, mutual recognition does not entirely maintain national sovereignty intact. When implementing mutual recognition instruments, states surrender part of their sovereignty, since in practice they allow "cross-border movement of sovereign acts exercised by states' executives and judicial organs".[816] Nevertheless, and at least in principle, this transfer is designed to be limited and confined within the limits of the mutual recognition instrument itself.[817]

It is the relative non-interfering nature of mutual recognition, in conjunction with its effectiveness and efficiency, that made its adoption welcome as the right avenue to fight crime and ensure the continuous existence of the AFSJ, while balancing between *varietate* and *concordia*.[818] As for positive harmonisation, it was assigned a secondary role, to function as a supplement to mutual recognition, and only if necessary.[819]

---

[815] ibid 1, 9.

[816] Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 Journal of European Public Policy 762, 765.

[817] Though, and while appearing innocent, the principles of mutual recognition and trust hold the potentially to eventually cause further harmonisation; see Miguel Poiares Maduro, 'So Close and Yet So Far: The Paradoxes of Mutual Recognition' (2017) 14 j. eur. pub. pol'y 814; and Ton van den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU' (2017) 19 Cambridge Yearbook of European Legal Studies 211, 224.

[818] Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144; Simone White, 'European Law: The Corpus Juris: a bold step' (1999) 17 Amicus curiae 23; Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022) 1, 59ff; Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277; European Commission, Judicial Cooperation, <http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm> (accessed 13 May 2023).

[819] See article 82 TFEU as well. The analysis shall expand on positive harmonisation efforts, as they have a key role to play in addressing the prison problem; see chapters 7, 9, and 10 of this thesis.

The fundamental importance of mutual recognition instruments based on mutual trust has been confirmed in CJEU case-law.[820] This was already noted in *Aranyosi/Căldăraru,* with the Court noting that the EAW provides for "a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law",[821] the end goal of which is "to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice".[822] Instruments based on mutual recognition are of "fundamental importance given that they allow an area without internal borders to be created and maintained".[823]

On this basis, it is clear that mutual recognition operating on the basis of mutual trust and seeking to enable effective, efficient, and simple cross-border judicial cooperation, ultimately constitutes a key tool in the Union's arsenal, in place to safeguard the functioning of the EU as an AFSJ. The entire framework rests on the presumption of equivalent rights presumption. The mutual trust and recognition principles, and the effectiveness and legitimacy of the entire anti-crime cross-border judicial cooperation framework, are conditional on respect of

[820] See indicatively Case C-399/11 *Melloni* [EU:C:2013:107, para 37; Case C-168/13 *PPU Jeremy F. v Premier ministre* [2013] ECR I-0000, para 35; Case C-237/15 PPU *Lanigan* EU:C:2015:474, para 28; *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 191.
[821] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 76; see also Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 32.
[822] ibid para 76.
[823] ibid para 78.

the EU values, including detainee rights and dignity. A systemic attack on article 2 TEU simultaneously constitutes an attack on mutual trust.[824]

To this end, it is paramount for the EU to ensure the continuous operation of its mutual recognition and trust-based judicial cooperation framework. Allowing structurally problematic detention conditions to persist would undermine the effectiveness of mutual recognition and trust principles, as the member states would no longer enforce the judicial products of fellow states. The legitimacy of the entire EU apparatus would also be undermined, as the Union would no longer be perceived as a community of values, where all members equivalently respect rights. Mutual recognition and trust are in place only because of the equivalent rights protection presumption. Once this is rebuked, the legitimacy of EU law shall be called in question – as has already happened, with *Aranyosi.* In turn, this would threaten the existence of an efficient, rapid, quasi-automatic, and very effective anti-crime cross-border judicial cooperation framework, upon which the entire existence of the AFSJ rests. Granted, the EU could perhaps come up with another tool to replace mutual recognition and trust. Perhaps it could push towards harmonisation, or allow its states to revert to the traditional cooperation mechanisms. Yet there would be drawbacks with either approach. Too much positive harmonisation would clearly go against the states' wish, as expressed in Tampere. Reliance on traditional cooperation mechanisms would not satisfy the demands of the internally borderless AFSJ.

[824] Closa Carlos, 2016, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals, and Procedural Limitations', in Closa Carlos and Kochenov Dimitry (eds), *Reinforcing Rule of Law Oversight in the European Union* (Oxford University Press 2016) 1, 35.

The functional imperative for EU action emerges clearly.

As a final note, the member states refusing to give effect to the mutual trust and recognition principles in light of systemic human rights risks is reminiscent of the *Solange* saga. There, the German Constitutional Court, alongside other national courts, stood firmly against the primacy, effectiveness, and legitimacy of the entire EU legal order, to ensure their own domestic human rights orders were adequately respected by EU law.[825] In *Aranyosi,* the Bremen Court reacted against the primacy, effectiveness, and legitimacy of mutual recognition and trust instruments, to protect detainee rights. The *Solange* saga has been long resolved: faced with external pressures, the EU evolved to bring human rights and values firmly within its own constitutional framework and identity.[826] The *Aranyosi* saga is still ongoing to this day – and the EU needs to evolve once more, to ensure that its rights and values are effectively enforced and respected equivalently across all member states and prison systems.

6.4 Conclusion

This first Part proved the existence and importance of the EU penal imaginary, and the nexus between said imaginary and detention regimes at a cross-border

[825] See Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], 2 BvL 52/71 *Solange I* [974], para 62; Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] 197/83 *Solange II* [1986], para 132. See also Corte Costituzionale [Italian Constitutional Court], No. 183/73 *Frontini* [1973]; No. 170/1984 *Granital* [1984]; No. 232/1989 *Fragd* [1989]. For an analysis see, among others, Joseph HH Weiler, 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 1, 137ff.

[826] For an overview of this evolution, see generally Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649; TC Harleny, *The Foundations of European Community Law* (2nd edn, Clarendon Press 1988) 1, 130ff; see further the CJEU's jurisprudence on fundamental rights, especially Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491.

and purely domestic dimension both. The prison reality directly undermines the legal and constitutional foundations, and the very identity of the EU. Further, problematic prisons pose a hurdle to mutual trust and recognition, an obstacle that is to be eliminated, to allow for the effective, efficient, and legitimate governance of cross-border crime via the operation of the EU multi-level regulatory framework on judicial cooperation. The prison reality is an EU problem, and must be addressed at EU level.[827] The alternative is simply untenable, as it would require for the EU to withdraw its judicial cooperation policies, dismantle its AFSJ, and renounce its own values.

EU action in prisons, to ensure detention conditions and regimes that actually provide for adequate and equivalent levels of fundamental rights protection, is a prerequisite. In light of the discussion in this chapter, the objective of EU action in prisons should focus on the following intertwined tasks:

- Safeguard the EU as a Union of Values the member states of which equivalently respect fundamental rights and human dignity.
- Safeguard the EU as an AFSJ in which free movement, national diversity, and fundamental rights are protected for all in a secure and just area.
- Secure the effective and legitimate operation of mutual recognition and mutual trust principles.

Importantly, such EU action should focus on all prison systems – should but one be left behind, the problematic nexus shall persist. In line with the EU penal imaginary, EU action should seek to uphold the EU human rights *acquis* as an

[827] For an analysis of the specific principles guiding EU legal action (conferral, subsidiarity, proportionality) see chapter 10 of this thesis.

end in itself, and in line with international human rights standards, especially as provided by the CoE and the UN. Naturally, the EU *acquis* may provide for higher standards in comparison. Further, EU action should respect national diversity, and the right of each member state to regulate and enforce its own domestic order (including prison system) – as long as any domestic arrangements are in line with the EU *acquis* and values. Simultaneously, the EU should ensure that these values are safeguarded so that the mutual trust and recognition principles continue operating, allowing judicial cooperation to continue in its current form – mutual trust flows from the presumption of equivalent rights protection, after all. The principled and functional imperatives are intertwined, and EU action should focus equally on both.

The achievement of these objectives constitutes a necessity for the Union, its member states, and citizens, from a legal, ontological, and practical perspective.

The next Part turns to identifying EU action in prisons.

PART B

SHAPING THE FUTURE OF THE EU IN PRISONS

The thesis has so far outlined the problematic state of criminal detention across EU states, and argued for a dual prerogative to address it at EU level. Building on these findings, the analysis proceeds to discuss EU action in prisons.

Chapters 7, 8 and 9 assess the EU response to this day. The task is twofold. First, identify what the Union has been doing to acknowledge and address the problematic nexus between EU and detention. Second, evaluate EU action against the principled and functional imperatives identified before. It is submitted that, while commendable, the EU action to this day has not fully comprehended nor dealt with the full extent of the issue, nor truly achieved the objectives identified previously.

Chapters 10 and 11, subsequently, identify further potential EU action that could achieve the objectives. At first, the analysis outlines the potential added value of an EU Prison Charter, which would harmonize detention regimes at EU level. It is maintained that such a Charter would be beneficial, under conditions – though it is doubtful whether the current Treaty framework allows for its adoption. Secondly, the analysis turns to the EU itself, outlining specific actions that the Union should strive to implement. These include accounting for the impact of its judicial cooperation framework on the individual, and acknowledging the effect of EU criminal law on national prison systems.

CHAPTER 7

IDENTIFYING THE EU APPROACH SO FAR

7.1 Introduction

This chapter uncovers what the Union has been doing to acknowledge and address the problematic nexus between EU and detention.

The following key clusters of EU action are identified and analysed. These include the *Aranyosi/Căldăraru* response; Directives granting pre-trial detainees certain procedural rights; the European Commission (EC) Recommendation laying out soft-law prison standards; and administrative initiatives by various EU institutions.

7.2 The judicial response: postponing mutual recognition

Previous chapters utilised the *Aranyosi/Căldăraru* [828] case as anchor, to showcase the problematic nexus between EU prisons, and the imperative for EU action. *Aranyosi/Căldăraru,* however, did more than merely acknowledge the problem. The CJEU provided a response, in the form of a two-step test. Should the executing state find (i) systemic deficiencies that also (ii) give rise to a concrete risk regarding the individual concerned, they may postpone mutual recognition and execution, to avoid the inhuman and degrading treatment of said individual.

The facts of the Aranyosi/Căldăraru, and the nexus between detention and mutual trust and recognition principles in the AFSJ, has already been

[828] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198.

examined.[829] The following sections focus on the Opinion and judgment of the CJEU.

7.2.1 The Advocate General's Opinion: proportionality assessment

Before focusing on the Court's reasoning and verdict, the analysis shall first outline the Opinion provided by the Advocate General (AG).[830] Doing so provides some necessary insight into the Court's reasoning, and invites considerations for future action as well.

The AG who sat in *Aranyosi/Căldăraru* was the late Yves Bot.

AG Bot commences his Opinion by identifying the core issue to be addressed. The case at hand, he observes, concerns a clash between detention conditions and mutual recognition. More importantly, this clash is simultaneously one of rights. On the one hand, the rights of the individual to be surrendered are in risk of violation, in case surrender results in detention under poor standards. On the other, the rights of the EU demos, in peril, should the effectiveness of the EAW system – and, more generally, the mutual recognition principle – fail. He observes that any solution would have to balance between these two points, and satisfy both individual detainee and EU demos.[831]

[829] See chapter 4 of this thesis.
[830] The role of the AG in the CJEU is to advise; see TEU art 19; TFEU arts 253-254; and Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2017) 14 Cambridge Yearbook of European Legal Studies 529.
[831] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot, para 5.

It is commendable that the AG, in his approach, does not delimit his analysis in a theoretical analysis of the regulatory framework, but rather considers the practical significance of that framework, drawing attention to the place of the individual.

Having established the issue, and having considered the legal and factual background of the case,[832] AG Bot goes on to consider a first possible solution. He examines whether a textual interpretation of the FD EAW itself could allow non-execution. He refers specifically to article 1(3) FD EAW. This provision declares that the FD "[…] shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".[833] In light of this provision, then, it could be argued that any member state called upon to execute a mutual recognition request could refuse to do so, if such execution would result in a real possibility of individual rights violations.[834]

Could fundamental rights trump mutual recognition and trust, and lead to a refusal to recognise and execute a EAW, on the basis of article 1(3) FD EAW?

In his Opinion, AG Bot dismisses the notion for three reasons. Firstly, the wording of the provision itself proclaims that EU states have an "obligation to respect"[835] EU human rights. Consequently, it serves as affirmation of the common fundamental rights thread, and thus an expression (rather than a rebuttal) of the

[832] ibid paras 10-38.
[833] FD EAW, art 1 para 3.
[834] See, indicatively, Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 324; Emily Smith, 'Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security' (2013) 1 New Journal of European Criminal Law 82.
[835] FD EAW, art 1 para 3.

mutual trust principle.[836] Secondly, the EU legislator took care to exhaustively list the grounds for refusal in the body of the FD itself.[837] Introducing Article 1(3) as an additional ground of refusal would clearly run against the legislative intent. Doing so would also undermine the overall spirit of simplicity, speed, and efficiency that characterises the EAW procedure,[838] and go against (rather than promote) the functional objective underlined previously. Lastly, allowing for such an interpretation would run contrary to the very principles of mutual recognition and trust, which are of fundamental importance to the very establishment and maintenance of the EU as AFSJ.[839]

In this fashion, AG Bot dismisses the possibility of reading article 1(3) FD EAW as a non-execution ground. As examined soon, the CJEU agreed with him on this point.[840] This only serves to underscore the fundamental importance of the mutual trust and recognition principles, and the functional imperative of EU action in prisons.

AG Bot proceeds by advocating for a different approach. Balance between the interests of the individual offender and the mutual recognition and trust principles may be achieved (he claims) through the principle of proportionality. AG Bot proffers that national judicial authorities should pursue the "individualisation of the penalty".[841] He calls for domestic judges to henceforth take into account the

[836] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot, paras 72-78.
[837] FD EAW, arts 3 and 4a.
[838] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot, paras 79-93.
[839] ibid paras 122-128.
[840] Section 7.2.2 of this thesis.
[841] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot, para 137.

circumstances in which a custodial sentence is executed, including the conditions of detention.[842] AG Bot seeks to impose a duty on domestic judges to ensure sentence proportionality – in other words, ensure that sentences do not have disproportionate consequences (such as exposure to poor detention conditions) for the detainee.

Applying this principle in the EAW context, the issuing state would have a responsibility to provide for proportionate sentencing and detention of the surrendered individual. In case there is evidence pointing to a failure of the issuing state to do so, the executing state should step in. In simple terms: the executing state should, in principle, presume (in line with mutual trust) that the issuing state has complied with the principle of proportionality, and provided for adequate detention standards. Consequently, the executing state should surrender the individual to the detention system of the issuing state. If, however, evidence points to a structurally inadequate detention system, the executing state should challenge the mutual recognition request of the issuing state, and instead take the matter to the CJEU.[843] The CJEU shall then arbitrate and decide whether execution should be allowed.

AG Bot concludes his Opinion with a call for action. He notes how the EU Commission, in the proceedings, had made public "a disheartening picture of the detention conditions in certain Member States";[844] yet, despite such awareness, "neither the Council nor the Commission has undertaken action to ensure that the Member States meet all their obligations or, at least, take the necessary

[842] In this fashion, AG Bot subscribes to the point made in section 2.3.3 of this thesis.
[843] ibid para 172.
[844] ibid para 181.

measures"[845] to ensure that all member states abide by the EU penal imaginary. AG Bot critiqued this lack of initiative, deeming EU action on detention as imperative for the continuous operation of the mutual recognition-based judicial cooperation framework. He also pointed at article 82 TFEU as a legal basis for future EU action on the field, suggesting that the EU harmonises detention standards to safeguard mutual trust and recognition.[846] The analysis shall return to this latter point.[847]

For now, the remainder of the section examines the actual judgment of the Court.

7.2.2 Judgment of the CJEU: two-tiered approach

The analysis now turns to the Court's response.

The CJEU begins its reasoning by reaffirming the "fundamental importance"[848] of the mutual recognition and trust principles for the AFSJ. It recalls how mutual recognition allows for the establishment of the EAW system, which has facilitated surrender procedures by replacing the previous CoE framework with a simpler, more effective one.[849] It stresses the reliance of mutual recognition on mutual trust, which in turn presumes that all member states "are capable of providing equivalent and effective protection of the fundamental rights recognised at EU

[845] ibid para 181.
[846] ibid para 182.
[847] See chapter 10 of this thesis.
[848] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 78.
[849] See chapters 5 and 6 of this thesis; and Council of Europe, *European Convention on Extradition of 13 December 1957* (Council of Europe 1957) European Treaty Series - No. 24.

level, particularly in the Charter".[850] Subsequently, it notes how mutual trust demands EU members to regard (presume) their peers as complying with EU law.

In light of the above, the Court concludes that, in principle, the executing state has an obligation to surrender, and may refuse to do so only on the grounds exhaustively provided within the FD EAW itself.[851]

Nevertheless, the Court also notes that human rights lie at the very heart of the EU, as enshrined in article 2 TEU.[852] Further, the EAW "is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter".[853] Instead, and according to article 51(1) CFREU, compliance with the Charter rights is mandatory for all member states, when applying EU law.[854] The CJEU also notes that the specific right under threat – the prohibition of degrading and inhuman treatment under article 4 CFREU – is an absolute right. This attribute stems from the Court's own case-law,[855] as well as the congruence of article 4 CFREU with article 3 ECHR.[856] An absolute right may not be restricted under any circumstances – no derogations allowed.[857]

---

[850] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* para 77.
[851] ibid para 79.
[852] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".
[853] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* para 83; see also Article 1(3) FD EAW.
[854] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 83.
[855] ibid para 85.
[856] ibid para 86. This right is absolute; see ECHR, art 15 para 2.
[857] For a definition and analysis on the nature of individual rights in European law, see chapters 2 and 3 of this thesis.

On the contrary, the Court notes, the principles of mutual trust and recognition are not absolute themselves. Instead, they may be limited in "exceptional circumstances".[858] It would appear that a threat posed to the (of absolute nature) right enshrined under article 4 CFREU may call for exactly such a limitation of the trust and recognition principles, and consequently of the entire surrender procedure. Recital 10 of the FD EAW supports such a notion, stating that the implementation of the EAW "may be suspended [only] in the event of a serious and persistent breach by one of the Member States of the principles set out in Article [2] of the Treaty on European Union".[859]

Thus, and while implementation in line with mutual recognition and trust remains the rule, exceptional circumstances (*in concreto*, a possible violation of an absolute CFREU right) warrant exceptions.

In light of these observations, the CJEU concludes as follows. When the executing judicial authority is in possession of evidence suggesting that surrender may result in a violation of article 4 CFREU, it must assess whether there is indeed a real risk of degrading and inhuman treatment for the individual concerned.[860] To this end, the CJEU put forth a two-step approach to be utilised by the executing court in its assessment.

Firstly, the executing court must determine whether detention conditions in the issuing state suffer from deficiencies, "which may be systemic or generalised, or

[858] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* paras 78 and 82.
[859] FD EAW, Recital 10.
[860] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* para 88.

which may affect certain groups of people, or which may affect certain places of detention".[861] Information that is objective, reliable, specific and properly updated may be used as an evidentiary basis for the court's assessment. Such information may stem, *inter alia*, from CoE case-law and CoE/UN monitoring reports on detention.[862] During this first step, the executing court is essentially seeking to identify whether the issuing state respects its positive obligation to provide for a prison system that ensures adequate protection of human rights and dignity, in line with the EU penal imaginary.[863] Should the executing authorities find that there is no "real risk of inhuman or degrading treatment b**y virtue of general conditions of detention**"[864] in the issuing state, then it must fulfil its mutual recognition obligations and surrender.

If, instead, the executing state identifies such a generalised risk, it must move on to the second part of the test. This revolves around establishing a specific and precise concern that the surrendered individual will be exposed to the generalised risk already identified. In this stage, the executing court must therefore narrow down its research scope, and consider the specific detention standards that the individual is likely to be exposed to, in case of surrender.[865] To clarify the individual circumstances of detention, the executing authority must request all the necessary supplementary information from the issuing court, which must respond as a matter of urgency.[866] To this end, the executing court may fix a (reasonable)

[861] ibid para 89.
[862] ibid para 89.
[863] ibid para 90.
[864] ibid para 91, emphasis added.
[865] ibid para 92.
[866] ibid para 95.

time limit for the receipt of such information.[867] While waiting for the information to arrive, "the execution of that warrant must be **postponed but it cannot be abandoned**".[868]

One of two possible outcomes may come out of the two-step approach. Should the information provided by the issuing state on the specific case suffice to dismiss concerns of human rights (specifically article 4 CFREU) infringements for the specific individual concerned, the executing court must continue with the surrender procedure as standard. If, however, the issuing authorities do not manage to dismiss the concerns of the executing court within a reasonable time, "the executing judicial authority must decide whether the surrender procedure should be brought to an end".[869]

Aranyosi/Căldăraru proves an attempt to reconcile rights and trust.[870] On the one hand, the principles of mutual trust and recognition retain their centrality within the AFSJ, and fundamental rights concerns are confirmed as not constituting ground for non-execution or refusal to abide by the mutual recognition principle. On the other hand, the Court ultimately allows for fundamental rights considerations to delimit AFSJ judicial cooperation principles. Article 4 CFREU – and its corresponding article 3 ECHR – is recognised as enshrining "one of the fundamental values of the Union and its Member States",[871] and is allowed to

[867] ibid para 97.
[868] ibid para 98, emphasis added.
[869] ibid para 104.
[870] Szilard Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal for Crime, Criminal Law and Criminal Justice 197.
[871] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 87.

lead to postponement of the proceedings, under conditions: in case the executing court identifies *both* a systemic and a specific risk, *and* the issuing state fails to provide evidence that discounts such a risk, then the executing court may postpone surrender proceedings.[872]

While *Aranyosi/Căldăraru* has perhaps been the most visible, it is far from the only initiative that acknowledges the problematic nexus between EU and detention, or strives towards providing some form of redress.

To conclude the assessment of current EU action, three further points are considered: Directives granting procedural rights to pre-trial detainees; the EU Commission (EC) Recommendation on detention; and various administrative efforts. These initiatives may be grouped under the clusters of 'litigation', 'persuasion', and 'management' strategies. Succinctly, litigation entails the adoption of legally binding norms; persuasion stems from soft-law initiatives nudging states to comply with set standards; while management relates to the funnelling of resources and information towards states, to support their efforts in enhancing detention standards and ensuring compliance with the EU penal imaginary.[873]

---

[872] It is interesting to identify emerging parallels with preceding ECtHR and CJEU case-law in the sphere of migration law; see *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); cases C-411/10 and C-493/10, *N.S. v. United Kingdom and M.E. v. Ireland* ECLI:EU:C:2011:865. For an analysis, see, among others, Steve Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"' (2011) Statewatch analysis 1, 1 , https://www.statewatch.org/media/documents/analyses/no-148-dublin-mutual-trust.pdf> (accessed 24 July 2023); and Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 324.

[873] This categorisation occurs as follows. First, compliance theorists seek to examine whether non-compliance happens on a voluntary or involuntary basis. Having identified the source of non-compliance, they subsequently distinguish between rationalist (changing actors' pay-off matrices) and constructivist (changing actors' preferences) approaches. See Tanja A Börzel, Tobias Hofmann and Carina Sprungk, *Why Do States not Obey the Law? Lessons From the European*

7.3 Litigation: pre-trial procedural rights Directives

To safeguard the functioning of judicial cooperation principles, and enhance mutual trust between states, the EU has adopted a series of Directives harmonising individual rights in criminal procedure, which are applicable to pre-trial detainees as well.

It should be reminded that EU states had already at Tampere[874] envisaged the possibility of adopting trust-enhancing measures. The point of such measures is to recalibrate the AFSJ, ensuring that individual rights are protected in practice,[875] thus safeguarding mutual trust and the effective functioning of mutual recognition instruments.[876] This utilitarian function of AFSJ measures on individual rights is reflected in the second paragraph of article 82 TFEU, which provides that:[877]

> 2. **To the extent necessary to facilitate mutual recognition** of judgments and judicial decisions […] **and judicial cooperation in criminal matters having a cross-border dimension**, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish

Union (2003) https://userpage.fu-berlin.de/~europe/forschung/docs/boerzel_hofmann_sprungk_2003.pdf (accessed 25 November 2022); see also Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311, 326ff.

[874] European Parliament, *European Council Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999* (1999) <https://www.europarl.europa.eu/summits/tam_en.htm> (accessed 24 July 2023), para 33; see chapter 6 of this thesis.

[875] Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and Transformation of Justice in Europe* (Hart 2016).

[876] Luis Arroyo Zapatero and Marta Munoz de Morales Romero, 'Droit Penal europeen et Traité de Lisbonne: Le cas de l'harmonisation autonome (article 83.1 TFEU)' in Geneviève Giudicelli-Delage and Christine Lazerges (eds), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne* (Société de législation compare 2012) 1, 113); Anne Weyembergh, 'Introduction' in Francesca Galli and Anne Weyembergh (eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université de Bruxelles 2012) 1, 9; Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Hart 2020) 1.

[877] TFEU, art 82 para 2, emphasis added.

> minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
>
> They shall concern:
>
> […] (b) the **rights of individuals in criminal procedure**;
>
> […] Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Working towards the objective of strengthening the presumption of mutual trust on the ground, a number of secondary EU law measures has been adopted. These include the Directive on the right to interpretation and to translation in criminal proceedings;[878] the Directive on the right to information in criminal proceedings;[879] the Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings;[880] the Directive on legal aid;[881] the Directive on the right of access to a lawyer and the right to have a third party informed and to communicate with third persons and with consular authorities

[878] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.
[879] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
[880] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.
[881] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.

while deprived of liberty;[882] and the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[883]

Each Directive seeks to establish common minimum rules at EU level, which "should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust".[884] It achieves this purpose by harmonising a specific procedural right, and ensuring that all EU states abide by a common, EU-specified standard.

Granted, the adoption of these Directives does not seem justified with the specific problem of structurally inadequate prisons in mind. This is evident by the rather broad scope of these Directives, and the complete absence of any concrete reference to detention.

Nevertheless, all these Directives apply to pre-trial detention. Indicatively, the Directive on interpretation and translation defines its scope of application as extending:[885]

> […] to persons **from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they**

[882] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.
[883] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.
[884] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, recital 9; similar declarations are incorporated in each Directive.
[885] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, art 2.

> **are suspected or accused** of having committed a criminal offence until the conclusion of the **proceedings**, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

While no explicit reference to detention is made, it is clear that pre-trial detention falls under the scope of this Directive.[886] The same starting point is used to define the scope for all Directives.

Yet, interestingly enough, post-trial detention lies outside the scope of these procedural-rights Directives. Indeed, the wording of the interpretation and translation directly explicitly delimits its own scope of application as extending until "the conclusion of the proceedings", [887] understood as "the final determination"[888] of guilt. Similar provisions are included in the Directive on information,[889] and the Directive on the presumption of innocence.[890] In the same vein, the Directive on legal aid,[891] and the Directive on the right to access a lawyer, [892] explicitly delimit their scope of application in regards to pre-trial detention.

---

[886] Note Adriano Martufi and Christina Peristeridou, 'The Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) European Journal of Crime, Criminal Law and Criminal Justice 153; see also the discussion under chapter 11 of this thesis.
[887] ibid.
[888] ibid.
[889] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1, art 2.
[890] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1, art 2.
[891] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/11, art 2.
[892] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1, art 2.

Therefore, it seems that the concept of 'criminal proceedings' does not extend to the post-trial stage of criminal justice. In practice this means that while detainees-suspects of crime may rely on these Directives, detainees-convicts may not.[893]

Indeed, the only Directive seemingly escaping this rule (at least to an extent) is the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. This specific Directive makes specific (albeit limited) references to post-trial detention as well. The Directive stipulates that post-trial detention may only be used as an *ultimum refugium* sanction, subject to judicial review; [894] that alternative, non-custodial measures are to be preferred;[895] that, as a rule, children are to be detained separately than adults,[896] and that national authorities must take appropriate measures to ensure certain rights of these detained children, including:[897]

> to ensure and preserve their health and their physical and mental development; […] ensure their right to education and training; […] ensure the effective and regular exercise of their right to family life; […] ensure access to programmes that foster their development and their reintegration into society; […] ensure respect for their freedom of religion or belief.

[893] See also Leandro Mancano, 'Storming the Bastille: Detention conditions, the right to liberty and the case for approximation in EU law' (2019) 56 Common Market Law Review 61, 78.
[894] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, art 10.
[895] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, art 11.
[896] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, art 12 paras 1-4.
[897] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, art 12 para 5.

No further details or specific provisions of relevance to post-trial detention are included in the Directive. This means that while the specific aspects of post-trial detention mentioned in the previous paragraph fall under the scope of this Directive, post-trial detention in general does not. This is made evident by the the Directive defining its own scope as relevant to children when they are "suspects or accused persons"[898] – implicitly yet firmly betraying an intent to not regulate post-trial situations *in abstracto.*

Ultimately, and escaping the few references mentioned already, the procedural rights protection granted in these Directives does not extend to post-trial detainees. It should also be noted that the Directives focus on granting individual rights – material conditions of detention and detention regimes are not referenced whatsoever. This is natural, since, as said, the objective of the Directives is to regulate rights in criminal proceedings generally.

However, the scope of these Directives is expanded in another manner. These Directives have been enacted to foster a climate of mutual trust on the ground, and consequently facilitate the functioning of mutual recognition instruments. As mentioned, mutual recognition entails a cross-border element by design, and as made evident in the wording of article 82 TFEU itself.[899] Yet the CJEU has found their scope of application to extend in purely domestic matters, and regardless of whether the application of any mutual recognition instrument is at stake. In the

[898] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, recitals 10ff.
[899] Note the discussion under chapter 4 and also chapter 10 of this thesis; see also TFEU, art 82 para 2.

case of *Moro*,[900] concerning the right to information Directive,[901] the CJEU first acknowledges that "prima facie and read in isolation, Article 82(2) TFEU could arguably lead to the suggestion that an act based on that provision is supposed to apply only to situations with a 'cross-border dimension'".[902] However, and due to the wording, context, and objective of the Directive,[903] the Court concludes that there is a general need for the Directive to apply "*independently of* the existence of *any specific situation of cross-border cooperation* between the authorities of two Member States".[904]

Considering the similar wording of other Directives regulating procedural rights, and considering the focus of the Court's reasoning on the nature of the nexus between harmonisation of rights under article 82 TFEU and mutual recognition in general, domestic application seems to expand and include all procedural rights Directives, rather than specifically the right to information one.[905]

While such a line most likely enhances the effectiveness and reach of the procedural rights safeguarded under the Directives, hence contributing to a climate of mutual trust, it nonetheless raises legitimacy concerns, which shall be addressed later.[906]

[900] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489.
[901] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
[902] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, para 36.
[903] ibid para 37.
[904] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, para 41.
[905] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378.
[906] See section 9.2 of this thesis.

In sum, the importance of such secondary law should not be underestimated. While not designed with prisons in mind, they nevertheless harmonise a number of procedural rights relevant to pre-trial detainees (and *some* relating to children in post-trial detention). In this fashion, the Directives constitute an indirect yet concrete expression of the EU penal imaginary and values. This holds particularly true for the children Directive, which acknowledges the importance of rehabilitation in the EU legal order, stating that member states are to "ensure access to programmes that foster [children] development and their reintegration into society".[907]

Overall, the Union has made considerable efforts to augment the protection of individual rights of individuals involved in criminal proceedings – further, the CJEU has expanded the scope of application of such rights, to apply to purely domestic settings as well. In this fashion, the procedural-rights Directives may be commended for enhancing mutual trust, while reaffirming the very identity and foundational principles of the Union itself.[908]

7.4 Persuasion: the EC Recommendation

The European Commission (EC) has most recently adopted a Recommendation, that seeks the soft-law harmonisation of individual detainee rights and detention conditions.

[907] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, art 12 para 5.
[908] At least on paper – in effect, the situation is somewhat different, and considerations of mutual trust and recognition take precedence over rights. See chapter 9 of this thesis.

The Recommendation constitutes soft law. Consequently, it has no legally binding force, places no obligations on its addressees, and holds no enforceability nor justiciability.[909] This is confirmed by the EC itself: in the official press release that accompanied the Recommendation, the Commission directly addressed national authorities in the following manner: "Member States are *urged* to take the necessary steps at national level to align practices with the recommendations". [910] In similar fashion, throughout the body of the Recommendation, the Commission stipulates that member states *should* act in X manner – the choice of terms is important, as, in their hard-law measures, EU institutions utilise *shall* to denote an obligation.[911]

In terms of terminology, the Commission refers to both pre- and post-trial detainees, covering "persons deprived of liberty in pre-trial detention and convicted persons serving a sentence of imprisonment".[912] Pre-trial detention[913]

[909] TFEU, art 288; Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 64; M Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State aid Regime' (2001) 8 Journal of European Public Policy 192, 194; Oana Ştefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 200.

[910] European European, *Commission Press Release, European Commission puts forward recommendations related to detention conditions* [2022] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7570 (accessed 15 May 2023), emphasis added.

[911] See e.g. in the context of criminal law, "Member States shall take the necessary measures to ensure that the following intentional acts […] are defined as terrorist offences", Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA OJ L 88, 31.3.2017, p. 6–21, art 3 para 1; and in the context of asylum detention, "Member States shall not hold a person in detention for the sole reason that he or she is an applicant"; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013, p. 60–95, art 26 para 1.

[912] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 6.

[913] The EC document closely mirrors the terms as developed under the CoE, and excludes detention in the context of arrest procedures; see Adriano Martufi and Christina Peristeridou, 'The

"should be understood as any period of detention of a suspect or accused person in **criminal proceedings** ordered by a judicial authority and prior to conviction".[914] It is important here to celebrate that the Recommendation explicitly brings pre-trial detention under the criminal justice umbrella, as often states seek to hide the *de facto* punitive nature of such measures by disguising them under some administrative cloak.[915]

The subject matter of the Recommendation emerges clear: pre- and post-trial detention in the criminal justice system. As for is purpose, this is explicitly laid out under the very first article:[916]

> This Recommendation sets out **guidance** for Member States to take effective, appropriate and proportionate measures to strengthen the rights of all suspects and accused persons in criminal proceedings who are deprived of their liberty, in relation both to the procedural rights of persons subject to pre-trial detention and to material detention conditions, in order to **ensure that persons subject to deprivation of liberty are treated with dignity, that their fundamental rights are upheld and that they are deprived of their liberty only as a measure of last resort.**

The overarching purpose of the Recommendations is to "strengthen the rights of all suspects and accused persons in criminal proceedings who are deprived of their liberty".[917] This objective is broken down into two distinct (albeit closely

Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) European Journal of Crime, Criminal Law and Criminal Justice 153.

[914] ibid art 4, emphasis added.

[915] Marc Miller and Martin Guggenheim, 'Pretrial Detention and Punishment' (1990) 75 Minnesota Law Review 335.

[916] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 1, emphasis added.

[917] ibid art 1.

related) tasks. One relating to enhancing procedural rights in the context of pre-trial detention, and another relating to promoting better detention conditions.

The latter purpose, relating to detention conditions, seems to apply indistinctly, both at pre- and post-trial level. The objective is to ensure all detainees "are treated with dignity, that their fundamental rights are upheld".[918] The former objective, now, is of more limited scope, as it applies only in relation to remand detention. The objective is to ensure that the dignity and rights of pre-trial detainees is respected, and that the states "ensure […] that they are deprived of their liberty only as a measure of last resort".[919]

The two objectives are succinctly codified within the Recommendation under the following headings.

Regarding specifically pre-trial detention, the EC recommends that pre-trial detention be used as *ultima ratio*, and that the states provide for non-custodial alternatives to punishment;[920] that national authorities impose pre-trial detention solely on the basis of reasonable suspicion, and having provided for specific limited grounds[921] that justify the measure;[922] all such decisions should be "duly reasoned and justified and refer[s] to the specific circumstances",[923] and be subjected to periodic judicial review.[924] The EC also promotes the idea that the length of pre-trial detention should remain proportionate to the custodial sentence

[918] ibid.
[919] ibid.
[920] ibid arts 14ff.
[921] ibid art 19. These grounds should, according to the Commission, be the following four: (a) risk of absconding; (b) risk of re-offending; (c) risk of the suspect or accused person interfering with the course of justice; or (d) risk of a threat to public order.
[922] ibid arts 19ff.
[923] ibid art 22.
[924] ibid arts 23ff.

threatened under the crime,[925] and that, in case a custodial sentence is eventually given, authorities should deduce time already spent in pre-trial detention from the final sentence.[926] Finally, the Recommendation enshrines certain core procedural rights, including the *audi alteram partem* principle,[927] and the right to an effective remedy and to appeal.[928]

As for detention conditions (for pre- and post-trial detainees both), the Recommendation entails provisions on accommodation,[929] allocation of detainees,[930] hygiene and sanitary conditions,[931] nutrition,[932] time spent outside the cell and outdoors,[933] work and education of detainees,[934] healthcare,[935] prevention of violence and ill-treatment,[936] contact with the outside world,[937] legal assistance and access to a lawyer,[938] and requests and complaints procedures initiated by the detainee.[939] It should be further noted that the Recommendation includes specific provisions regarding a number of particularly vulnerable groups, including women and girls,[940] foreign nationals,[941] children and young adults,[942]

[925] ibid arts 30ff.
[926] ibid art 33.
[927] ibid arts 26ff.
[928] ibid arts 28ff.
[929] ibid arts 34ff.
[930] ibid arts 37ff.
[931] ibid arts 40ff.
[932] ibid arts 43ff.
[933] ibid arts 45ff.
[934] ibid arts 47ff.
[935] ibid arts 49ff.
[936] ibid arts 52ff.
[937] ibid arts 54ff.
[938] ibid arts 58ff.
[939] ibid arts 61ff.
[940] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, arts 64ff.
[941] ibid arts 67ff.
[942] ibid arts 71ff.

persons with disabilities or serious medical conditions,[943] and detainees with special needs or vulnerabilities.[944] Specific provisions regulate inspections and monitoring, with the EC inviting member states to "grant unhindered access" to monitoring mechanisms of both the Council of Europe and the UN, but also of the EU itself.[945]

The Recommendation concludes with specific measures to address radicalisation in prisons (both at the pre- and post-trial level),[946] hence complementing various administrative efforts to this end, covered in the following section.[947]

Overall, the EC Recommendation sets out to harmonise individual rights, with a view of safeguarding the functioning of the AFSJ, and the principles of mutual recognition and trust. The Recommendation is to be applauded for its broad scope as well, as it includes specific provisions on pre- and post-trial detainee rights, and conditions of detention as well.

7.5 Management: awareness, training, and funding

The final EU initiative to be examined takes the form of management initiatives.

These include administrative efforts that seek to raise awareness in two fronts: regarding structural, repeat issues that plague national detention regimes; and regarding best practices that should be promoted across the Union. The EC Recommendation is of obvious relevance here. The EC Recommendation itself

[943] ibid arts 75ff.
[944] ibid arts 77ff.
[945] ibid arts 79ff.
[946] ibid arts 82ff.
[947] See section 7.5 of this thesis.

builds on a previous Green Paper[948] on detention,[949] where the Commission publicly acknowledges the importance of detention for mutual recognition and trust, and for tackling radicalisation.[950] The Commission is not the only body that has drawn attention to the place of detention in the EU *acquis*. Both the European Council[951] and the Parliament[952] have, in the last decade, acknowledged the importance of prisons, building on a similar rationale: need to increase awareness, as addressing the prison problem is necessary to safeguard the effectiveness of EU law (and specifically mutual recognition instruments),[953] and ensuring the Union remains an Area of Security.[954]

Besides raising awareness and discussing the topic of detention in the intra-EU fora, the EU institutions have contributed by providing for knowledge exchange and training initiatives. The Commission has taken steps to facilitate access to detention-related information, which has culminated in the establishment of the

[948] As noted, "Green papers are documents published by the European Commission to stimulate discussion on given topics at EU level"; see https://eur-lex.europa.eu/EN/legal-content/glossary/green-paper.html (accessed 05 October 2023).
[949] European Commission, *Strengthening mutual trust in the European judicial area: A Green Paper on the application of EU criminal justice legislation in the field of detention* (European Commission 2011) COM/2011/0327 final.
[950] ibid.
[951] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015)
[952] European Parliament, *European Parliament Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations [2015] (P8_TA(2015)0410)*; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2017) 2015/2062(INI).
[953] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015) recitals 1 and 13; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2017) 2015/2062(INI), recital 3.
[954] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015) recital 3; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2017) 2015/2062(INI), recital 3.

FRA's Criminal Detention Database.[955] The Database covers information relating to material detention conditions (such as cell space, healthcare, violence etc.), and, as the FRA itself stipulates, its purpose is to help national judiciaries assess whether detainees involved in cross-border cases are at risk of inhuman and degrading treatment.[956] To the same end, the Commission has updated the Handbook on how to issue and execute a EAW,[957] with a focus, once more, on educating practitioners in regards to inhuman and degrading treatment.[958] The Commission has also established the Radicalisation Awareness Network (RAN), which contains a working group dealing specifically with detention ('RAN prisons'),[959] while also having recruited the assistance of various EU agencies and networks. These include in particular Eurojust,[960] the European Judicial Network (EJN),[961] the European Judicial Training Network (EJTN),[962] the Confederation of European Probation (CEP),[963] the European Union Agency for

[955] European Union Agency For Fundamental Rights (FRA) website: < https://fra.europa.eu/en/databases/criminal-detention/> (accessed 13 May 2023)
[956] ibid.
[957] European Commission, *Commission Notice: 'Handbook on how to issue and execute a European arrest warrant'* (European Commission 2017) 2017/C 335/01, OJ C 335/1.
[958] ibid para 5.9.4.
[959] See dedicated page on the Commission website, <https://home-affairs.ec.europa.eu/networks/radicalisation-awarenessnetwork-ran/topics-and-working-groups/prisons-working-group-ran-prisons_en> (accessed 14 May 2023).
[960] Eurojust, *Case-law by the Court of Justice of the European Union on the European Arrest Warrant* [2021] 43. The Eurojust case-law overview contains summaries of the CJEU's judgments categorised according to a set of important keywords that largely reflect the structure of the EAW Framework Decision.
[961] Council of the European Union, *Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW* [2017] 15207/17.
[962] See for instance training on European Judicial Training Network, *The functioning of the EAW in the EU in practice: improving trust in national criminal justice systems* [2023] https://traininghub.ejtn.eu/seminars-and-webinars/listing/1393-the-functioning-of-the-eaw-in-the-eu-in-practice-improving-trust-in-national-criminal-justice-systems (accessed 13 May 2023); European Judicial Training Network, *Judicial Cooperation in Criminal Matters: Practical Case-Based Simulation (Counter-terrorism)* [2023] <https://ejtn.eu/activity/criminal-law/> (accessed 13 May 2023).
[963] See for instance CEP Probation, *Expert Group meeting on Radicalisation and Violent Extremism* (CEP 2022) https://www.cep-probation.org/expert-group-meeting-on-radicalisation-and-violent-extremism-29-march-2022-cologne-germany/ (accessed 13 May 2023).

Law Enforcement Training (CEPOL),[964] and the European Organisation of Prison and Correctional Services (EuroPris).[965]

Finally, funds from the EU Justice Programme[966] have been directed towards developing the STREAM ('Strengthening Trust in the European Criminal Justice Area Through Mutual Recognition and the Streamlined Application of the European Arrest Warrant') project,[967] which, as its very title reveals, focuses on tackling practical challenges related to the operation of the EAW via training activities, and knowledge analysis and exchange. Additionally, both the European Parliament[968] and the Council of Ministers[969] have invited the Commission to divert further funding towards detention, to support national authorities towards modernising and bringing their prison systems up to standard – to an extent, such initiatives have been developed, though they are still in embryonic form.[970]

7.6 Conclusion

[964] See <https://www.cepol.europa.eu/education-training/what-we-teach/onsiteactivities/472022ons-radicalisation-prison> (accessed 13 May 2023).
[965] See <https://www.europris.org/?s=radicalisation> (accessed 13 May 2023).
[966] Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.
[967] See < https://stream-eaw.eu/> (accessed 13 May 2023).
[968] European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), para 67; European Parliament, *European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States* [2021] (2019/2207(INI)), para 35.
[969] Council conclusions on mutual recognition in criminal matters — 'Promoting mutual recognition by enhancing mutual trust' [2018] ST/15272/2018/INIT OJ C 449/6.
[970] Élodie Sellier and Anne Weyembergh (eds), *Criminal Procedures and Cross-Border Cooperation In The Eu's Area Of Criminal Justice: Together But Apart?* (éditions de l'Université de Bruxelles 2020) 1, 435; Anne Weyembergh and Lucas Pinelli, 'Detention conditions in the issuing Member State as a ground for non-execution of the European Arrest Warrant: state of play and challenges ahead' (2022) 12 European Criminal Law Review 25; see further <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projectsdetails/43252386/101057013/JUST2027> (accessed 13 May 2023).

The EU has acted in two key ways. Firstly, and in the context of mutual recognition proceedings, the CJEU has allowed the executive state to protect individuals from exposure to structurally problematic detention regimes that would likely violate their individual rights, particularly article 4 CFREU. Secondly, the EU has made efforts to enhance mutual trust, by harmonising detention regimes, and ensuring equivalent protection of individual rights. This has happened via hard law, with a series of Directives granting procedural rights (also) to pre-trial detainees; via soft law, with the EC Recommendation nudging states to utilise PTD as a last resort, and respect the rights of all detainees; and via management initiatives, seeking to promote awareness, knowledge exchange, and funnel resources towards problematic prisons.

Simultaneously, the EU is trying to mitigate the problematic consequences of the prison issue (via the two-tiered test), and address the root cause of the issue (by improving detention conditions on the ground). Such efforts are commendable – yet it is already becoming apparent that such efforts focus primarily (if not exclusively) on mutual recognition and trust. Building on this observation, the next chapters shall assess the EU reaction against the functional and principled imperatives identified before.

CHAPTER 8

ASSESSING THE CJEU TWO-STEP-TEST RESPONSE

8.1 Introduction

Via the two-step approach, the CJEU has strived to delimit mutual recognition instruments when their enforcement would expose the individual to structurally problematic prisons that would likely result in a fundamental rights violation. While commendable and in the right direction, the *Aranyosi/Căldăraru* response undermines mutual trust, while falling short of achieving truly effective and comprehensive protection of individual rights.

With *Aranyosi/Căldăraru,* the CJEU acknowledged that mutual trust does not (should not) constitute *blind* trust.[971] This position already had strong advocates at scholarship[972] and institutional[973] level. Granted, the CJEU did not formally rewrite mutual recognition instruments, nor allowed article 1(3) EAW to be

[971] Szilard Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal for Crime, Criminal Law and Criminal Justice 197, 211; Lars Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 1, 140.

[972] See, indicatively, M Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union' in Elspeth Guild and Florian Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008) 1, 171; Auke Willems, 'Mutual trust as a term of art in EU criminal law: revealing its hybrid character' (2016) 9 European Journal of Legal Studies 211; Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021).

[973] European Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union Green Paper* (European Commission 2003) COM75 final; European Council, *The Stockholm Programme: An open and secure Europe serving and protecting citizens* (European Council 2010) OJ C115/1; see also European Commission, *Action Plan Implementing the Stockholm Programme* (European Commission 2010) COM171 final; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27, recitals 1 and 5.

interpreted as a *de iure* ground of refusal. However, it recognised that a potential violation of article 4 CFREU may, in the specific circumstances of the two-step approach, constitute a postponement ground. In this fashion, the CJEU verdict falls at least partially in line with the voices raised in favour of revisiting mutual recognition instruments, so as to ensure individual prerogatives are accounted for.[974]

It has been observed that, in light of the plethora of well-known issues concerning detention,[975] but also more general human rights, democracy, and rule of law concerns across EU states, such a judicial outcome constitutes a "classic case of Minerva taking flight at dusk"[976] – an expected, somewhat delayed, yet welcome outcome. In this light, *Aranyosi/Căldăraru* may be cast as a victory. A pyrrhic victory, perhaps, with the Court having to acknowledge limitations in AFSJ foundational principles – but a victory nonetheless.

However, on closer examination, *Aranyosi/Căldăraru* suffers from a series of shortcomings. It is submitted that the CJEU two-tiered test, while seeking to balance mutual trust and individual prerogatives, ultimately falls short of comprehensively protecting both.

To prove this point, the chapter proceeds in three steps. Firstly, subsequent CJEU case-law applying the *Aranyosi/Căldăraru* test is identified and

[974] Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 363ff.
[975] See chapter 2 of this thesis.
[976] Barbara A Misztal, 'Trust and Cooperation: The Democratic Public Sphere' (2001) 37 Journal of Sociology 371, 371; see further Michael Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2018) 24 European Law Journal 124.

summarised. Secondly, it is explained how the test is, by design, diluting the principles of mutual trust and recognition. Thirdly, the analysis draws attention to the gaps left by the judicial approach in regards to individual prerogatives.

8.2 Aftermath: the post-*Aranyosi* saga

This section shall identify and summarise subsequent CJEU case-law that applied the two-step test in detention scenarios. This shall provide us with the full picture, on the basis of which the analysis proceeds to assess the judicial response.

Aranyosi/Căldăraru marks the first instance, in which the CJEU was forced to deal with the specific issue of detention in the context of mutual recognition in criminal matters – the first, but not last. Further cases reached the Luxembourg Court. These cases are, in chronological order, *Aranyosi II*, *ML* (also referred to as *Aranyosi III), Dorobantu,* and *E. D. L*.[977]

8.2.1 *Aranyosi II*: no response

Aranyosi II returns to Mr Aranyosi a year after.[978] The German judiciary asked the CJEU to clarify the scope of the executing state's assessment. The question submitted was this: to which prisons must the executing state extend its examination?[979] The EU judges, however, refused to consider the question. This

[977] For an analysis of the *Aranyosi* saga in its entirety, see Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023).
[978] C-496/16 *Pál Aranyosi* [2017] ECLI:EU:C:2017:866.
[979] ibid para 17.

was because, in the meantime, Hungary had rescinded the EAW against Mr Aranyosi, thus turning Germany's query into a hypothetical.[980]

8.2.2 *Aranyosi III (ML)*: clarifying the scope of the executing state's assessment

Despite this initial refusal, the German court eventually got its answer – albeit in a different case. Two years after *Aranyosi/Căldăraru*, the CJEU was faced with the case of *ML*.[981] This case concerned ML, a Hungarian national. ML was wanted, and was eventually sentenced *in absentia*, for various offences.[982] To this end, the District Court of Nyíregyházi, Hungary, submitted a EAW request[983] to the Public Prosecutor's Office in Bremen. Following the *Aranyosi/Căldăraru* line, the German judiciary requested information. The Hungarian Ministry of Justice responded, specifying the prisons in which ML would be detained. Further, the Hungarian Ministry provided assurances that ML would not be subjected to any inhuman or degrading treatment within the meaning of article 4 CFREU in these specific prisons, or in any future prisons in which ML could be transferred.[984] Yet the German judiciary insisted, submitting a list of no less than

[980] ibid para 28; for the right of the CJEU to refuse giving an answer to hypothetical preliminary queries, see Case 244/80 *Pasquale Foglia v Mariella Novello* [1981] ECR 1981 – 03045.
[981] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589.
[982] Including bodily harm, damage, fraud and burglary; see Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 19.
[983] In reality, two separate EAWs were submitted; the first on August, and the second on October 2017; see Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, paras 20 and 23.
[984] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 21.

78 questions.[985] These questions sought to assess in detail detention conditions across all detention centres to which ML might be transferred.[986]

Eventually, the case reached Luxembourg by means of a preliminary ruling request. In its request the Bremen judiciary essentially enquired whether i) the *Aranyosi/Căldăraru* test requires the executing authority to assess information regarding *all* centres of detention in the issuing state, or only these specific centres in which the individual to be surrendered would likely be transferred; and ii) how *detailed* such information should be.[987]

As regards the first query, the Luxembourg Court declared that a general assessment of the entire national prison system is to be precluded. The Court's reasoning is that such an assessment would yield information that would not be specific and precise enough.[988] Instead, the executing state's assessment should focus on prisons in which the surrendered individual could actually be detained. These, the Court clarified, could include both the final destination of that individual, and transitional or temporary detention centres.[989]

The CJEU proceeded to clarify and delimit the executing authorities' power to assess detention conditions in the issuing state. The Court referred to the principle of mutual trust, confirming its fundamental importance. Similarly, it referred to the text of the FD EAW itself, which declares that a "European arrest

[985] An important point, as the rather extravagant number may betray faltering trust between member states; see Adam Łazowski, 'The Sky is Not the Limit: Mutual Trust and Mutual Recognition aprés Aranyosi and Căldăraru' (2018) 14 Croatian Yearbook of European Law and Policy 1, 18; see section 8.3 of this thesis.
[986] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 27.
[987] ibid para 40, emphasis added.
[988] ibid para 78; see also Opinion of AG Campos Campos Sánchez-Bordona, para 62.
[989] ibid paras 80-81.

warrant shall be dealt with and executed as a matter of urgency".[990] In light of these considerations, the CJEU decided to delimit the executing authorities' power, claiming that it should not meddle in affairs reserved for the issuing state:[991]

> The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is […] a **matter that falls exclusively within the jurisdiction of the courts of the issuing** Member State.

Further, the CJEU took the opportunity to scrutinise the German court on its 78 questions. It found that, due to their sheer number, content, and scope, such questions go against the principle of mutual trust, and undermine the effective and fast execution of a EAW.[992] Instead, the executing state should take care to limit its line of questioning to matters of *obvious relevance* to the assessment of whether the individual surrendered runs a real risk of inhuman or degrading treatment.[993] Hence, "questions concerning […] whether it is possible to smoke, who washes inmates' clothing, and whether there are bars or slatted shutters on cell windows go beyond what is essential in order to establish whether that risk exists".[994] The analysis shall return to this point, and the notion of 'relevant' for the purposes of determining human rights breaches in the context of EU law.[995]

[990] FD EAW, art 17 para 1.
[991] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 87, emphasis added.
[992] ibid para 105.
[993] ibid para 103; see also Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, Opinion of AG Campos Sánchez-Bordona, para 76.
[994] ibid para 103.
[995] See section 8.4 of this thesis.

For now, the analysis continues with the cases of *Dorobantu,*[996] and *E. D. L*.[997]

8.2.3 *Dorobantu*: human rights to be weighed against the efficacy of judicial cooperation

Shortly after *ML,* the Higher Regional Court of Hamburg received EAWs issued by the Romanian Court of First Instance of Medgidia, concerning the surrender of DT Dorobantu. [998] Here, the German judiciary had concerns about overcrowding in Romanian prisons, and this time it focused its queries on cell size, and potential violations in light of article 4 CFREU. The Luxembourg Court was called upon to answer whether there is an absolute minimum limit for the size of cells; whether type of occupancy (single or multiple) and areas covered by furniture constitute important factors; what other infrastructural requirements would prove relevant, for assessing compliance of detention conditions with EU law; and whether a holistic assessment of the prison regime, including the legal and organisational characteristics or shortcomings, are also to be factored in the executing state's assessment. [999] Further, the German judiciary wondered whether the executing state is to undertake a comprehensive assessment of the quality of the issuing state's prison system, or delimit itself to spotting errors; and whether failure to meet the minimum standards safeguarded under the EU penal imaginary is "unquestionable", giving rise to an automatic existence of a real risk for the individual concerned – or whether the executing state may carry out its own assessment to determine whether the detention conditions of the issuing

[996] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 19.
[997] Case C-699/21 *E. D. L.* [2023] OJ C 73/22.
[998] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 19.
[999] ibid para 36.

state actually constitute structural shortcomings that give rise to a specific risk for the individual.[1000]

In response, the CJEU started by referring to the relevant guidelines regarding detention conditions provided by the ECtHR.[1001] Recalling the place of the ECHR and Strasbourg jurisprudence in the EU penal imaginary, the CJEU declared that:[1002]

> […] in accordance with the first sentence of Article 52(3) of the Charter, in so far as **the right set out in Article 4 of the Charter corresponds to the right guaranteed by Article 3 of the ECHR, its meaning and scope are to be the same as those laid down by the ECHR**. In addition, the explanations relating to the Charter make clear, with respect to Article 52(3), that the meaning and the scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR, but also by the **case-law of the European Court of Human Rights** […]

Having thus reaffirmed the significance of CoE standards in EU law, and the particular relevance of the ECHR and ECtHR case-law, the CJEU proceeded to make explicit reference to the ECtHR case of *Muršić.*[1003] It stated that, in accordance to that case, if the space available to a detainee is below 3 square metres (m^2) in multi-occupancy accommodation, "a strong presumption of a violation of Article 3 ECHR arises".[1004] The CJEU also found that other factors of life in prison, including access to outdoor exercise, access to natural light or air,

---

[1000] ibid.
[1001] See chapters 2 and 3 of this thesis; for an analysis see Ágoston Mohay, *Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order* (EU Law Analysis 2019) < http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html> (accessed 24 July 2023).
[1002] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 58, emphasis.
[1003] *Muršić v Croatia* App no 7334/13 (ECtHR, 20 October 2016), para 71.
[1004] The CJEU did not consider single-occupancy cells, since Dorobantu would be detained in a multi-occupancy cell.

ventilation, room temperature, effective access to private toilets, and basic sanitary and hygienic standards, are all to be taken into account by the executing state in its assessment.[1005]

Yet, and despite referring to the ECHR and ECtHR standards, the Luxembourg Court concluded by reminding that any consideration and assessment of the executing authority in regards to the prison system of the issuing state must be "weighed **against** considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition".[1006] This is somewhat paradoxical, given that fundamental rights do not stand against mutual trust – rather, they give rise to that principle.

The CJEU moved on to confirm its *ML* ruling, reminding that the executing state must delimit its assessment in those specific prisons, in which the issuing state intends to detain the individual, and avoid any "excessive" assessment.[1007] It made a point to stress that, should the issuing state provide assurances that "the person concerned will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained",[1008] then the executing state "must" rely on such assurances.[1009] Finally, the CJEU declared that surrender may be postponed only if the executing state can produce precise information that disproves the

[1005] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 75.
[1006] ibid para 44, emphasis added.
[1007] ibid para 66.
[1008] ibid para 68.
[1009] ibid para 68.

assurances provided by the issuing state, and, at any rate, mutual recognition and trust are to be delimited only in "exceptional circumstances".[1010]

8.2.4 *E. D. L.:* escaping the first limb?

In *E. D. L.*,[1011] finally, history repeats itself – though this time it does not include Germany. Instead, the Italian *Corte d'appello di Milano*[1012] received a EAW by the Croatian judiciary, with a request to surrender E.D.L. to be prosecuted.[1013] However, execution was delayed, as, on the basis of expert reports, the Italian court identified E.D.L. as suffering from a psychotic disorder requiring continuous treatment.[1014] In case the treatment stopped, there was a risk of "probable episodes of psychiatric decompensation".[1015] Further, the reports submitted that E.D.L. was altogether unsuitable for prison life, since he ran "a significant risk of suicide in the event of imprisonment".[1016] The Italian court was concerned that surrendering "would interrupt E.D.L.'s treatment and lead to a deterioration in his general state of health, the effects of which could be exceptionally serious, or even [amount] to an increased risk of suicide".[1017] The Italian judiciary claimed that surrender could amount to a possible violation of article 4 CFREU (prohibition of torture),[1018] but also articles 3 (right to the integrity of the person)[1019] and 35 (right to healthcare)[1020] of the Charter. However, no relevant explicit ground for

[1010] ibid para 69.
[1011] Case C-699/21 *E. D. L.* [2023] OJ C 73/22.
[1012] (Court of Appeal, Milan, Italy); see Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 9.
[1013] Općinski sud u Zadru (Municipal Court, Zadar); see Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 8.
[1014] (Court of Appeal, Milan, Italy); see Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 9ff.
[1015] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 10.
[1016] (Court of Appeal, Milan, Italy); see Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 10.
[1017] ibid para 11.
[1018] CFREU, art 4.
[1019] CFREU, art 3.
[1020] CFREU, art 35.

refusal was to be found in the EAW itself.[1021] Consequently, the Italian court referred to the CJEU.[1022]

The EU Court began by acknowledging that, while E.D.L. is not (yet) "the subject of any measure involving deprivation of liberty",[1023] the issue is nevertheless likely to affect his individual rights. After all, detention is often the logical outcome of (if not precursor to) prosecution.

Once more, the CJEU reaffirmed the importance of the mutual recognition and trust principles for the Union as an AFSJ,[1024] and reminded that EU law imposes upon national authorities an obligation:[1025]

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

Regardless, and in light of article 4 CFREU, "in exceptional circumstances, relating, *inter alia*, to the life or health of the requested person being manifestly endangered, surrender may be temporarily postponed".[1026] This is confirmed by

[1021] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 13ff.
[1022] ibid para 20.
[1023] ibid para 22.
[1024] ibid paras 30ff.
[1025] ibid para 31; referring further to *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, para 192.
[1026] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 36.

the FD EAW itself, which allows “serious humanitarian reasons” to exceptionally and temporarily postpone surrender.[1027]

More importantly, and as noted in the AG’s Opinion,[1028] the CJEU found the E.D.L. case to be rather peculiar. This was because the risk for the individual, in these specific circumstances, does not flow from any structural deficiencies *per se,* but rather from the individual’s own specific health conditions. The CJEU found the risk to be intrinsic (relating to the individual’s health) rather than externally deriving (due to structural deficiencies of the prison system). The analysis shall resume this point promptly.[1029]

In light of such observations, the Luxembourg Court did not apply the two-step *Aranyosi* test, opting instead for a single-step approach, skipping the need to ascertain generalised deficiencies. Instead, and based on the existence of the specific illness, and the fact that the Croatian prison system is not properly equipped to treat this specific illness,[1030] the CJEU allowed postponement – going as far as to explicitly state that the executing authority may *refuse* surrender, if the risk cannot be disregarded in a reasonable time on the basis of assurances provided by the issuing state.[1031]

[1027] ibid para 36; referring further to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24, art 23 para 4.
[1028] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona, para 41.
[1029] See section 8.4 of this thesis.
[1030] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona, para 41.
[1031] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 55.

The *E. D. L.* approach is unique, as it skips the assessment of the existence of any systemic or generalised deficiencies at the prison system of the issuing state, and explicitly permits refusal. It will be interesting to note whether the *E.D.L.* approach was a one-off exception due to the pressing nature of the case at hand, and whether the *Aranyosi* two-stepped assessment shall remain the general rule going forward[1032] - or whether some sort of symbiotic relationship will be formed between the two.[1033]

8.3 Two-step approach undermining mutual trust

Having provided for an overall view of the *Aranyosi* saga to this day, the analysis proceeds to scrutinise the judicial approach.

It is submitted that allowing the executing state to assess the prison system of the issuing state undermines mutual trust. It shall be recalled that in *Aranyosi/Căldăraru* AG Bot suggested a different approach, one which would disallow member states to review their peers. Yet the CJEU opted for a different solution. It has been noted that in this fashion the Court "nuanced"[1034] the meaning of mutual trust, allowing it to be delimited.[1035] Temporarily, this may be justified – especially since the benefits (protection of individual prerogatives) outweigh or at least match the drawbacks (undermining judicial anti-crime

[1032] Though it has been argued that perhaps the E.D.L. approach marks an early shift in judicial approach; see Johan Callewaert, 'One step is enough? Judgment of the CJEU in E.D.L.' (2023) < https://johan-callewaert.eu/one-step-is-enough-judgment-of-the-cjeu-in-e-d-l/?fbclid=IwAR3XTF5EWn1qNEIonUrIxkTJBtCrhEnTeiOssKu9wje58zCUfycS_g8H2ZM > (accessed 04 June 2023).
[1033] See section 8.4 of this thesis.
[1034] Tomasz Ostropolski, 'The CJEU as Defender of Mutual Trust' (2015) 2 New Journal of European Criminal Law 166, 178.
[1035] Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32 Utrecht Journal of International and European Law 112, 118.

cooperation in the AFSJ). As a temporary patchwork, the *Aranyosi/Căldăraru* approach may well work. However, the two-tiered test has persisted ever since, as shown in a series of relevant case-law. This is detrimental for mutual trust.

The argument is straightforward. With the two-tiered step, the CJEU has allowed the executing state to check the prison systems of their fellow issuing states, and demand assurances. In this fashion, the CJEU has set up a peer-review system, appointing EU member states as watchdogs of fellow member states.[1036] This sends the message that member states are allowed to recognise that other member states are unable to watch over their own prison systems. Granted, this is true[1037] – yet it should never be a point for executing states to examine or confirm. The task of assessing prison systems was never meant to fall on the member states. On the contrary, they are supposed to presume compliance, in accordance with mutual trust, and common membership to the Union of Values.[1038]

The two-stepped strategy permits (if not actively nudging towards) the gradual erosion of mutual trust. This was observed by AG Bot, who warned against allowing for national authorities to assess the prison systems of their peers. The AG foresaw that this could undermine trust, while potentially promoting national

[1036] Armin von Bogdandy et al, 'Reverse Solange: Protecting the essence of fundamental rights against EU Member States' 49 Common Market Law Review (2012) 489.
[1037] See chapter 2 of this thesis.
[1038] See generally on this point Koen Lenaerts, 'EU Citizenship and Democracy' (2016) 7 New Journal of European Criminal Law 164, 172.

biases.[1039] The AG's position has been echoed by various commentators, noting that the *Aranyosi/Căldăraru* test promotes a status of distrust.[1040]

Such concerns are not theoretical. They have become a reality. This is evidenced by the cases that followed *Aranyosi/Căldăraru.* EU states have in practice made use of the two-tiered test, questioning the human rights compliance of their fellow EU states. When assessing the prisons of the issuing state, the executing authorities seek to broaden their research, often submitting a plethora of queries to the issuing authorities – as made evident in the *ML* case.[1041] Such behaviour constitutes evidence of limited trust, and a direct contradiction to the principle.[1042] Instead of a community of values, the EU is becoming a community of peer-reviewing states in distrust.

Another problematic factor flows from the system of assurances that the CJEU has incorporated in its two-step approach. The CJEU notes that the executing state may request that the issuing state provides it with "necessary supplementary information". [1043] Once such assurances are provided, the executing state *must* rely on them,[1044] "at least in the absence of any specific indications that the detention conditions in a particular detention centre are in

[1039] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot, paras 78, 93, 96, 106, 122.
[1040] See, among others, André Klip, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 109, 110; Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221.
[1041] See section 8.2.2 of this thesis.
[1042] Adam Łazowski, 'The Sky is Not the Limit: Mutual Trust and Mutual Recognition aprés Aranyosi and Căldăraru' 14 Croatian Yearbook of European Law and Policy (2018) 1, 18.
[1043] For confirmation, see Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 108.
[1044] ibid para 111; see also Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, Opinion of AG, point 64.

breach of Article 4 of the Charter".[1045] This is problematic in terms of mutual trust in the abstract. The entire concept of trust rests, by definition and design, on confidence in another.[1046] That the issuing state should have to reaffirm this confidence by a renewed promise seems paradoxical. Granted, one may argue that the confidence deriving from mutual trust is manifested *in abstracto,* whereas the promise made via assurances is given *in concreto,* regarding the specific individual, and therein lies its added value. Yet it seems that forcing one that has clearly broken confidence (by going against mutual trust to begin with) to promise anew only serves to add insult to injury, and does little to restore trust – which anyway "needs facts, not words".[1047] In addition, there is a real possibility that a state that breaks confidence *in abstracto* may similarly break (due to simple inability, or purposeful unwillingness) its concrete promise. This risk is far from theoretical, as evidenced by reports that uncover a number of false assurances provided in the EAW context.[1048] This, once more, has detrimental consequences for mutual trust.

The erosion of mutual trust introduces a number of challenges. Mutual trust is directly and obviously tied to mutual recognition[1049] – undermining mutual trust equals weakening mutual recognition mechanisms. The benefits of such mechanisms have already been laid out in detail.[1050] It suffices to recall that

[1045] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 112.
[1046] Larry E Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553.
[1047] A point raised by Nicola Canestrini, see < https://canestrinilex.com/en/readings/trust-needs-facts-not-words-diplomatic-assurances-in-extradition-proceedings> (accessed 21 October 2023).
[1048] Fair Trials, "Beyond surrender: Putting human rights at the heart of the European Arrest Warrant", June 2018, p. 20, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 20 October 2023).
[1049] See chapters 4 and 6 of this thesis.
[1050] ibid.

undermining mutual recognition has a direct adverse effect in terms of the Union's struggle against criminality and impunity, encouraging forum shopping behaviour,[1051] weakening the Union as an AFSJ,[1052] and ultimately harming the common interests of EU states and citizens. In addition, and besides affecting mutual trust, the two-step approach undermines the principle of sincere cooperation and loyalty, as enshrined under article 4 TEU.[1053] Rather than trusting and cooperating, the CJEU approach pushes member states to ignore the very legal obligations of cooperation, trust, and recognition, to which they have subjected themselves to.[1054]

Allowing the two-tiered approach to consolidate and persist *ad infinitum* threatens the Union's identity, objectives, principles, and renders decades of effort and evolutionary progress null.

This is exacerbated should we consider that the postponement of the executing state may well amount to a *de facto* refusal to execute. Even accounting for time extensions granted through postponement, an overnight improvement of detention conditions seems unlikely, especially in member states struggling with

[1051] Especially since there is no unanimity on how the executing state should conduct its assessment; hence, each Member State has developed their own criteria. Thus, convicts may opt to pursue to serve their sentence in what they deem a favourable environment, calling on deficiencies of the issuing State's prisons to justify their preference. See further Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 57, 111.
[1052] See chapters 4 and 6 of this thesis.
[1053] TEU, art 4 para 3; see the CJEU confirming this in Case C-699/21 *E. D. L.* [2023] OJ C 73/22, para 45. Note also András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 Cambridge Yearbook of European Legal Studies 239, 250.
[1054] In turn, this erodes the rule of law at EU level; see Leandro Mancano, 'Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition' (2021) 40 Yearbook of European Law 475, 486.

structural, deep-rooted deficiencies.[1055] A postponement decision may thus amount to a refusal to enforce mutual recognition in disguise.[1056] This only amplifies the problematic impact of the two-tiered approach in terms of mutual trust.

The CJEU approach offers no redress on the root cause of the issue: poor detention conditions. In this light, the potential for further mutual trust erosion remains present. The judicial approach is designed to have a limited (at best) impact in detention conditions. Indeed, findings demonstrate that the judicial approach has not resulted in states actually addressing and improving their detention regimes – simply, it has had the effect of states trusting less in one another, and refusing to give effect to mutual recognition requests.[1057] Without addressing the root cause of the issue, further cases will reach Luxembourg,[1058] and more states will postpone (and potentially refuse) recognition and execution.

In this light, the CJEU approach seems more like a makeshift response – a response that has the potential to yield short-term benefits, by avoiding individual exposure to problematic detention regimes, and perhaps even supplement the EU efforts towards enhancing prisons on the ground, if used as a last resort. Such benefits, however, are conditional. The two-tiered approach may work only if

[1055] Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468.
[1056] Szilard Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal for Crime, Criminal Law and Criminal Justice 197, 216.
[1057] Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023); Gwen Jansen, 'The need for a new roadmap of procedural safeguards: a lawyer's perspective' (2021) 22 ERA Forum 279, 284.
[1058] More than 300 hundred, since 2016 – see EC Rec recital 11. Period covered 2016-2019. For further reference see: https://ec.europa.eu/info/publications/repliesquestionnaire-quantitative-information-practical-operation-european-arrest-warrant_en.

national prison systems find themselves in a trajectory of convergence, actually and actively seeking to address their structural problems and enforce the EU penal imaginary. Under such a scenario, challenges by the executing state would gradually wane, mutual trust would be restored, and the two-step approach could function as a safety net, until harmony is restored. Yet, the analysis has already showcased that the problem of detention is not getting better – on the contrary, structural issues persist, and states seem even to be diverging further.[1059]

One could make the point that such an erosion of mutual trust, while detrimental, is justified.[1060] After all, the objective is the protection and promotion of individual rights, a fundamental EU value under article 2 TEU. This, however, is not the case, as demonstrated under the following section.[1061]

8.4 Two-step approach not fully protecting fundamental rights

It has been noted that with *Aranyosi/Căldăraru* the CJEU "favored safeguarding individual rights over the effectiveness of mutual recognition and mutual trust in the criminal law sphere".[1062] While in principle this direction is to be commended,

[1059] See chapter 2 of this thesis.
[1060] Generally on this point, for an argument that individual rights should prevail over mutual trust considerations, see Sionaidh Douglas-Scott, *Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR* (2015) https://ssrn.com/abstract=2752133 (accessed 21 May 2023) 29, 40.
[1061] Indeed, the CJEU allowed for mutual trust and recognition to be diluted, without fully achieving the objective of safeguarding individual prerogatives; reminiscent of Dostoyevsky's quote: "Your worst sin is that you have destroyed and betrayed yourself for nothing." See Fyodor Dostoyevsky, *Crime and Punishment* (Garnett - Neilson 1917) 1, 328.
[1062] See, among others, Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468, 490; Ermioni Xanthopoulou, 'The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?' (2022) 28 European Law Journal 218, 230; Leandro Mancano, 'A New Hope? The Court of Justice Restores the Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System', in C Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law* (Hart 2018) 1, 285ff; Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is "Exceptional" Enough?' (2016) 1 European Papers 943.

it is maintained that there are a number of issues with the two-tiered test in regards to individual prerogatives.

An obvious shortcoming is that the judicial approach does not address the prison issue itself. While this is an obvious weakness, it may well be excused for our purposes. This section focuses on assessing the judicial approach against individual prerogatives. The Court willingly diluted mutual trust to try and keep individuals outside problematic prisons (though it could, at the very least, echo AG Bot's call for EU action in prisons). At any rate, the objective and CJEU direction is noble, and it is doubtful whether the CJEU could have legitimately addressed problematic prisons on the ground. The analysis shall not persist on this point.

More important problems relate to the design of the two-step test itself.

It is worrisome that the CJEU allowed the possibility to 'postpone' in 'exceptional circumstances' only.

It shall be reminded here that in *Aranyosi/Căldăraru* the CJEU was all too quick to confirm its commitment to the effectiveness of EU law,[1063] stating that mutual trust and recognition may only be delimited in "exceptional circumstances".[1064] Indeed, the CJEU never admitted that states could outright refuse to acknowledge the surrender requests of their fellow states – only that they may temporarily postpone. Further, such postponement is justified only in exceptional

[1063] Referring also to the cases of *Melloni* and *Opinion 2/13;* see Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 75-76, and para 78. For an analysis of these cases, and the prioritisation of the effectiveness of EU law over rights, see section 9.3 of this thesis.
[1064] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 78, 82.

cases, where systemic deficiencies may affect the individual concerned – these two conditions (systemic and individual risk) must be proven in conjunction. The CJEU does not allow states to refuse recognition, and allows them to postpone only in "times of crisis".[1065]

The (considerably narrow) possibility to postpone mutual recognition does not provide any true, long-lasting, firm guarantees for the individual. It rather serves as a time extension, momentarily halting the adverse effects of mutual recognition.[1066] This was made evident particularly in *E. D. L.,* which dealt with circumstances of special gravity, in light of the risks posed for the health of the individual. Even here, the CJEU reaffirmed the importance of the mutual recognition and trust principles for the Union as an AFSJ,[1067] made a point to remind the member states that execution must remain the norm, and postponement the exception (and only if absolutely justified and necessary, and for a limited duration). Even if the *E. D. L.* case explicitly acknowledged refusal as an option, it still made a point that non-execution should be considered only as a last resort, and only if "in the light of all the circumstances, the postponement of surrender has to be extended beyond a reasonable period of time, and a dialogue with the issuing judicial authority has been maintained.[1068]

[1065] Helmut Satzger, 'Mutual Recognition in Times of Crisis: Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant (2018) European Criminal Law Review 317.
[1066] Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468.
[1067] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 30ff.
[1068] Thomas Wahl, 'AG: Postponement of Surrender in Case of Serious Health Risk' (2022) 4 eucrim 253; see further Case C-699/21 *E. D. L.* [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona; Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 31 and 36.

This insistence of the CJEU to focus on postponement, exceptional circumstances, and safeguard mutual trust and recognition at all costs, is symbolically problematic as well. In the aftermath of *Aranyosi,* it has been observed that, to avoid mutual recognition requests falling short, executing authorities may in practice choose to ignore evidence pointing towards structural shortcomings, and instead decide to execute and surrender/transfer the individual.[1069] That considerations relating to judicial cooperation and safety would trump individual prerogatives is a choice made by national judiciaries, yet the EU is also to blame, for having allowed this in-between situation to foster, and for allowing effectiveness considerations to retain such a central role. Granted, the CJEU allowed for individual prerogatives (particularly article 4 CFREU) to delimit the effectiveness of EU law – yet it never fully allowed individual prerogatives to take primacy. The CJEU emerges as an actor that prioritises effectiveness over rights – a message that many EU states have been eager to receive and echo. The practical risk for the individual emerges as obvious.[1070]

Another issue flows from the CJEU efforts to delimit the power of executing states to protect the individual – and the power of the individual to protect herself. This is evident in a number of ways.

At the outset, the entire framework surrounding assurances is problematic in terms of individual rights protection. Placing the burden of proof on the executing state or the individual to counter the assurances given by the issuing state, and

[1069] Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023) 1.
[1070] See also chapter 9 of this thesis, for a discussion on the risks of allowing effectiveness to trump individual prerogatives.

demanding that the executing authorities and individual demonstrate in advance that the specific detainee will suffer real risks, is an overly demanding task. It is challenging to prove the second *Aranyosi/Căldăraru* limb.

This is only exacerbated by the lack of post-recognition monitoring mechanisms, as neither executing state nor individual have the power to challenge the execution of mutual recognition instruments, once this execution has taken place.[1071] Indeed, the executing authorities *must* rely on the assurances provided by the issuing state,[1072] and there are no post-surrender/transfer mechanisms that would allow the executing state to check whether such assurances have actually been kept. In case that the issuing state is unable or unwilling to keep these promises, the individual will suffer the consequences – and the two-step approach provides no redress.

Granted, the executing authorities still have the power to assess detention conditions in advance. Yet this power is too narrow. In *ML,* the CJEU disallowed the executing authorities to expand their research. Instead, the Court urged the executing authorities to respect mutual trust and the efficiency of mutual recognition instruments – even while faced with structural deficiencies that give

[1071] Fair Trials, Be*yond surrender: Putting human rights at the heart of the European Arrest Warrant* [2018] 20 https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 20 October 2023); see also Wouter van Ballegooij, *European Arrest Warrant European Implementation Assessment* (EPRS | European Parliamentary Research Service 2020) https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf (accessed 19 October 2023); and Eva Aizpurúa and Mary Rogan, 'Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies' (2020) 11 New Journal of European Criminal Law 204.

[1072] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 111; see also Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, Opinion of AG, para 64.

rise to systemic human rights violations risk.[1073] Indeed, the fact that the issuing state has failed to maintain its prisons humane and human-rights compliant *at structural level* seems not to deter the CJEU – if anyone should be checking compatibility with human rights, this should be that very issuing state, according to *ML.*[1074] That the CJEU trusts a structurally failed state to safeguard the rights of the individual is paradoxical, and only justified if we allow considerations of effectiveness to trump the rights of the individual and the Union of Values.

In response to the German queries submitted in *ML,* the Luxembourg Court responded that questions not of "obvious relevance" and "essential" [1075] to establish a risk of article 4 CFREU violations are to be avoided, as they go against the philosophy of an efficient, rapid, and simple mutual recognition process – and so is the examination of detention centres where the surrendered individual may be held post-execution.[1076] It is peculiar that the executing state should delimit its queries in this manner, especially since the ECtHR case-law has repeatedly stressed the need to consider the cumulative impact of all factors and detention conditions on the individual[1077] - a point that the CJEU itself acknowledged in *Dorobantu.* [1078] Should the CJEU wish to fully and comprehensively protect individual prerogatives, the *ML* philosophy falls short.

Similarly, in *Dorobantu,* the Court concluded by reminding that any consideration and assessment of the executing authority in regards to the prison system of the

[1073] ibid para 87.
[1074] ibid para 87.
[1075] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 103.
[1076] ibid para 87.
[1077] See chapter 2 of this thesis, particularly section 2.3.1.
[1078] See section 8.2.3 of this thesis.

issuing state must be "weighed against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition",[1079] and that an assessment of detention conditions in all prisons of the issuing state in which the individual might be detained to be "clearly excessive".[1080] In addition, the Court dictates that any assessment on the part of the executing state must take into account the time limits imposed by the EAW.[1081] Yet, even if the issuing state provides assurances in regards to a specific prison, it may be that further (post-mutual recognition) transfer occurs. In such a case, the individual may well end up in a prison establishment different from the one mentioned in the assurances of the issuing state, and one that does not provide for adequate standards of detention. In other words, the executing state may give assurances that the individual shall be kept in adequate and humane prison P1, whereas in reality the individual ends up detained in P2, an entirely different prison than the one indicated, and one providing for less satisfactory standards, and giving rise to a real risk. Yet, such a matter is regarded as purely intra-state by the CJEU, escaping the monitoring competence of the executing state, and proving unworthy of further consideration from the Luxembourg Court.[1082]

Such case-law makes it evident that the two-tiered step does not provide for an adequately broad scope of assessment – on the contrary, it betrays a desire from

[1079] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 44.
[1080] ibid para 65.
[1081] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 95; Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 79; Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, para 67; Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 23ff.
[1082] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327.

the CJEU for "neat" bureaucratic measures and effective cooperation.[1083] Yet, respect for fundamental rights should take precedence over mutual trust and recognition concerns.[1084]

A few more points should be noted.

There is a practical danger that the states will abuse the judicial system, by creating what I call 'EAW/ToP' prisons. The system of mutual recognition and binding assurances forces the executing state to recognise, execute, and forcefully transfer individuals even to prison systems faced with structural deficiencies – as long as the issuing state promises that there is no real risk for the specific individual. In practice, this means that "[a]s long as issuing authorities show that the individual subject to a EAW will not be detained in an overcrowded facility, general or systematic deficiencies will not have to be addressed".[1085] The danger is apparent: a practical member state that does not wish to lose access to the mutual recognition and trust framework could designate a specific, limited number of prisons as 'EAW/ToP' prisons – that is to say, prisons designed to receive individuals in the aftermath of a EAW/ToP request. In turn, the state could ensure that *these* specific prisons comply with the EU penal imaginary. This would ensure that mutual trust and recognition proceedings would proceed as normal, as the *Aranyosi* two-step does not regulate such scenarios. However, the structural problems and systemic rights violations for the vast majority of

[1083] Dirk van Zyl Smit, 'Regulation of Prison Conditions' (2010) 39 Crime and Justice 503, 555.
[1084] For a more holistic criticism, see J Cortés-Martín, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 REALaw 5, 8.
[1085] Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468, 491.

detainees held in prisons *other* than specific 'EAW/ToP'-designated facilities would persist. Even if we accept that such a course of action would at the very least enhance the rights of some detainees, it nevertheless gives rise to reverse discrimination, creating two sub-classes of detainees: those involved in mutual recognition instruments, and those not.[1086] It also directly undermines the identity of the EU as a Union of Values.

The CJEU judicial approach does not address such a danger – on the contrary, it arguably nudges states towards adopting precisely such a strategy. Commenting on the CJEU jurisprudence, it has been noted that "[t]he message to Member States having difficulties with prison conditions is: make sure you have a good prison to keep EAW prisoners in the first weeks and then you can do as you please".[1087] The comment may be blunt, yet it is, I maintain, dishearteningly accurate. That the Court should promote effectiveness, while gatekeeping and seeking to delimit the executing state's discretion in such a manner is to be lamented, as it shows a marked disregard towards individual rights and the Union of Values.

There is another practical issue here too: the CJEU is so far focused exclusively on article 4 CFREU, and (almost exclusively) on overcrowding. Does this mean that it is just overcrowded facilities giving rise to article 4 CFREU violations that are to be acknowledged as structurally deficient? Such a narrow scope is unjustified. In light of the analysis conducted previously, it seems that the CJEU

[1086] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327; see further subsection 5.2.1 of this thesis.
[1087] André Klip, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 109, 112.

has not addressed the detention issue in a comprehensive manner. It would prove interesting to note how the Court would respond in the face of other (non-absolute) rights or problematic factors, and it is lamented that such issues were not addressed.

This is true especially since the facts of the case, and the submissions of the parties, allowed for and even invited such considerations. Indeed, in *Aranyosi/Căldăraru* the referring courts cited article 4 CFREU and overcrowding in particular, but also indicated the potential of *any* individual rights violation, in light of *any* structural issue.[1088] Similarly, in *ML* a total of 78 questions were submitted, which concerned a variety of problematic factors *besides* overcrowding.[1089] In *Dorobantu* the domestic judiciary specifically enquired about the possibility to undertake a comprehensive examination, focusing on a number of various parameters besides living space and cell size provided to individuals.[1090] In *E. D. L.* the entire narrative concerned not solely article 4 CFREU as corresponding to article 3 ECHR, but also the right to health.[1091] Before the *E. D. L.* judgment was made public, scholars commented that the facts of the case, and the submissions of the referring state as revolving around not only article 4, but also articles 3[1092] and 35[1093] of the Charter,[1094] would finally push the CJEU to consider the interaction between detention and other CFREU

[1088] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, paras 35-45.
[1089] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 27.
[1090] Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589, paras 19-36.
[1091] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 28ff.
[1092] Right to the integrity of the person.
[1093] Right to healthcare.
[1094] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, paras 1, 20.

rights.[1095] This did not come to pass, as the CJEU instead chose to centre its reasoning and verdict on article 4 CFREU once more.

Based on the facts of each case, and the queries referred to the CJEU by domestic authorities, the Court had leeway to examine other factors of relevance besides overcrowding, and other rights of relevance besides article 4 CFREU. This would not pose any danger akin to judicial activism, nor derail the CJEU from its designated role to deal with the specific facts and queries presented to it in each case. On the contrary, considering all factors and rights of relevance would allow the CJEU to enhance the protection of individual prerogatives, safeguard the Union's values, and bring its case-law more in line to the Strasbourg jurisprudence.

It shall be reminded that the CJEU asks executing authorities to assess the robustness of the detention systems of fellow states by relying on "information that is objective, reliable, specific and properly updated on the detention conditions […] that demonstrates that there are deficiencies",[1096] indicatively citing "judgments of the ECtHR, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN" [1097] as 'good evidence'. As already established, CoE and UN findings (and particularly the ECtHR jurisprudence) dictate that the overall assessment of the quality of any detention regime may not focus on individual factors, but rather has to take all

[1095] Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023).
[1096] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 89.
[1097] ibid.

parameters of relevance into account. Furthermore, and even if relevant findings do not suffice to establish a violation of article 4 CFREU (article 3 ECHR), they may still amount to a violation of some other right.[1098] This holds especially true in case of minor infringements, which, when examined in isolation, may seem relatively minor, yet, when assessed holistically, may compound and give rise to a violation.[1099] In such a light, it is paradoxical that the CJEU encourages the executing states to make use of CoE standards and findings, while itself ignores the same standards and findings.

Consequently, it seems that the focus of the CJEU on article 4 CFREU and overcrowding specifically is unfounded.[1100] A proper response should instead seek to account for all factors and rights of relevance.

On the basis of such observations, the two-step approach is also problematic in light of its first limb: having to prove 'systemic deficiencies and risks', in addition to proving a risk for the specific individual concerned. Yet a risk for the specific individual concerned may well be present even in a system not suffering from systemic deficiencies – or the risk may relate to a right other than the one safeguarded under article CFREU, or stem from factors other than overcrowding. In a Union of Values, addressing fundamental rights considerations for a specific individual caught in cross-border proceedings cannot be automatically restricted

[1098] See chapter 2 of this thesis.
[1099] Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Year of International Law 145, 159.
[1100] Leandro Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61; Csongor István Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne' (2020) 21 German Law Journal 838.

to instances of systemic deficiencies[1101] - a point that the CJEU has so far ignored.[1102] Yet, "[t]he main problem, which thousands of EU citizens are facing, is not connected to the systemic meta-violations of rights, but to a myriad of most mundane ones, which are not dealt with by national authorities".[1103]

Hopefully the Court's approach in *E. D. L.* will mean that problems associated with the step's first limb, and the need to prove structural deficiencies alongside a real risk for the individual, shall soon belong in the past. It shall be reminded that in that case, the CJEU allowed for the executing authority to focus exclusively on the second limb, and decide on postponement on the basis of the individual risk posed to the individual detainee. An assessment of the overall prison system of the issuing state was deemed unnecessary and inappropriate. This was due to the grave risk posed to the individual.[1104]

However, it seems unlikely that *E. D. L.* will signal any change in direction. The outcome of the case may be commendable, yet the Court's reasoning is not. This is because the CJEU focused on the following distinction. Should the risk stem from detention conditions, then the executing state must conduct both a generalised and individual assessment, as per *Aranyosi.* The only time when the

[1101] Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549, 562; Leandro Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61; Csongor István Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne' (2020) 21 German Law Journal 838.
[1102] Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549, 562.
[1103] Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Year of International Law 145, 159.
[1104] See section 8.2.4 of this thesis.

executing state is allowed to skip the generalised assessment is when the risk stems from the individual detainee, rather than the prison system itself.[1105]

The distinction seems unwarranted and feeble. *E. D. L.* noted that the specific illness of the individual concerned was the problem that gave rise to a real risk – yet this was precisely a problem only *because* the issuing state had no way to treat said illness.[1106] The issue giving rise to a real risk here is the inadequacy of the prison system of the issuing state itself, not the individual condition. To reverse the *E. D. L.* logic: should the prison system of the issuing state happen to be equipped with the latest medical advancements, equipment, and expertise, would execution be allowed? If such a question is answered in the affirmative, then the risk hardly stems from the individual, but rather the prison system itself. If, on the other hand, the question is answered on the negative, it would mean that even a properly equipped, humane, respectful prison system would not suffice to dismiss the risk – consequently, one may well argue that *any and all* risks stem from the individual, and that the *Aranyosi* test has no merit.

To support my argument, allow me a rather provocative example, which yet matches the *E. D. L.* rationale. Assume that individual A is a professional boxer, whereas individual B has no such expertise. Assume further that prison system X suffers from structural violence, where detainees and wardens have been repeatedly reported to harass and harm others. In such a scenario, does the

[1105] Case C-699/21 *E. D. L.* [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona, particularly para 49. For an analysis see Lorenzo Grossio and Margherita Rosi, 'The Ultimate (but not the Only) Remedy for Securing Fundamental Rights in the EAW System? Some Reflections on Puig Gordi and E. D. L.' (2023) 8 European Papers 547.
[1106] Case C-699/21 *E. D. L*. [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona, particularly para 43.

danger result from the individual's lack of fighting abilities and skill, or from the prison system itself? If the risk flows from the individual, it follows that we should allow individual A to be detained there, and disallow the detention of individual B. If, on the other hand, the risk flows from the system itself, neither A nor B should be detained there.

If we accept that structural deficiencies must be proven (as per *Aranyosi*), then the problem is not the condition of the individual – it is the nature of the system itself. Well-trained and amateur fighters are both at a real risk, in light of the structural deficiencies. Similarly, individuals of average health and individuals suffering from specific conditions are both at a real risk, in light of the structural deficiencies. One group may (perhaps) resist further and longer than the other – yet this does not justify different treatment, for the danger remains present for both.

If, on the other hand, structural deficiencies need not be present (as per *E. D. L*.), then the assessment should focus solely on the individual, and her circumstances. The test should be singular, of one limb.

If, finally, we allow both the *Aranyosi* and *E. D. L.* tests to exist at the same time, and require structural deficiencies to be proven for some individuals, while others (those most vulnerable) escape such a requirement, this begs the question: where do we draw the line, how do we differentiate between individuals, who gets to determinate who is adequately healthy, strong, in a 'sufficient enough' condition to be detained, and who is not – and on what basis? The CJEU should do well to provide us with clear guidelines and criteria in such situations, if it insists

on going down the dual '*Aranyosi* for some – *E. D. L.* for others' path. This would be a necessity in a Union of Values, and to ensure the legitimacy of the CJEU as well.

At any rate, the CJEU's current reasoning is unsatisfying.

A final, more general observation is to be made. It is maintained that the judicial system results in the *de facto* harmonization of EU prison systems to the lowest possible standard. Indeed, states are forced to accept the mutual recognition requests and assurances of their peers; all it takes to escape the CJEU scrutiny is to provide sufficient standards in the 'EAW/ToP' prisons; the CJEU focuses only on article 4 CFREU and overcrowding; and the powers of the individual and the executing state are delimited in favour of the effectiveness and efficiency of mutual recognition. Consequently, the CJEU is pushing for *some* individual rights protection (definitely focusing on the most visible and symbolic right, that of torture and inhuman treatment) just enough, the bare minimum that shall allow for the unhindered operation of mutual trust and recognition. Yet this sends the message to the member states that, long as they abide by such minimum standards, they are in line with the CJEU jurisprudence. The practical danger is that all EU members, even those that currently provide for adequate, humane detention conditions, are pushed towards the lowest minimum denominator of individual rights protection.[1107] This further undermines the legitimacy of the EU as a Union of values, and unduly burdens individual prerogatives.

[1107] This point builds on observations made in Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144, 145; see also Jörg Monar, 'Deviations from and Alternatives to the Community Method in Justice and Home Affairs' in Renaud

8.5 Conclusion

The two-tiered approach, while commendable and potentially effective as a temporary, supplementary measure, has been allowed to persist for far too long, without simultaneously evolving from a patchwork approach to a comprehensive remedy that places the individual at the heart of the assessment, while addressing the problematic impact of judicial cooperation. This has adverse consequences on mutual trust and individual prerogatives both.

For this stance, the CJEU has been criticised as lacking empathy,[1108] failing to recognise the place and adverse effect of mutual recognition for the individual.[1109]

Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011) 1, 118, 130.

[1108] For a general criticism on the CJEU promoting effectiveness over individual rights considerations, see Pablo Martin Rodriguez, 'Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero dl 2013, Stefano Melloni' (2013) 30 Revista general de derecho europeo 1, 34.

[1109] Stefano Montaldo, 'On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights' (2016) 1 European Papers 965, 980; see further chapter 11 of this thesis for a discussion on how to ameliorate this situation.

CHAPTER 9

ASSESSING THE EU LITIGATION, PERSUASION, AND MANAGEMENT INITIATIVES

9.1 Introduction

While the CJEU approach focuses on mitigating individual exposure to structurally problematic prison systems in the context of mutual recognition proceedings, the remainder of the approaches identified under chapter 7 strive to address the very problems characterising such systems themselves.

In principle, such efforts are commendable and highly topical. Yet, there is room for improvement. This is because current EU initiatives in prisons suffer from some key shortcomings. EU litigation efforts, and their broad interpretation in *Moro,* undermines vertical trust (in terms of the Union's perceived legitimacy by its states and peoples). The EU detention initiatives focus on the functional objective, omitting the axiological one. This is particularly evident in regards to the human rights protection standards provided by the Directives and the EC Recommendation. Such standards take the form of minimum-maximum, diluting individual rights protection, rather than enhancing it. EU detention-oriented action often brings no added value, but rather subtracts from the pan-European penal imaginary, leading to a fragmented and commodified human rights order.

The following sections expand on these issues. The chapter concludes that current EU action in detention, while commendable, leaves a lot to be desired. Subsequent chapters offer some thoughts on how best to address these

shortcomings and achieve the overarching objective of ensuring national regimes that actually safeguard human rights in detention.

9.2 Procedural rights Directives interpreted broadly: undermining legitimacy

In Tampere, the EU states provided for the possibility to adopt secondary law that harmonises national rules.[1110] This possibility is today enshrined in article 82 TFEU. The rationale of such measures is directly tied to the promotion of mutual recognition proceedings.

A textual analysis of article 82 TFEU reveals that harmonisation of individual rights is feasible under certain conditions. Specifically, harmonisation is permitted if necessary to facilitate *mutual recognition* in criminal matters having *a cross-border dimension*. [1111] Examples of criminal matters with a cross-border dimension include criminals acting as part of a transnational network, [1112] or criminals engaging in forum-shopping behaviour, committing a crime in one member state, and then fleeing to another, seeking to abuse the variance between heterotopic legal orders so as to escape punishment.[1113] Essentially, article 82 TFEU seems to envision all instances where judicial cooperation between two or more EU member states proves necessary, to tackle cross-border

[1110] See chapters 4 and 6 of this thesis.
[1111] Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Hart 2020) 1, 87ff.
[1112] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378.
[1113] See analysis in chapters 4, 6, and 8 of this thesis. For an example, see AE Kouroutakis, 'The Italian European Arrest Warrants for the Five Greeks Taking Part in Riots and Their Rejection by the Greek Authorities' (2016) 7 New Journal of European Criminal Law 295; see further Gert Vermeulen, 'Where Do We Currently Stand with Harmonisation in Europe?', in André Klip and van der Wilt (eds) *Harmonisation and harmonising measures in criminal law* (Royal Netherlands Academy of Arts and Sciences 2002) 1, 73.

criminalisation – it is exactly this cross-border nature of criminal efforts that permits harmonisation to occur.[1114]

As analysed previously,[1115] the EU has adopted a number of Directives on the basis of article 82. The purpose of these Directives is to harmonise a series of procedural rights at EU level. While their subject matter is procedural rights broadly understood, the article 82-based Directives are of direct relevance to (at least pre-trial) detention. It was also mentioned that in the case of *Moro*,[1116] concerning the right to information Directive,[1117] the CJEU interpreted that there is a general need for the Directive to apply "*independently of* the existence of *any specific situation of cross-border cooperation* between the authorities of two Member States". [1118] Considering the similar wording of other Directives, alongside the Court's reasoning on the nature of the nexus between harmonisation of rights under article 82 TFEU and mutual recognition in general, all procedural rights Directives seem to have domestic application.[1119]

Such a broad interpretation of the scope of application of the procedural rights Directives invites considerations in regards to their legitimacy. "As is widely

[1114] Anne Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions* (Editions de l'Université de Bruxelles 2004) 1, 139; J.R. Spencer, 'Why Is the Harmonisation of Penal Law Necessary?', in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences 2002) 1, 43, 47; Ulrich Sieber, 'The Forces behind the Harmonisation of Criminal Law', in Mireille Delmas-Marty, Mark Pieth and Ulrich Sieber (eds), *Les Chemins de l'harmonisation pénale* (Société de Legislation Comparé 2008) 1, 385, 393ff; Irene Wieczorek, 'EU Harmonisation of Rules on Detention: Is EU Competence (Article 82(2)b TFEU) Fit for Purpose?' (2022) 28 European Journal of Criminal Policy and Research 465.
[1115] Chapter 7 of this thesis.
[1116] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489.
[1117] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
[1118] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, para 41.
[1119] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378.

known, Al Capone was not convicted for what he should have been but for what he could be (tax fraud)."[1120] It is maintained that the CJEU's interpretation relies on a similar stratagem. The justification of article 82 TFEU, as the legal basis of the Directives, is to enhance mutual trust in cross-border proceedings. Yet the CJEU has interpreted the notion of 'cross-borderness' in an overly broad manner, essentially rendering it null, and going against article 82 TFEU itself, ignoring the principle of conferral.

This becomes all the more apparent, once we consider the details of that case, and the reasoning of the CJEU.

Moro concerned an Italian national charged with handling the proceeds of crime, namely jewellery. The criminal activity had occurred in Italy. In the course of the proceedings before the Italian court, the defendant admitted that he had actually stolen the jewellery. The charge was modified to theft. The defendant then sought to negotiate his penalty, as allowed under Italian law. His application was rejected, as the Italian criminal procedural code explicitly prohibited penalty negotiation requests to be submitted after the start of the proceedings.[1121]

The case was of distinct domestic flavour. *Moro* concerned "an offence committed by an Italian national, on Italian territory, causing loss to another Italian national".[1122] Yet the Italian judiciary referred to the CJEU, as it feared that the protection of individual rights under the Italian procedural law fell short of the EU

[1120] Csongor István Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States' (2017) 27 Indiana International & Comparative Law Review 1, 10.
[1121] For an analysis of the facts and procedural history of the case, see Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, paras 1-28.
[1122] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, Opinion of the AG Bobek, para 30.

penal imaginary, particularly the right to information Directive. The analysis has shown that the Italian judiciary should have no such fear, as (and unlike articles 2 and 7 TEU) the Directives are only applicable in cross-border proceedings[1123] – or so it was thought.

Before the CJEU, the Italian government submitted a simple point. The use of the term 'cross-border dimension' in article 82 TFEU "means that the scope of application of any secondary-law legislation based on that provision ought to be limited to situations with a *cross-border dimension*".[1124] Such an argument seems rather straightforward and self-evident. It is also in line with the principle of conferral. Article 82 TFEU, in its current form, is in place to fulfil a rather narrow role. The article permits harmonisation to reinforce judicial cooperation occurring on the basis of mutual recognition *only when* such cooperation is actually occurring.[1125] The wording of the provision itself leaves no doubt. Its narrow, supportive role is reflected in the *traveuax preparatoires* of the article.[1126] The harmonisation competence of article 82 TFEU is conditional, and attached to matters of cross-border dimension. The latter notion should be interpreted narrowly. Such a reading would be "member-state friendly",[1127] and respect the criminal law (and carceral) sovereignty of the states. In Tampere, the member

[1123] See chapters 3 and 5 of this thesis.
[1124] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, Opinion of the AG Bobek, para 32.
[1125] Jannemieke W Ouwerkerk, 'EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application (Editorial) (2019) 27 european journal of crime, criminal law and criminal justice 89, 96.
[1126] See the analysis in Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) 16 European Constitutional Law Review 1, 33, referring further to CONV 727/03, 'Draft sections of Part Three with comments' 1, 31; European Convention Secretariat, Reactions to draft text CONV 802/03 – Analysis, CONV 821/03, 27 June 2003.
[1127] Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) 16 European Constitutional Law Review 1, 33.

states did not agree to harmonisation resulting in self-standing, broad-reaching EU policy. Should the EU wish to explore such a path, it should revise the Treaties.

Yet, in his Opinion, the AG stated that he is "not convinced by that argument".[1128]

It is interesting to analyse the rationale which led the AG and the CJEU itself to dismiss the argument raised by the Italian authorities, as supported by a textual interpretation of article 82 TFEU. How may one find that an explicit reference to 'cross border dimension' should *not* translate to an interpretation that finds the scope of article 82-based Directives to be contingent on the existence of exactly such a dimension?

In its reasoning, the CJEU first acknowledges that "prima facie and read in isolation, article 82(2) TFEU suggests that an act adopted on the basis of that provision is supposed to apply only to situations with a 'cross-border dimension'".[1129] However, and due to the wording, context, and objective of the Directive,[1130] the interpretation should be different. This is because, the CJEU claimed, the Directive is aimed towards fostering a general "climate of mutual trust",[1131] so as to "build bridges"[1132] that allow judicial cooperation between all member states to thrive in the AFSJ. In this fashion, the CJEU focused on the necessity to facilitate mutual trust and recognition – "*independently of* the existence of *any specific situation of cross-border cooperation* between the

[1128] ibid paras 32-33.
[1129] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, para 36.
[1130] ibid para 37.
[1131] ibid para 39.
[1132] ibid para 42.

authorities of two Member States".[1133] The *telos* of the procedural rights Directives is to enhance mutual trust and recognition – and for that reason, individuals should benefit from the protection of procedural rights at all times.[1134]

The criterion of cross-borderness has been deemed irrelevant.[1135] Granted, such an approach may be taken to promote the effectiveness of mutual recognition instruments, and safeguard the functional imperative of EU action in detention. Further, it was previously noted that the CFREU has been interpreted as applying in all cases where member states are acting within the scope of EU law – and mutual recognition is, in principle, firmly within this scope.[1136] Consequently, it may be argued that the Directives should be interpreted in a similar, expansive manner. More practically, it may be argued that it is very challenging (if not impossible) to clearly differentiate a cross-border case from a purely domestic one, and that often cases that commence as domestic end up having a cross-border dimension.[1137] At any rate, the effect of such a broad interpretation is net positive for individual prerogatives, and addresses any dangers of reverse discrimination.[1138]

[1133] Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, para 41.
[1134] ibid para 37.
[1135] Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Hart 2020) 1, 87ff; C Eckes, EU competence in relation to procedural rights and detention conditions' in European Parliamentary Research Service, *Procedural Rights and Detention Conditions: Cost of non-Europe Report* (2017) 1, 66, 70ff.
[1136] See discussion in chapter 4 of this thesis; see also Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105 ; CFREU, art 51 para 1 ; and TEU, art 6 para 1.
[1137] A point raised recently as well by Irene Wieczorek, 'The procedural rights directives as part of a broader paradigm shift in EU Criminal Law' in Ilaria Gambardella and Victor Davioeu (eds), *Directives on Procedural Rights in Criminal Matters: 15 Years after the Roadmap, where do we stand, where do we go?* (EU Law Live 2023) 1, 5.
[1138] See chapters 4, 6 and 7 of this thesis; see also the recent discussion in Irene Wieczorek, 'The procedural rights directives as part of a broader paradigm shift in EU Criminal Law' in Ilaria Gambardella and Victor Davioeu (eds), *Directives on Procedural Rights in Criminal Matters: 15 Years after the Roadmap, where do we stand, where do we go?* (EU Law Live 2023) 1, 5.

In this light, the outcome of the CJEU interpretation is in line with the objectives identified previously in the thesis,[1139] and commendable.

Yet the reasoning is paradoxical, and there is a grave danger here. The argument is simple: while the Court's interpretation may be commendable, article 82 TFEU simply disallows such an interpretation. The member states made their will explicit in the TFEU, wishing to avoid harmonisation unless necessary.[1140] An interpretation that goes directly against the Treaty provisions violates state sovereignty, raises allegations of competence creep,[1141] and disregards the plural, diverse, heterotopic nature of the Union.[1142] The objective of the CJEU is noble, yet its reasoning and disregard for the Treaties and the will of the states is not.[1143] The beneficial points addressed before should not be allowed to preside over fundamental principles of EU law. After all, conferral and national diversity are firmly and explicitly codified in the Treaties, whereas mutual trust is not.

The *Moro* reasoning should not be allowed to dominate. This becomes even more apparent, upon consideration of another aspect of the procedural Directives, that is of relevance also to the EC Recommendation: the interpretation of minimum

[1139] See chapter 6 of this thesis.
[1140] Willem Thomas Eijsbouts and Jan-Herman Reestman, 'Editorial - Mutual Trust' (2006) 2 European Constitutional Law Review 1; Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) 1; European Parliament, *European Council Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999* (1999) <https://www.europarl.europa.eu/summits/tam_en.htm> (accessed 24 July 2023), para 33; Larry E Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553, 576, 581, 584.
[1141] Stephen Weatherill, 'Competence Creep and Competence Control' 23 *Yearbook of European Law* (2004) 1, 7; Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) 16 European Constitutional Law Review 1, 29.
[1142] Ole Elgstrom and M Smith, 'Introduction: Negotiation and policy-making in the European Union: processes, system and order' (2011) Journal of European Public Policy 673. See also TEU, art 4 para 3.
[1143] Reminiscent of the Tobacco Case; see Case C-376/98 *Germany v European Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419, paras 83-84, 106-107.

rules in light of the *Melloni* spirit, which effectively transforms such rules into minimum-maximum.

9.3 Perpetuating the *Melloni* spirit*:* effectiveness over rights

The rationale of the procedural rights Directives, and also that of the EC Recommendation and the EU administrative action in detention, is similar to the CJEU rationale in *Moro:* enhance fundamental rights so as to promote mutual trust, and safeguard mutual recognition. It is submitted that this functionalistic logic falters, for it disregards the condition of *minimum* standards, promoting instead *min-max* standards that delimit the protection of individual prerogatives.

This tendency to prioritise the effectiveness of EU law over rights I shall call the *Melloni* spirit, as it reflects the reasoning of the CJEU in that case. I shall analyse that case first, as it proves directly relevant to the discussion.

The setup in *Melloni*[1144] is markedly similar to that of *Aranyosi/Căldăraru.* The case was referred to the CJEU by the Spanish *Tribunal Constitucional*.[1145] The Spanish court referred because it found itself in a dilemma. On the one hand, it had to abide by the mutual trust and recognition principles, and execute the EAW. On the other, the Spanish court had reservations that, in case of surrender, the procedural rights of the individual would be violated. The rights in question referred to the right to an effective judicial remedy and fair trial, as safeguarded under article 47 CFREU and article 6 ECHR, and the right of defence, as safeguarded under article 48 of the CFREU and article 6 ECHR. Of particular

[1144] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.
[1145] Spanish Constitutional Court.

importance to the Spanish Constitutional Court was the fact that the protection of these rights was higher in the Spanish legal order, compared to the levels of protection they enjoyed in the legal order of the member state that had issued the EAW.[1146]

The CJEU, similar to *Aranyosi/Căldăraru,* was called upon to engage in a balancing act between human rights law, and the mutual trust and recognition principles. The human rights rules in question were of constitutional importance to the executing member state. Nevertheless, the Luxembourg Court declared that where a conflict arises between an aspect of EU law and an aspect of law in an EU state, EU law must always prevail.[1147] Consequently, and when faced with an obligation to implement EU law, national authorities must do all in their means to give effect to that law, even if it means violating national human rights, for "rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law".[1148]

Such an approach has been highly contested and criticised, and for good reason: national orders and, most importantly, individual rights, seem to be disregarded in favour of the effectiveness, primacy, and uniformity of EU law.[1149]

[1146] For an analysis of the case, see Aida Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308.
[1147] Referring also to Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66; *Opinion 1/91* [1991] ECR I 6079, para 21; *Opinion 1/09* [2011] ECR I 1137, para 65; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3, and Case C 409/06 *Winner Wetten* [2010] ECR I 8015, para 61.
[1148] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para 59.
[1149] See, indicatively, Paul De Hert, 'EU criminal law and fundamental rights' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edgar 2016) 1, 105, 112; Lorena Bachmeir Winter, 'Bypassing or Intensifying the Dialogue between Courts? The Impact of *Melloni* at the National Level' in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart 2021) 1, 404; Valsamis Mitsilegas and Leandro Mancano, 'Melloni: Primacy versus Rights?' in Valsamis Mitsilegas, Alberto di Martino and

It has already been proven that the *Aranyosi* saga betrays similar tendencies, with the CJEU pushing for the effectiveness of mutual trust and recognition by all means, while individual rights considerations are dealt with only incidentally – the negative impact of this judicial line for the individual has been made apparent.[1150] Similarly, the *Melloni* spirit still lingers in the procedural rights Directives, the EC Recommendation, and the Union's administrative action as well. This is evident in a number of ways.

Firstly, and in terms of rationale and *raison d'être*.

All of the Directives adopted under article 82 TFEU are in place to promote the functional objective of safeguarding mutual trust and recognition. This is evident in the very body of the Directives themselves, declaring that "[c]ommon minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust". [1151] Identical provisions are found in other Directives[1152] – or at least provisions equivalent in effect, such as:[1153]

Leandro Mancano (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart 2021) 1, 393; Maartje de Visser, 'Case Notes: Dealing with Divergences in Fundamental Rights Standards: Case C-399/11 Stefano Melloni v. Ministerio Fiscal' (2013) 20 Maastricht Journal of European and Comparative Law 576; Ilias Anagnostopoulos, 'Criminal Justice Cooperation in the European Union after the First Few "Steps": a Defence View' (2014) 15 ERA Forum 9, 18.

[1150] See section 8.3 of this thesis.

[1151] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, recital 9.

[1152] See Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1, recital 8.

[1153] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1, recital 10, emphasis added; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European

> this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus **to facilitate mutual recognition** of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States.

It is clear then that the objective of the Directives is purely functional. Human rights protection is only a means to the end of mutual trust and recognition.

The same holds true for the EC Recommendation.

On first impression, it may seem that the Recommendation reaffirms the Commission's commitment to upholding the universal nature of human rights, and protecting such rights effectively across the Union. Indeed, the very title of the EC Recommendation itself includes the term procedural 'rights', with the preamble acknowledging that "[i]n accordance with Article 2 of the Treaty on European Union, the European Union is founded on the values of respect for human dignity […] and respect for human rights".[1154] The Recommendation further confirms the importance of the EU penal imaginary. It cites the CFREU, which constitutes the Union's very own bill of rights;[1155] and acknowledges that the member states are already committed to human rights principles as applying in detention, and as provided by the CoE and the UN.[1156] Recital 20 states that

arrest warrant proceedings [2016] OJ L297/1, recital 2. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, recital 2.

[1154] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, recital 1.

[1155] TEU, art 6 para 3; Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 648; Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131.

[1156] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, recitals 2, 3, and 4.

"[t]he Commission aims to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case-law of the Court of Justice and of the European Court of Human Rights".[1157]

Despite such proclamations, perceiving the Recommendation as a human rights-oriented instrument would be a fable. On closer inspection, the real purpose of individual rights as means to an end[1158] emerges. Having acknowledged the human rights standards deriving from the EU penal imaginary, Recital 20 advances:[1159]

> To this end, it is necessary to provide an overview of selected minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and material conditions of detention **in key priority areas for judicial cooperation in criminal matters between Member States.**

In this manner, the EC confirms that individual rights are relevant when, in fact, manifesting within the context of judicial cooperation occuring on the basis of mutual recognition. This is confirmed by the fact that reference to individual rights is accompanied by direct and frequent references to the principles of mutual recognition and trust;[1160] the *Aranyosi* case-law;[1161] and the EAW FD.[1162] The same holds true for core criminal justice principles that the Recommendation promotes: any reference to rehabilitation and reintegration is accompanied by

[1157] ibid recital 20.
[1158] Specifically the effectiveness and primacy of EU law, and the promotion of security.
[1159] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, recital 20, emphasis added.
[1160] ibid recitals 5, 6, and 18.
[1161] ibid recital 5.
[1162] ibid recitals 5, 11, and 17.

reference to mutual recognition and radicalisation concerns.[1163] Any reference to specific human rights, such as those safeguarded under article 3 (prohibition of torture) and article 5 (right to liberty) ECHR in the context of detention, is rooted firmly and exclusively within the context of mutual recognition and radicalisation.[1164] Worryingly, and similar to the CJEU, the EC Recommendation frames violation of both rights primarily in the context of overcrowding,[1165] as if it was the sole problematic factor of relevance.

The Recommendation's real *raison d 'être* proves dual: preserve and support the mutual trust and mutual recognition principles, and tackle radicalisation in prisons. This is confirmed by further reference to the EU Strategy for Combating Radicalisation and Recruitment to Terrorism, [1166] and the Conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism.[1167] Individual rights are only relevant when in the specific context of mutual recognition or radicalisation – they do not constitute an end in themselves.

The same holds true for various EU documents and declarations, which approach the prison problem on the basis of mutual trust. Indicatively, the EC Recommendation itself refers to the 2018 Council conclusions on promoting

[1163] ibid recital 30.
[1164] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, recital 16.
[1165] ibid recital 13.
[1166] Council of the European Union, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 19 May 2014 (OR. en) 9956/14
[1167] Council of the European Union, *the Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism of 2015* [2015].

mutual recognition by enhancing mutual trust,[1168] and the European Parliament's report on the European arrest warrant.[1169] While rehabilitation and individual rights are explicitly acknowledged from both Council and Parliament, they remain, nevertheless, framed and approached under an effectiveness- and security-oriented angle.[1170] Similarly, and if we examine the management initiatives outlined before,[1171] the same issue emerges. Such initiatives are justified on mutual recognition and radicalisation grounds, and designed to enhance the effectiveness of EU law.

Such references that link individual rights to mutual trust and mutual recognition proceedings are to be criticized. This is because rights constitute no more than the façade of a justification, serving instead as a mere tool in the context of other tasks (mutual recognition and counter-radicalisation efforts). In practice, this results in lowering fundamental rights protection, rather than enhancing it – a point examined promptly.

For now, to conclude with the evidence that the *Melloni* spirit lingers.

[1168] ibid recital 6; referring further to Council conclusions on mutual recognition in criminal matters — 'Promoting mutual recognition by enhancing mutual trust' [2018] ST/15272/2018/INIT OJ C 449/6.

[1169] ibid recital 9; referring further to European Parliament, *European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States* [2021] (2019/2207(INI)).

[1170] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015) recital 5; Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015) recital 16; European Parliament, 'Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations' (P8_TA(2015)0410) recital 10; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2017) 2015/2062(INI), recital 66.

[1171] Section 7.5 of this thesis.

The Directives include the following expression:[1172]

> This Directive lays down minimum rules. Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. **Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate**.

This provision is included in the EU Directive on legal aid. Identical provisions are included in other procedural rights Directives.[1173]

Markedly, the Directives on interpretation and translation,[1174] information,[1175] and presumption of innocence[1176] *do not* make the same point. Instead, they are either silent,[1177] or allow states to "[…] extend the rights set out in this Directive in order to provide a higher level of protection also in situations **not explicitly**

[1172] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/11, recital 30, emphasis added.
[1173] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1, recital 54; and Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, recital 67.
[1174] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.
[1175] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
[1176] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.
[1177] See Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1. The Directive states nothing on the matter, besides the generic statement that "As this Directive establishes minimum rules, Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection" – recital 48. Yet the same provision is included in all other Directives examined in this chapter as well, so such a statement means little.

dealt with in this Directive."[1178] The wording of such provisions is not clear. It may initially suggest that these Directives escape the *Melloni* spirit, since they do not explicitly prohibit member states from adopting higher standards of protection.

Yet, it is submitted that, while not identical, such provisions are in fact equivalent to the provisions explicitly prohibiting higher standards of protection, as they effectively make the same point. This is because they permit states to regulate and enforce their own rights *also in situations not explicitly dealt with* by the EU legislator. I maintain that this should be interpreted as allowing states to provide higher levels of protection in areas escaping the scope of the Directives, while silently and implicitly prohibiting them from adopting higher standards in the areas falling *within* the scope of said Directives.[1179] Granted, this interpretation would be contrary to the text of article 82 TFEU itself. Yet it would be very much in line with the *Melloni* spirit, the *Aranyosi* case-law, and the procedural rights Directives where an explicit prohibition is included. The CJEU in *Melloni* and *Aranyosi* never prohibited member states from imposing higher standards altogether – such a prohibition became relevant only when such high standards would go against the mutual trust and recognition principles. In this light, it seems logical and in line to the Union's constant prioritisation of mutual trust and effectiveness over rights, for the EU legislator to allow member states to adopt higher standards in matters escaping the scope of the Directives. After all, it would be unlikely for such

[1178] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, recital 32; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1, recital 40.

[1179] For a different approach, see, among others, Valsamis Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 1, 63ff; and Hans G Nilsson, 'How to Combine Minimum Rules with Maximum Legal Certainty' (2011) 4 Europarättslig Tidskrift 665.

matters to ever play a role in mutual recognition proceedings. In other words: the potential for a conflict between matters not regulated by the Directives and mutual trust and recognition is minimal, hence EU states are allowed to adopt their own higher standards.

At any rate, the point stands: the procedural rights Directives (explicitly or implicitly) ban higher national levels of protection, prioritising mutual trust and recognition over individual prerogatives considerations.

The same holds true for the EC Recommendation. As already indicated, individual rights standards codified in the Recommendation emerge, *prima facie*, as minimum, in the sense that states "may extend the guidance set out in this Recommendation in order to provide a higher level of protection". [1180] Simultaneously, however, "[s]uch higher levels of protection **should not constitute an obstacle to the mutual recognition** of judicial decisions that this guidance is designed to facilitate".[1181]

There are issues with the EU approach of reading minimum rules as imposing min-max standards, and disallowing higher standards of fundamental rights protection when it would undermine mutual trust and recognition proceedings. The obvious problem concerns individual prerogatives protection, which is diluted and instrumentalised, treated as a means to some other end. "[T]o see law as a mere tool, lacking any inherent worth and serving no distinctive values that are

[1180] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 3.
[1181] ibid art 3, emphasis added.

essential to it, is profoundly dangerous".[1182] The rights and values of the EU *acquis* assume an ancillary role, contingent to mutual trust and recognition.[1183] Yet it is the Union of Values that gives rise to mutual trust and justifies mutual recognition – not mutual trust generating the EU values. By placing a hard-cap on national human rights orders, the EU is forcing states to dilute their protection in cases falling under the scope of mutual recognition instruments. This ultimately undermines both human rights and (consequently, and ironically) also has an adverse effect on mutual trust in the long term.

Similarly, this line of reasoning detaches the EU penal imaginary from the international human rights order. By imposing maximum thresholds to fundamental rights protection, the EU dilutes the protection offered by the UN and the ECHR. EU law prohibits member states from adopting or enforcing standards that would undermine the effectiveness of mutual recognition proceedings, in this manner lowering – rather than confirming – the CoE/UN standards.[1184] The departure from a self-standing and principled (under the CoE/UN) to a purely functional (under EU law) rationale of human rights protection signals the fragmentation of the European ethos.[1185] EU states receive two distinct signals: one from the CoE and UN, focused on protecting rights as values and ends in

[1182] Brian Tamahan, Law as a means to an end: threat to the rule of law (CUP: 2006)
[1183] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549, 552; referring further to Philipp Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002) 1, 250ff.
[1184] Els Dumortier et al, 'The rise of the penal state: What can human rights do about it?' in Sonja Snacken and Els Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2011) 1, 107.
[1185] Matej Avbelj, 'Human rights inflation in the European Union' in Lorenza Violini and Antonia Baraggia (eds) *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edgar 2018) 1, 7ff; Dirk van Zyl Smit, 'Regulation of Prison Conditions' (2010) 39 Crime and Justice 503, 554.

themselves, and another from the EU, focused on the effectiveness of EU law, where rights are mere means to be used (and even diminished, if necessary) to that end. The issue is that the EU carries stronger enforcement mechanisms.[1186] Even worse, this disparity is not readily clear. The EU acts under the pretext of promoting fundamental rights, and frames itself as aligning to the CoE/UN standards. This is evident in the Directives, and also the EC Recommendation itself, both of which make frequent reference to international human rights standards, proclaiming to be advancing them.[1187] This adds a layer of legitimacy, yet the claim is false. In practice, the EU seeks to protect individual rights *for a certain reason* that is altogether external to the EU values, but rather functional. The EU also seeks to protect individual rights *to a certain extent*: long as the lowest common denominator [1188] is safeguarded, and as long as mutual recognition business proceeds as usual, higher standards are allowed. Yet the moment that mutual recognition is threatened, higher human rights standards are to be discouraged, to be discarded as a no more useful tool, deemed as a hurdle to, rather than objective of EU law.

It seems that the EU is repeating its *Opinion 2/13* rationale:[1189] the effectiveness of EU law is a far more important objective over the alignment of EU human rights

[1186] André Klip, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 109, 118.
[1187] See in particular European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, recitals 2, 3, 4.
[1188] Gaëtan Cliquennois, Sonja Snacken and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11; Jörg Monar, 'Deviations from and Alternatives to the Community Method in Justice and Home Affairs' in Renaud Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011) 1, 118, 130; Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144, 145.
[1189] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454; see section 3.3 of this thesis for an analysis.

standards to CoE ones. Similar to *Melloni, Opinion 2/13* has attracted a lot of – justified, in my view – criticism. The kernel of this criticism, as applying also in the current context, may be summarised in a single sentence: the EU fails to take human rights seriously.[1190]

There is another danger flowing from the adoption of min-max standards. Such standards, in practice, result in the *de facto* convergence of the EU domestic orders.[1191] Yet harmonization was never meant to equal unification of law, or turn the AFSJ into a single legal order. By prohibiting the adoption of higher domestic standards, the EU is pushing towards exactly this goal, discreetly prioritising positive harmonisation over its negative counterpart – yet this is exactly the opposite of what member states chose in Tampere.

The fact that the *Melloni* spirit has found its way into the Directives and Recommendation is to be lamented, for the functional objective is promoted not only before but also *against* the axiological one. Mutual trust and recognition should be safeguarded, yet individual prerogatives and the Union of Value should be safeguarded *equally.* That the latter are sacrificed in favour of the former is something that the Union should address, going forward.

9.4 Conclusion

[1190] Sionaidh Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (2014) U.K. Const. L. Blog http://ukconstitutionallaw.org (accessed 27 October 2023).
[1191] Gaëtan Cliquennois, Sonja Snacken and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11; Jörg Monar, 'Deviations from and Alternatives to the Community Method in Justice and Home Affairs' in Renaud Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011) 1, 118, 130; Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144, 145.

EU initiatives have focused on enhancing the quality of detention conditions, or at least keeping individuals in mutual recognition proceedings outside structurally problematic prisons. However commendable, such action proves nonetheless ultimately inadequate. The key issues identified concern the impact of such initiatives on trust, understood both horizontally (mutual trust between peers) and vertically (perceived legitimacy of EU law). More importantly, current EU action focuses primarily on the functional imperative of rescuing mutual recognition and trust, failing to account for the principled objective of safeguarding individual prerogatives in a Union of Values. Such a focus instrumentalises detention, allowing for effectiveness, security, and primacy concerns to take precedence, and detaching EU action from the international human rights (particularly CoE) standards, forgetting that such standards lie at the heart of the EU penal imaginary and the European ethos.

While commendable, EU action in prisons is presented with a number of gaps. It is clear that the objectives have not yet been met. The analysis turns to addressing current shortcomings via future EU initiatives.

CHAPTER 10

TOWARDS AN EU PRISON CHARTER: CHALLENGES AND OPPORTUNITIES

10.1 Introduction

The thesis has outlined the disparity between the EU penal imaginary and structural shortcomings on the ground; the problematic impact this has for the Union at legal, ontological, and practical level; and the currently employed EU initiatives that seek to address the issue, revealing both their strengths and gaps. In this fashion, the analysis has so far adopted a backwards-looking analysis, examining what already *is* and *has been*.

Chapters 10 and 11 take the analysis to its logical conclusion. Utilising previous findings as a springboard, the burden of the following sections lies on examining the future of EU detention policy. While, perhaps, a promise to rethink the entire field is "prone to disappoint",[1192] these chapters seek to outline a few key points that should guide future EU action in prisons. These revolve around adopting hard law, in the form of an EU Prison Charter (EPC); and accounting for the effect of EU judicial cooperation and penal policies in national detention systems and individuals.

Chapter 10 tackles the former task. The analysis conceptualises EU prison law, before proceeding to examine the potential contents, form, and added value of

[1192] As observed in Frank Meyer, 'Rethinking European Criminal Law' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 461.

an EPC, and the legal feasibility of such an initiative in light of the principles of conferral, subsidiarity, and proportionality.

10.2 Towards an EPC: potential

It is maintained that the Union should adopt an EU Prison(s) [1193] Charter, harmonising prison law at EU level. The objective of such a Charter should be to provide *truly minimum* (as opposed to min-max) legally binding standards of detention, to ensure the equivalent protection of detainee prerogatives *as an end in itself*.

10.2.1 Conceptualising prison law

It is argued that the EU should harmonise the *prison law* of its member states. It is paramount to conceptualise prison law as a notion, to normatively ground the argument.

It has already been noted that prison law constitutes the body of legally-binding regulations that dictate material and procedural detention conditions.[1194] In broad terms, prison law may be sketched as the law defining all aspects of detention. Such aspects are taken to include both material detention conditions (prison law *stricto sensu*), and procedural detention conditions.[1195]

[1193] Official Council of Europe and EU documents tend to refer to a European Prisons Charter, while scholarship more frequently utilises the singular form, referring rather to a European Prison Charter – such differences in terminology are miniscule, and do not subtract from the tautology.
[1194] See section 1.3.
[1195] The following categorization is largely based on the works of Kelk, though revised and expanded upon. See Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof.mr. Constantijn Kelk* (Boom Juridische Uitgevers, 2008) 1, 575; and Constantijn Kelk, *Recht voor gedetineerden* (Samsom 1978) 1, 30.

Material detention conditions refer to standards regulating the living space provided to detainees; access to healthcare; general infrastructure (heating, ventilation, light, food); quantity and quality of vocational, educational, recreational and other activities provided; time spent outside cell or in communication with the outside world. This is the more 'traditional' understanding of prison law, dictating how a detention environment shall function, look, and feel like.

Procedural detention conditions include all procedural rights and mechanisms that allow the individual detainee to effectively participate in dialogue with the criminal justice (especially correctional and judicial) authorities. Indicatively, the rights of a detainee to information, interpretation, translation, and legal aid, are all vital here. Further, the detainee should have the right to be informed about the aforementioned rights, and the right to be informed about the material detention conditions that are to be expected. This more procedural and less visible aspect of prison law relates to how a detainee may claim their place as a subject or holder of legal rights.[1196]

Prison law is, first and foremost, *law* – that is, a body of legally binding standards that must be respected, and the violation of which gives rise to enforcement and litigation mechanisms. Prison law relates to the post-trial phase of criminal procedure, essentially regulating the implementation of custodial measures.[1197]

[1196] Or, as Kelk puts it, *rechtsburger*; see Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof.mr. Constantijn Kelk* (Boom Juridische Uitgevers 2008) 1, 573; referring further to Constantijn Kelk, *Nederlands detentierecht* (Gouda Quint 2000) 1, 15.

[1197] *Strafvollzugsrecht*. Custodial sentences, in turn, refer to all sentences involving a "caged, dependent and in his existence unfree" convict: "It should not be forgotten that the essence of a

Simultaneously, prison law is relevant to pre-trial detention, as preceding the criminal trial. It follows that prison law is part and parcel of criminal law.[1198] This is because detention (at the pre- and post-trial level both) occurs due to the involvement of the individual in the criminal justice system. Pre-trial detention precedes the criminal trial, while post-trial detention comes in its aftermath.[1199] Prison law itself interacts with and is shaped by both substantive and procedural criminal law, and rules regarding criminal justice procedure, sentencing, and corrections.

Having sketched the normative understanding of *prison law,* the analysis moves on to examine its EU flavour.

10.2.2 Potential EPC contents

Within the Union, the motion for adopting an EU Prison Charter (EPC) was first introduced by the European Parliament in a 2017 Resolution,[1200] in the immediate aftermath of *Aranyosi/Căldăraru*[1201] – though there were already calls for some

prison,/regardless of the huge difference in repression and arbitrariness that between/several systems can exist, at one and the same highest/unnatural situation: that of the caged,/dependent and in his existence unfree man. The original text as follows: Men mag niet vergeten dat het wezen van een gevangenis,/ongeacht het enorme verschil in repressie en willekeur dat tussen/diverse stelsels kan bestaan, op één en dezelfde hoogst/onnatuurlijke situatie betrekking heeft: die van de gekooide,/afhankelijke en in zijn existentie onvrije mens. See Sonja Snacken and Dirk Van Zyl Smit, 'The prisoner as rechtsburger: a European perspective' in Stijn AA Franken, Miek De Langen and Martin Moerings (eds), *Constante waarden. Liber Amicorum Prof. mr. Constantijn Kelk* (Boom Juridische Uitgevers 2008) 1, 573; referring further to Constantijn Kelk, *Nederlands detentierecht* (Gouda Quint 2000) 1, 5.

[1198] Dirk van Zyl Smit, 'Prison Law' in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press 2015) 1, 988.

[1199] As already stated, for the purposes of this thesis, other types of detention (e.g. migration detention, military detention, or home confinement) escape the scope of the analysis; see chapter 1 of this thesis.

[1200] Resolutions are in principle non-binding, yet they codify the Council's (Council of the EU) will, and seek to create impetus for further investigation and potential action into a subject. See https://www.consilium.europa.eu/en/council-eu/conclusions-resolutions/ (accessed 05 July 2023).

[1201] European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), para 59. Though similar ideas may

sort of EU legislative action in the field of detention long before the CJEU delivered its seminal judgment.[1202] The proposition quickly caught on, with scholars,[1203] practitioners,[1204] and the very CJEU[1205] itself advocating for the necessity of legally-binding detention standards at EU level. Naturally, and as all

be traced back already to two decades ago, at the start of the millennium; see European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154.

[1202] European Commission, *Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention* [2011] COM/2011/327 final; European Commission, *Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* [2003] COM/2003/0075 final; Council of the European Union, *Resolution of the Council of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [2009] OJ C 295/1; European Parliament, Eu*ropean Parliament resolution of 15 December 2011 on detention conditions in the EU* [2011] P7_TA (2011)0585; European Parliament resolution of 27 February 2014 (2013/2109(INL)), P7_TA (2014)0174 1, 17; European Parliament, *recommendation of 6 November 2003 to the Council on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union* [2003]; European Parliament, European Parliament recommendation to the Council on the rights of prisoners in the European Union (European Parliament 2004) 2003/2188(INI) OJ C 102E/154; for an analysis, see indicatively Christine Morgenstern, 'Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards' (2009) 9 ERA Forum 527.

[1203] Regarding specifically pre-trial detention, see Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221; TAC Coventry, 'Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU' (2017) 8 New Journal of European Criminal Law 43; and Adriano Martufi and Christina Peristeridou, 'The purposes of pre-trial detention and the quest for alternatives' (2020) 28 European Journal of Crime Criminal Law and Criminal Justice 153; regarding detention overall (including post-trial detention), see Leandro Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 56 Common Market Law Review 61; Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and comparative law 704; Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327; Steve Peers, EU Justice and Home Affairs Law (4th edn, Oxford University Press 2016); Valsamis Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart 2016); and Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311.

[1204] ECBA, "ECBA Initiative 2017/2018: Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" 1, 3 <**http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf**> (accessed 17 May 2023).

[1205] Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 90; Case C-653/19 *Criminal proceedings against DK* [2019] ECLI:EU:C:2019:1024, Opinion of AG Pitruzzella.

things under the sun,[1206] the idea is far from a novel one. Rather, it was already developed in the CoE context.[1207]

In matters of substance, such a Charter would essentially mirror the standards already found in the EC Recommendation and other soft-law instruments, such as the European Prison Rules or the Mandela standards, transforming soft law standards into hard law (what scholarship dubs the 'hardening' of soft law).[1208]

In more detail, and as the European Parliament has been advocating,[1209] an EPC would regulate virtually every aspect of prison law. The Parliament has suggested a number of areas to be harmonised at EU level. These include a prisoner's right to have access to a lawyer, to healthcare and to notify a third person that he or she has been detained; the right to physical and mental safety, in particular protection against violence committed by fellow prisoners and the prevention of suicide; prison conditions: health, accommodation, cleanliness, ventilation, light, food; the right of access to internal and, if necessary, external medical services; re-education, training, rehabilitation and reintegration into society and the workforce, in particular through the provision of information to prisoners concerning the resources available to help them prepare for such

[1206] To utilise the famous adage of Sir Arthur Conan Doyle, *A Study in Scarlet* (Oxford World's Classics 2008) Part I, Chapter III; if only to confirm the statement, see also Ecclesiastes 1:9.
[1207] Council of Europe, *Recommendation 1656 (2004) of the Parliamentary Assembly* [2004] CM/AS(2004)Rec1656-final; Michel Hunault, *Report Committee on Legal Affairs and Human Rights Situation of European prisons and pre-trial detention centres* [2004]; Michel Hunault, *Report of the Committee on Legal Affairs and Human Rights: European Prisons Charter* [2006] Doc. 10922; see, further, for health-care specific standards, Council of Europe, Committee of Ministers, Recommendation No. R (98) 7 Concerning the Ethical and Organisational Aspects of Health Care in Prison (Council of Europe 1998).
[1208] Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2014) 21 European Law Journal 68.
[1209] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), paras 22ff.

reintegration.[1210] Further, the Parliament has cited the need for specific measures concerning vulnerable groups;[1211] has stressed the need to allow visiting rights for relatives, friends and third parties; has called for training for prison staff and law-enforcement officers; the allowance of EU supervisory competence on national prisons;[1212] the promotion of measures which offer an alternative to imprisonment such as, in particular, community service;[1213] and the allocation of the EU budget towards the specific purpose of detention.[1214]

It is interesting to note that the Parliament does not cite a number of rights that would normatively fall under the scope of prison law. Importantly, the Parliament does not refer to the need to provide legal aid to detainees, or the right to a lawyer; the presumption of innocence for all individuals and pre-trial detainees in particular; the right to be present at judicial (particularly pre-trial and sentencing) and probation proceedings; and the obligation of detention authorities to make all information provided available on paper and in a language which the detainee understands.[1215] Such omissions matter little for pre-trial detainees, due to the

[1210] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, para 1(c).
[1211] ibid; see also European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), paras 22ff.
[1212] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, para 1(i); European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), para 58.
[1213] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, para 1(c); European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), para 15.
[1214] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, para 2.4; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), paras 49 and 64.
[1215] As opposed to earlier drafts, see European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, para 1(c).

regulation of these very rights under the procedural rights Directives expanding to pre-trial detention. However, the EPC, if ever adopted, should include and explicitly regulate such rights for post-trial detainees too, as they are not protected by these Directives.

Unsurprisingly, and given the direct inspiration that EU institutions have drawn from the CoE in the area, the contents of the Charter practically mirror those of a 2004 CoE Recommendation.[1216] In overview, relevant headlines from that CoE Recommendation include the following.[1217] Detainees (pre- and post-trial both) should have the right to access a lawyer; right to access a doctor, and medical services. Detainees (particularly pre-trial ones) should have the right to inform a person of their choosing upon detention. National authorities should provide all detainees educational and vocational activities, and visiting rights. National authorities should take care of vulnerable detainees. The objective of detention should be the rehabilitation and reintegration of all detainees. Non-custodial measures should be preferred, and detention should be employed as an *ultimum refugium* solely. All detainees should be informed of their rights in an effective, comprehensive manner. Complaint mechanisms and remedies should be readily in place, and available to all detainees.

[1216] Council of Europe, *Recommendation 1656 (2004) of the Parliamentary Assembly* [2004] CM/AS(2004)Rec1656-final.
[1217] For all subsequent references, see Council of Europe, *Recommendation 1656 (2004) of the Parliamentary Assembly* [2004] CM/AS(2004)Rec1656-final, para 6.2, provisions a-j; see further Michel Hunault, *Report of the Committee on Legal Affairs and Human Rights Situation of European prisons and pre-trial detention centres* [2004] Doc. 10097; Michel Hunault, *Report of the Committee on Legal Affairs and Human Rights: European Prisons Charter* [2006] Doc. 10922.

It should be also reminded that, while the CoE has not yet managed to make such standards legally binding, it has nevertheless adopted the European Prison Rules, which provide for soft-law harmonisation.[1218]

In light of this extensive list and comprehensive scope of CoE standards already in place, it becomes clear that an EU Prison Charter would add little in terms of content, or substance. Indeed, the EPR would essentially mirror standards already laid out by the CoE.

While not novel in content, the EPC would not be devoid of value.

10.3 The EPC added value

It is submitted that an EPC would be beneficial as it would introduce legally binding and enforceable standards across all EU states. In this fashion, its scope and form would address lacunae at EU, international, and domestic level.

10.3.1 Addressing the EU lacunae

At EU level, the EPC would address two shortcomings: the lack of legally binding standards for all detainees; and the detachment of detention from mutual trust considerations.

Commencing with the latter point: it is maintained that the EPC should seek the objectives of establishing humane detention standards and protecting detainee prerogatives as ends in themselves. Current Eu initiatives, including management action, the EC Recommendation, and the procedural rights Directives justify their existence on the basis of mutual trust. Tying EU detention

[1218] See subsection 3.2.2 of this thesis.

initiatives to mutual trust overly delimits their scope, and introduces a threshold, as individual prerogatives are enhanced *long as they do not undermine the effectiveness of mutual recognition instruments*.[1219] With the EPC, the EU should break the wheel, escaping such functionalistic justice. The objective to be pursued here should be the protection of individual prerogatives, and the fulfilment of EU values as a functional and axiological imperative both. Functional considerations should not be allowed to trump the ethos and identity of the Union, nor have any adverse impact on individual rights.

In addition, the added value of an EPC would lie in its form.

Consider the following. Should a similar, pan-European Prison Charter be adopted by the CoE,[1220] it would be applicable across all 46 Council members.[1221] On the other hand, and if indeed adopted by the EU and in accordance with the ideas expressed by the European Parliament,[1222] the applicability of the Charter would be diminished in terms of territorial scope. An EU-specific Charter will be binding only across the EU 27 member states.[1223] Granted, it would be ideal for the Charter to reach the highest number of states possible.

[1219] See chapter 9 of this thesis.
[1220] As the CoE has been pushing with its Council of Europe, *Recommendation 1656 (2004) of the Parliamentary Assembly* [2004] CM/AS(2004)Rec1656-final.
[1221] A point that has drawn criticism, for the adoption of an EU Prison Charter could argualy divide Europe, as it would exclude non-EU CoE members; see Dirk van Zyl Smit, 'Humanising imprisonment: a European project?' (2006) 12 European Journal of Criminal Policy Research 107.
[1222] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (2003/2188(INI)) OJ C 102E/154.
[1223] In light of this, Dirk van zyl Smit has argued against the EU proceeding alone, advocating instead for a joint EU-CoE Prison Charter. See Dirk van zyl Smit, 'Humanising Imprisonment: A European project?' (2006) 12 European Journal on Criminal Policy and Research 107. Whether that is feasible currently, is a consideration that should be taken into account.

Yet, the question of who adopts the Charter is relevant not only because it would define the territorial scope of application. More importantly, the question is relevant as the answer would most likely determine the Charter's legal nature, and the enforcement measures accompanying implementation.

Since the CoE functions as an intergovernmental entity, it would have far less powers to give effect to the Charter, and ensure effective implementation.[1224]

If adopted by the CoE, the Charter would most likely take the form of a Convention adopted in the aftermath of intergovernmental negotiations. If adopted by the EU, the Charter would (most likely, as is typical in the AFSJ and criminal-justice related measures) assume the form of a Directive.[1225] This would be in line with the Parliament recommendation of a binding EPC.[1226]

In practice, this would make the Charter a legally binding document. It would allow the EU to stipulate a specific objective that has to be achieved, yet it would simultaneously allow national authorities to adopt whichever (legislative or not) measures they see fit.[1227] The Charter would be accompanied by all the enforcement mechanisms in the Union's arsenal: direct and indirect effect, state liability, infringement proceedings, CJEU and Commission monitoring and

[1224] ECHR, art 46 para 2; see also Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125; and David Harris et al (eds), *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018).
[1225] See TFEU, art 82 – which is the most likely legal basis.
[1226] European Parliament, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (European Parliament 2004) 2003/2188(INI) OJ C 102E/154, paras 1(d) and 2.1; European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), para 59.
[1227] TFEU, art 288.

enforcement mechanisms would accompany it.[1228] Simultaneously, it would respect national diversity and autonomy. Adopting the EPC in the form of an EU Directive would achieve equilibrium between the objectives.

Granted, the EU already has binding standards of relevance to detention, in the form of the procedural rights Directives. However, such Directives are relevant only in pre-trial detention settings. Further, they tackle detention matters only incidentally, following a piece-meal logic, and focusing on mutual trust and recognition considerations.

More holistically, the EU has also addressed detention matters in the form of the EC Recommendation. Despite its comprehensive nature, the Recommendation is limited by its very nature. This is because, as the name implies, the Recommendation constitutes soft law, with no binding effect whatsoever on the member states. Before even the EC Recommendation was adopted, it was noted how:[1229]

> […] it is doubtful whether a Recommendation would actually improve the situation in Member States—the measures the Council of Europe has been implementing have not turned out to be successful, so why would another non-binding act or number of such acts have any different effect?

[1228] For a comprehensive run-down, see indicatively András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).
[1229] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327, 339.

It would be interesting to note, now that the Recommendation has actually been adopted, whether such an observation holds its value in the future – though it must be admitted that there are indeed arguments to back it up.

Soft-law-norms may be similar to hard-law-norms, in the sense that they both establish certain rules of conduct. Yet, and contrary to hard law, soft law has no legally binding force, places no obligations on its addressees, and holds no enforceability nor justiciability.[1230] Naturally, the benefits of soft law should not be underestimated. While lacking the enforcement capabilities of its hard law counterparts, soft law measures serve a key informative function,[1231] which often raises visibility and awareness without pushing too hard towards any specific direction – an advantage of particular importance in the sensitive field of detention. Soft-law measures serve as "a source of communicating ideas and experience […] without being specifically prescriptive in relation to any particular form",[1232] which allows member states to choose the methods in which they shall achieve the prescribed objectives. Simultaneously, soft-law instruments have the potential to translate to practical change on the ground,[1233] and, if implemented and applied wisely, their effect may well end up being "completely

[1230] TFEU, art 288; Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 64; M Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State aid Regime' (2001) 8 Journal of European Public Policy 192, 194); Oana Ştefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 200.
[1231] M Gardenes Santiago, 'Las comunicaciones interpretativas de la Comision: concepto y valor normativo' (1992) 19 Revista de Instituciones Europeas 933, 939.
[1232] Joanne Scott and Susan Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565, 572.
[1233] Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19, 64.

indistinguishable from hard law".[1234] Further, soft-law instruments present the EU with more flexibility, and involve less bureaucracy and red-tape,[1235] allowing the Union to depart "from the traditional model where collectively binding decisions are taken by elected representatives within parliaments and implemented by bureaucrats within public administrations".[1236]

Yet, and exactly because of such traits, soft law may well be criticised as a rather undemocratic procedure, [1237] which departs from the principle of legal certainty,[1238] involves no constitutional checks and balances,[1239] and allows the EU to stretch and even escape its competences altogether.[1240] Coupled with the fact that the realm of detention has been traditionally regarded as the *sanctum sanctorum* of Westphalian sovereignty,[1241] governing prisons via soft law does not emerge as the most legitimate route. In addition, soft law lacks any binding nature, and does not invoke any enforcement machinery. In practice, then, the

[1234] J Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167, 177.
[1235] Oana Ştefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 200.
[1236] O Treib et al, 'Modes of Governance: Towards a Conceptual Clarification' (2007) 14 Journal of European Public Policy 1, 3, 14ff.
[1237] Sandra Kröger, 'The End of Democracy as We Know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance' (2007) 29 Journal of European Integration 565.
[1238] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 862ff.
[1239] Karen Yeung, *Securing Compliance: A Principled Approach* (Hart 2004) 1, 11.
[1240] Both the EU Parliament and member states have raised this point in the past; see, indicatively, European Parliament*, Résolution du Parlement européen du 8 mai 1969, sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités adoptée à la suite du rapport fait au nom de la Commission juridique par M. Burger* [1969] OJ C63/18; and Conseil d'État, Rapport Public 1992, collection 'Études et documents', Documentation française 44, 1993, Paris, 22–23, quoted in S Leclerc, 'Les communications de la Commission et le marché intérieur. A propos de l'arrêt rendu par la Cour de justice des Communautés européennes le 20 mars 1997 dans l'affaire C-57-95, Rec. (1997), p I-1640 à I-1652' (1998) 34 Cahiers de Droit Européen 161, 163.
[1241] Emma Kaufman and Mary Bosworth, 'The prison and national identity: citizenship, punishment and the sovereign state' in David Scott (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170; see chapters 1 and 3 of this thesis.

Recommendation raises legitimacy concerns, perpetuates and further crystallizes a litany of poor practices and perceptions (as it also ties the principled objective of securing rights to mutual recognition considerations), while its beneficial points may be safely ignored by its addressees.

In this light, a legally binding, comprehensive EPC that promotes rights as an end in themselves, would be highly beneficial in the EU legal order.

10.3.2 Addressing the CoE/UN lacunae

The legally binding nature of the EPC, and the enforcement mechanisms that accompany it, would address the lack of enforcement bite of the CoE and the UN standards.

Both the UN and CoE lack the distinctive features of EU law. Both the UN and Council largely lack its own enforcement agents, and have to rely on national authorities instead – a reality that poses challenges in regards to their implementation and effective enforcement.[1242]

It is true that the UN Covenants are legal documents. Yet, as quasi-judicial organs, UN human rights treaty bodies are empowered to receive individual complaints. The procedures only apply to the parties which ratified the relevant optional protocols and they are in any case non-binding.[1243] As for the CoE:

In nature, the CoE is a purely intergovernmental organisation. This by definition hinders the Council's potential. The Council lacks effective enforcement

[1242] Monika De Silva, *Accession of the European Union to the United Nations Human Rights Treaties: Explaining the Reasons for Inaction* (College of Europe 2020) < http://aei.pitt.edu/103407/1/edp_7_2020_de_silva.pdf> (accessed 24 July 2023).
[1243] ibid.

mechanisms. Yes, the CoE has (and continues to) produced landmark human rights documents, with the ECHR at the forefront; and, indeed, the majority of these provisions are legally binding, and produce legal effect.[1244] Each Council member has to respect the relevant regulatory framework, as ratified, and made part and parcel of the domestic legal order.[1245] In case the values envisioned in the Convention are undermined or outright ignored, there are mechanisms in place to hold states accountable for their deviant behaviour. Two such mechanisms constitute the ECtHR, and the Committee of Ministers. The Court receives complaints by individuals, and subsequently sits in judgment. In case it deems that there has indeed been a state violation, it may award pecuniary or non-pecuniary damages (so-called 'just satisfaction') to the injured party.[1246] The Court's decisions are to be considered *erga omnes* – potentially binding across all members.[1247] The Court´s judgments are supervised by the Committee of Ministers.[1248] In case it deems a state as non-compliant, the Committee has the power to refer back to the Court, re-initiating judicial proceedings.[1249]

[1244] For a comprehensive analysis see indicatively Wolfgang Benedek, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 1 European Convention on Human Rights Law Review 151.
[1245] Lorenzo Zucca, 'Monism and Fundamental Rights' in Julie Dickson and Pavlos Eleftheriadis (eds), *The Philosophical Foundations of the EU* (Oxford University Press 2012) 1, 331;
[1246] ECHR, art 41. See, for example, the cases of *OAO Neftyanaya Kompaniya Yukos v the Russian Federation (just satisfaction)* App no 14902/04 (ECtHR, 8 March 2011); *Cyprus v Turkey* (just satisfaction) App no 25781/04 (ECtHR, 12 May 2014); *Catan and others v the Republic of Moldova and Russia* App no 3370/04 (ECtHR, 19 October 2012); *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993).
[1247] Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77.
[1248] ECHR, art 46 para 2: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".
[1249] ECHR, art 46.

Nevertheless, in practice, the framework has proven to be lacking. ECtHR judicial verdicts and mandates are often outright ignored, [1250] or implemented with heavy delay – such that amounts to *de facto* non-implementation. [1251] While the Committee may refer back to the Court, such a practice often serves effectively as revolving doors, without applying any real pressure to the states; often it does little more than simply adding to the (already considerable) workload of the ECtHR.[1252] In turn, it has been noted that the ever-increasing backlog of pending cases[1253] hinders the enforcement capacities of the Strasbourg court.[1254]

The Council is intergovernmental. By design, its effectiveness rests on the willingness of national authorities to cooperate and "be bound by the Court's judgments."[1255] As admitted by the former Commissioner for Human Rights, the Council's "[…] work is based on cooperation and good faith. When you don't have

[1250] Élisabeth Lambert Abdelgawad, 'The Enforcement of ECtHR Judgments' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 326; see also Lize R Glas, 'The European Court of Human Rights supervising the execution of its judgments' (2019) 37 Netherlands Quarterly of Human Rights 228.
[1251] Agnieszka Szklanna, 'Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues' in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights* (Intersentia 2018) 1, 445.
[1252] Paul Mahoney, 'The European Court of Human Rights and its Ever-Growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its discontents: Turning Criticism into Strength* (Edward Elgar 2013) 1, 26; and Iain Cameron, 'The Court and the Member States: Procedural Aspects' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe* (Cambridge University Press 2013) 1, 43.
[1253] Council of Europe, Survey of Activities, European Court of Human Rights, http:// www.echr.coe.int/Eng/InfoNotesAndSurveys.htm. (accessed 5 June 2023).
[1254] Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 1, 859.
[1255] Bernadette Rainey, Elizabeth Wicks and Andclare Ovey (eds) *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn Oxford University Press 2020) 1, 59.

that, it's very difficult to have an impact. We kind of lack the tools to help countries that don't want to be helped."[1256]

At any rate, and even if the countries 'want to be helped' and enforce the CoE standards, the entire Strasbourg apparatus operates on an individual, *post facto* basis.[1257] Unlike EU law, the ECHR is not equipped with direct applicability and supremacy. The implementation of ECtHR judgments in the domestic jurisdictions often differs "fundamentally".[1258] This is also due to a more practical factor. It has been noted that it is often less costly and more politically convenient for a state to be condemned by the ECtHR and pay just satisfaction, than to respond to the Council's demands and re-adjust domestic standards and practices.[1259] Indeed, and while the Committee of Ministers supervises cases that have been assessed and deemed as human rights violations by the ECtHR, there is a plethora of judgments concerning structural problems that have not been implemented in decades. [1260] Due to the defective implementation of judgments,[1261] the effectiveness of the system and the credibility and authority of the Court are seriously endangered.[1262]

[1256] See interview in Ginger Hervey, 'Europe's human rights court struggles to lay down the law' (POLITICO 2017) < https://www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/> (accessed 5 July 2023).
[1257] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327.
[1258] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 260.
[1259] Steven D Roper, 'Compliance with the European Convention on Human Rights: Testing Competing Theoretical Perspectives with post-Communist Countries' (2017) 45 East European Quarterly 123, 137.
[1260] Council of Europe, *The implementation of judgments of the European Court of Human Rights* [2020] Doc. 15123.
[1261] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254.
[1262] Leo F Zwaak, 'Effectiveness and fulfillment of the judgements on human rights: the experience of the European System' (2007) San José IIDH 331, 333.

Further, “this upsurge in unconcealed violations has gone hand-in-hand with efforts to critique and curtail the reach of international human rights law”.[1263] The ECtHR has been blamed for judicial activism,[1264] and the legitimacy of the entire CoE apparatus has been called into question.[1265] Utilising the case of Greece once more as an example: when then Greek Minister of Public Order was called upon to account for the numerous ECtHR rulings against Greece, and the lack of compliance of the latter, he responded defensively, seeking to shift the moral spotlight (arguably, blame) to the ‘expansionist’ ECtHR:[1266]

> **The first thing we should examine is how the Court judges and what decisions it reaches**. The [European] Court of Human Rights has not only convicted Greece, it has convicted countless countries countless times. It has an **expansionary tendency** in the application of treaties, in a totally broadened manner, while the legal adequacy of its decisions […] opens up huge questions. […] The expansionary way of interpreting treaties, by people who are in many cases not legal professionals, and whose legal training in the philosophy of law is relatively limited, generates major issues, major issues in Greek Law [...].

In this climate, the ECtHR is not only subject to legal criticism of its judgments, but also faces a sustained political backlash against its very authority.[1267] CoE

[1263] Sappho Xenakis and Leonidas K Cheliotis, ‘Carceral moderation and the Janus face of international pressure: A long view of Greece’s engagement with the European Convention of Human Rights’ (2018) 70 Law and Social Change 37, 51.
[1264] Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its discontents* (Edward Elgar 2013).
[1265] Barbara M Oomen, ‘A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European court of human rights in the Netherlands’ (2015) 20 International Journal of Human Rights 407.
[1266] UNFOLLOW (2012) Interview with Minister of Public Order Nikos Dendias by A Zenakos and L Charalampopoulos https://www.youtube.com/watch?v=IWe9lDm7wDM (accessed 05 November 2021); see further Sappho Xenakis and Leonidas K Cheliotis, ‘Carceral moderation and the Janus face of international pressure: A long view of Greece’s engagement with the European Convention of Human Rights’ (2018) 70 Law and Social Change 37, 51.
[1267] Øyvind Stiansen and Erik Voeten, ‘Backlash and judicial restraint: Evidence from the European Court of Human Rights’ (2020) 65 International Studies Quarterly 770; Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (TMC Asser

human rights norms (law and case-law standards on paper) and implementation (law in action) find themselves in mismatch. From the perspective of the individual, it seems that the CoE mechanisms in place provide only for a rather "distant opportunity" for human rights protection.[1268] The ECtHR finds itself in a weaker legal situation compared to EU mechanisms.[1269]

In contrast, and if an EU Prison Charter became reality, it would lay out hard obligations, accompanied by hard enforcement.[1270] An EPC would enshrine legally binding standards (hard obligations), making them clear, and would further allow for detention regimes to be subjected to the review of the CJEU (hard enforcement);[1271] any state that would fail to effectively transpose and meet the standards of the Directive would be subjected to the panoply of the EU monitoring and enforcement mechanism.[1272]

The EPC would have considerable impact in propelling the EU goals, values, and anti-crime cooperation policies forward. This is not so much due to the novelty of

Press 2009); The Telegraph, *The European Court of Human Rights has neither Authority nor Legitimacy* (The Telegraph 2012); Janneke Gerards, 'The Scope of ECHR Rights and Institutional Concerns' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights* (Cambridge University Press 2014) 1, 84.

[1268] Matej Avbelj, 'Human rights inflation in the European Union' in Lorenza Violini and Antonia Baraggia (eds) *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edgar 2018) 1, 7ff.

[1269] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 260.

[1270] Kenneth W Abbott et al, 'The Concept of Legalization' (2000) 54 International Organization 401; further Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

[1271] A clear departure from the Third Pillar FD framework, where FDs imposes clear obligations but could not be subjected to judicial review nor had direct effect; see

[1272] Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2014) 21 European Law Journal 68

the standards it would introduce, but rather due to its legally binding, enforceable, and comprehensive nature.

Yet, the adoption of such a Charter remains, so far, elusive. Does the EU have the competence to actually adopt an EPC? It is to this question the analysis now turns. To this end, it proceeds by examining three core principles, which guide all EU action: conferral, subsidiarity, and proportionality.

10.4 The EPC legality

It is submitted that both conferral and proportionality are doubtful, and hence EU litigation in the field would prove, most likely, illegitimate.

As declared in the TEU, "[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality".[1273] Each principle may be broadly understood as follows. Conferral prescribes what the EU can and cannot legally do (can the Union assume action?). Subsidiarity addresses the question of whether it is the Union itself that should act, instead of its member states (should such action be assumed at EU level?). Finally, proportionality guides the manner and extent of EU action (how and to what extent should EU action evolve and develop?).

Cumulatively, the three principles guide EU legal action. Anything the Union does, must be justified on the basis of this trinity: conferral, subsidiarity, proportionality. Each principle must be satisfied in conjunction with the others. It is not enough

[1273] TEU, art 5 para 1.

for EU operations to prove, e.g., proportional, without satisfying conferral or subsidiarity. If such is the case, and EU initiatives are found in violation of (one of) the principles, they may be challenged by the national courts (or the EU Commission itself), and deemed *ultra vires*: exceeding legal limits, and ultimately annulled, before the CJEU.[1274]

The Treaty proceeds to define conferral, subsidiarity, and proportionality in more detail – and so does the analysis.

10.4.1 Conferral

In accordance with article 5 TEU[1275] and the principle of conferral, the EU needs to rely on a legal basis that falls within the limits of its competence. Two potential legal bases have been suggested for the adoption of an EPC, and will be examined in turn: 82 TFEU, and 352 TFEU.

10.4.1.1 Article 82 TFEU

Article 82 TFEU allows the Union to harmonise domestic standards. It shall be recalled that this provision declares:[1276]

> **To the extent necessary to facilitate mutual recognition** of judgments and judicial decisions and […] judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules […]. They shall concern: […] (b) the **rights of individuals** in **criminal procedure.**

[1274] See also the analysis in chapter 3 of this thesis.
[1275] TEU, art 5 para 2.
[1276] TFEU, art 82 para 2, emphasis added.

In his Opinion, referring to domestic detention standards, AG Bot noted that article 82 TFEU "presents a legal basis for harmonisation of national legislation in order to facilitate mutual recognition",[1277] a position further adopted by AG Pitruzzella.[1278] The European Parliament has reiterated this point, calling for the adoption of an EPC on the basis of article 82 TFEU – while the Parliament makes no explicit reference to that article, it nevertheless mentions mutual recognition as the justification behind such action, hence explicitly pointing towards article 82 TFEU.[1279] Scholarship has argued for the same article to be utilised as a legal basis towards adopting prison standards.[1280]

Would harmonisation of detention conditions fall under the scope of article 82 TFEU?

Such harmonisation must be *necessary to facilitate mutual recognition*. It seems that this condition is fulfilled. Harmonisation of detention standards would indeed pursue the functional imperative of safeguarding mutual trust and recognition. Further, harmonisation seems necessary to safeguard mutual trust and mutual recognition.[1281] Disparate, inadequate prison systems are conceptualised as

[1277] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, Opinion of AG Bot, paras 100 and 182.
[1278] Case C-653/19 *Criminal proceedings against DK* [2019] ECLI:EU:C:2019:1024 [2019], Opinion of AG Pitruzzella; see further Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, para 90.
[1279] European Parliament, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (European Parliament, 2017) 2015/2062(INI), recital 3.
[1280] See indicatively Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221; Leandro Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61; Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?' (2016) 3 European Papers 943; Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311.
[1281] For an analysis on Article 82(2) TFEU, see Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?' (2022) 28 European Journal on Criminal Policy and Research 465; see also Gert Vermeulen and Wendy

limitations to the functioning of the legal principle of mutual trust, and an issue to be addressed via litigation. This utilitarian function of AFSJ measures on individual rights matches the functional imperative.

Yet, article 82 TFEU also dictates that harmonisation must be of *individual rights* in *criminal procedure*. There are two issues here. The first concerns the notion of 'individual rights'. Both the Parliament's Resolution examined previously, and the Council of Europe's Recommendation which serves as blueprint for the Parliament's Resolution, do not refer to detainee rights. Rather, they set out to harmonise detention conditions and regimes in general, thus envisioning a seemingly broader scope than the one provided by the legal basis. Secondly, it is unclear whether *criminal procedure* extends to detention. This term poses two problems. Firstly, detention conditions – and prison law in general – may fall under the umbrella of substantive (rather than procedural) law in the legal systems of some member states. Secondly, post-trial detention arguably escapes the scope of the Union's competence, since it is not part and parcel of criminal procedure, but rather comes in its aftermath.

It has been argued that these considerations may be overcome as follows.[1282]

Regarding the condition to harmonise *individual rights*, scholars have suggested a conceptualisation of detention conditions as constituting rights themselves. The argument is that the detention environment should not be regarded as consisting

De Bondt, *Justice, Home Affairs and Security: European and International Institutional and Policy Development* (Maklu 2015).

[1282] For an analysis, see also Christos Papachristopoulos, 'On the Legitimacy of the European Prison Charter' (Maklu forthcoming); and Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311.

of a set of impersonal standards, which are parallel to individual rights. Instead, detention conditions should be considered as belonging to the very core of the EU penal imaginary itself. Poor detention conditions do not give rise to individual rights violations; rather, poor detention conditions are to be deemed as individual rights violations themselves. In particular, it has been suggested that poor detention conditions constitute part and parcel of article 6 CFREU, encompassing the right to liberty and corresponding to article 5 ECHR. This is because article 6 CFREU declares that any deprivation of liberty should only occur on the basis of clear, foreseeable, accessible rules and procedures. Detention conditions that are disparate and inadequate contradict this requirement. The argument rests on disparity: the EU penal imaginary proclaims certain conditions, which would make one believe that the EU prison systems operate in a humane, tidy, orderly manner. Yet the judicial and empirical findings on the ground obviously contradict this legislative and normative expectation. Consequently, prison conditions do not constitute clear, foreseeable, accessible rules under article 6 CFREU. The detainee's right to liberty is directly undermined, and harmonisation becomes possible because harmonising detention conditions would equal harmonising individual prerogatives (specifically those falling under the scope of article 6 CFREU).[1283]

The argument has theoretical merit and is well articulated. It could arguably be expanded to allow for a similar reading of other relevant CFREU and ECHR rights,

[1283] Leandro Mancano, 'Storming the Bastille: Detention conditions, the right to liberty and the case for approximation in EU law' (2019) 56 Common Market Law Review 61.

hence fulfilling the *individual rights* requirement of article 82 TFEU.[1284] Yet it does not necessarily follow the ECtHR approach, as already examined.[1285] Further, it is not at all clear whether member states would appreciate such a scholarly interpretation, as 'detention conditions' and 'detainee rights'[1286] are clearly two distinct terms, and the member states explicitly foresaw the possibility to regulate on the latter, not the former.

Regarding the *criminal procedure* requirement, the argument rests on the following two pillars.

Firstly, criminal procedure as a notion differs from that of criminal proceedings. Turning to the wording of procedural rights Directives: it has already been stated that these Directives extend to pre-trial detention only. Yet, these Directives refer to the rights of individuals *in criminal proceedings*. Consequently, criminal proceedings is understood "to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal".[1287] Criminal *procedure*, it follows, does not have the same meaning or scope. Instead, it must necessarily have a broader scope, extending beyond the final judgment, including

[1284] See also the relevant discussion in Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022).
[1285] Chapter 2 of this thesis.
[1286] Granted, the terms 'detainee' and 'human' rights are also different, yet the EU penal imaginary leaves no doubt as to the universal nature of human rights, expanding to all human beings, including detainees.
[1287] Note the wording of the Directives as analysed under section 7.3 of this thesis; for an analysis see Adriano Martufi and Christina Peristeridou, 'The Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) European Journal of Crime, Criminal Law and Criminal Justice 153.

the execution of the sentence at post-trial level – hence, detention standards as well.[1288]

Secondly, the EU is proving willing to assume action in both pre- and post-trial detention. Scholars have fleshed out this argument in more detail, referring to the willingness of EU bodies to bring both pre- and post-trial detention standards under the EU law umbrella. It shall be recalled that the European Parliament and Commission have both called for EU action in procedural and material aspects of detention, without differentiating between pre- and post-trial stages of detention.[1289] Similarly, the European Council, the EU institution comprising heads of state or government responsible for defining the general political direction and priorities of the European Union, has supported implementation of the European Prison Rules (which, as already stated, are essentially a mirror of the EPC),[1290] demonstrating a similar willingness to bring all aspects of detention under the EU umbrella.[1291] Another point is that the EU has adopted various FDs that shape detention, regulating the transfer of pre- and post-trial detainees – consequently, the EU seems willing to act in the broad area of detention.[1292] The

[1288] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327; Leandro Mancano, 'Storming the Bastille: Detention conditions, the right to liberty and the case for approximation in EU law' (2019) 56 Common Market Law Review 61

[1289] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44.

[1290] VW Ballegooij, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS, European Added Value Unit 2017) 1, 68ff; see also European Council, *The Stockholm Programme: An open and secure Europe serving and protecting citizens* (European Council 2010) OJ C115/1.

[1291] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327.

[1292] See chapter 4 of this thesis.

CJEU itself has adopted a broad definition of detention,[1293] stipulating rules on detention and prison conditions in third (non-EU) states.[1294]

On the basis of these two reasons, detention *lato sensu* should fall under the criminal procedure umbrella of article 82 TFEU.

Ultimately, from the EU perspective, both the scholars and legislative (the trinity of Parliament-Council-Commission) concur that an EPC seems necessary for the continuous operation of the AFSJ mutual trust and recognition principles, and legally feasible, on the basis of article 82(2) TFEU. Whether the member states would subscribe to this interpretation is a different matter.

There is another difficulty here, relating to the scope and objective of article 82 TFEU. This provision may well serve as a legal basis for the purposes of harmonising prisons in the mutual trust and recognition context. Yet, if we subscribe to the simultaneous need for the EU to address the principled imperative as well, conferral falls short, as article 82 TFEU is simply too narrow to invite any considerations for EU action in detention as a self-standing objective. In other words, article 82 TFEU is in place solely to promote judicial cooperation – article 2 TEU-relevant considerations are ignored. Yet, as noted, any approximation in the field of detention "should reflect both functional and self-standing views on the advancement of procedural rights"[1295] – and it is clear that

[1293] Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] PPU JZ ECR I - 610, para 47.
[1294] Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2019) 20 ERA Forum 327.
[1295] Jannemieke W Ouwerkerk, 'EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application (Editorial) (2019) 27 european journal of crime, criminal law and criminal justice 89, 96.

"the functional scope of Article 82(2) tfeu is too confined and too one-sided to develop a self-standing EU policy" to this end.[1296]

10.4.1.2 Article 352 TFEU

Alternatively, article 352 TFEU may serve as a potential legal basis. The article declares:[1297]

> 1. **If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties**, and the Treaties have not provided the necessary powers, the Council, acting **unanimously** on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
>
> […]
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

This provision is meant to provide the Union with the power to act in unforeseen circumstances, as necessary, and without being held back by the absence of an express, pre-existing legal basis.[1298] The CJEU has ruled that article 352 TFEU has been "designed to fill the gap where no specific provisions of the Treaty confer on the [EU] institutions express or implied powers to act".[1299] In this fashion,

---

[1296] ibid 89, 96.
[1297] TFEU, art 352, emphasis added.
[1298] Theodore Konstadinides, 'Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 Yearbook of European Law 227, 228; Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and Nikolas Lavranos (eds), *Interface Between EU Law and National Law* (1st edn Europa Law 2007) 1, 13, 31.
[1299] Opinion 2/94, *Accession to ECHR (ECHR I)* [2014] EU:C:1996:140, paras 29-30. See also Case T-44/14, *Costantini* [2016] EU:T:2016:223, para 53.

it functions as an umbrella provision, or 'flexibility' clause.[1300] This should be noted, as it allows for the achievement of both the functional and the principled EU imperative in prisons (unlike article 82 TFEU).

In this light, the argument could be made that harmonisation of (pre- and post-trial) criminal detention at EU level could be made possible, as it proves a necessary precondition to attain not one, but two EU objectives: promoting EU values,[1301] and ensuring the continuous and effective operation of the AFSJ.[1302] The argument is strengthened once one considers that article 352 TFEU allows for the EU action even where there is a specific legal basis, yet the measure to be enacted goes beyond the scope of the specific legal basis.[1303] In other words: if one subscribes to the view that article 82 TFEU already allows for the harmonisation of individual rights in criminal procedure, but finds its scope does not extend to post-trial detention too, this is not an issue, as article 352 TFEU still remains relevant and a valid option. In this sense, relying on a combined reading of articles 82 and 352 TFEU may prove enough.[1304] Use article 82 TFEU to harmonise pre-trial detention, and article 352 TFEU to harmonise its post-trial counterpart.

[1300] This was the title given to the provision in Article I-18 Constitutional Treaty; see further Manuel Kellerbauer and Marcus Klamert, 'Article 352 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2072ff.
[1301] TEU, art 3 para 1.
[1302] TEU, art 3 para 2.
[1303] Case 45/86 *Commission v Council* [1987] EU:C:1987:163, para 15.
[1304] Case C-166/07 *International Fund for Ireland* [2009] ECR I-07135, para 69.

In practice, there are difficulties. Article 352 TFEU requires unanimity, which, in such a sensitive topic, may prove difficult to secure.[1305] The requirement for unanimity renders this article practically void in another fashion as well. On the one hand, it may be that the member states will agree on the need for EU litigation in detention, and allow for a broad reading and interpretation of article 82 TFEU, as suggested by EU scholars and bodies – in which case article 352 TFEU will give way to the more specific provision, and prove of no value. On the other hand, and if the member states remain reluctant to allow for EU penetration in the field of detention *lato sensu*, it follows that the unanimity requirement of article 352 TFEU will not be fulfilled.

It follows that if the EPC is adopted under the current Treaty framework, article 82 TFEU will most likely serve as the legal basis. This is problematic, as that article does not allow for the achievement of the principled imperative, but is tied to functional considerations.

10.4.2 Subsidiarity, and proportionality

It is doubtful whether either article 82 or 352 TFEU allow for the harmonisation of detention conditions and detainee rights *lato sensu.* It would be better for the EU to reform the Treaties, and provide an explicit ground-legal basis to this end.

Yet, and even if we accept the arguments put forth by EU scholars and institutions, and conclude that conferral is satisfied because the conditions of article 82 TFEU

[1305] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and comparative law 704, 717.

are fulfilled, we still need to examine the principles of subsidiarity and proportionality.

Subsidiarity, it shall be reminded, translates to the question: even if we accept that the EU could act, *should* the EU act? It is maintained that the answer to this query is positive. The EU should act, in light of its principled and functional imperative, in light of the extend and gravity of the issue as stemming from structural shortcomings that give rise to systemic violations, and in light of the failure in part of both states and other pan-European (CoE/UN) initiatives to sufficiently resolve the situation. It is *necessary* for the EU to harmonise prisons to rescue its mutual trust and recognition-based judicial cooperation framework.[1306]

As for proportionality: it broadly dictates that the specific EU measures to be adopted must be consistent with the EU *acquis*; suitable to achieve the desired end; necessary; and not impose an excessive burden.[1307]

The EPC would indeed be consistent with the EU *acquis*, as it would align to current EU judicial cooperation policies, values, and objectives. The EPC (in the form and scope envisaged under this thesis) would also be very much suitable to

[1306] See TFEU, arts 67 and 82; note also Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144, 145; Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439; Wouter van Ballegooij, 'Measuring the Added Value of EU Criminal Law' (2016) 2 eucrim 90; and Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the treaties.

[1307] When the EU is legislating, proportionality is often skipped or assigned only a marginal importance – the criteria on the basis of which the EU assesses the proportionality of its own policymaking are not clear or coherent at all. See for a discussion Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439; with further references to Takis Tridimas, The General Principles of EU Law (2nd edn, Oxford University Press 2006) 1, 138; and Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 143ff. NB: different notion to the proportionality of penalties concept outlined in chapter 2 of this thesis.

fulfil the functional and principled imperatives both. I am not advocating that harmonisation at EU level is all that it takes for the prison crisis to disappear – it is, however, an important first step to the right direction, and with considerable potential to achieve its pursued ends. As for necessity, this is to be understood as the least restrictive measure in the Union's arsenal. Given that the EU has already enacted management and persuasion measures which are yet to fulfil the objective, it seems that litigation and enforcement are the next logical step. Finally, and as regards the excessive burden criterion: this is a balancing act, between the benefits that the EU action would achieve, and the costs it will incur. The benefits are clear, in the form of the functional and principled imperative. However, the costs of an EPC arguably outweigh such benefits.

This is because the EPC would essentially seek to harmonise prison law in its entirety: an entire discipline and field of state sovereignty harmonised at EU level, a measure that is not justified on the basis of article 82 TFEU alone.

To understand this latter point, it is important to understand the legitimacy challenges facing the EPC in the current political and Treaty framework.

10.5 The EPC legitimacy

Even if legal concerns relating to the principle of conferral are circumvented, it is doubtful whether EU litigation in post-trial criminal detention (the *sanctum sanctorum* of Westphalian sovereignty, and a highly symbolic area)[1308] would be

[1308] Emma Kaufman and Mary Bosworth, 'The prison and national identity: citizenship, punishment and the sovereign state' in David Scott (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170.

accepted by the member states.[1309] Instead, it is likely that, in such a scenario, the Union would face allegations of competence creep.[1310] This holds especially true in consideration of the development of the AFSJ, and the choice made to rely primarily on mutual trust and recognition, and to avoid harmonization.[1311] The EPC would go above and beyond Tampere, as it would positively approximate each EU prison system in its entirety under a common minimum standard. This would be equal to replacing the orchestra with a single synthesizer, which would produce all the sounds of the individual instruments in itself.[1312] Indeed, and if the EPC ever became a reality, all EU prison systems would have to abide not only by the same values, but also by the same rules and procedures – in this context, mutual trust becomes obsolete, for "if the 'other' becomes much like 'myself', then trust is no longer a real issue".[1313] The very nature of the EU has been described as a system of negotiation, and the EU bodies or scholars should do well to consider national sovereignty and will,[1314] as expressed in the lack of a self-standing prison competence, and the Tampere preference of negative (over

[1309] Pedro Caeiro, Sonia Fidalgo and Joao Prata Rodrigues, 'The evolving notion of mutual trust' 25 Maastricht Journal of European and Comparative Law (2018) 689, 690.
[1310] Stephen Weatherill, 'Competence Creep and Competence Control' 23 *Yearbook of European Law* (2004) 1, 7; Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' 16 European Constitutional Law Review (2020) 1, 29.
[1311] Willem Thomas Eijsbouts and J Reestman, 'Editorial: Mutual Trust' 2 *European Constitutional Law Review* (2006) 1; Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) 1; European Parliament, *European Council Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999* (1999) <https://www.europarl.europa.eu/summits/tam_en.htm> (accessed 24 July 2023), para 33; Larry E Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553, 576, 581, 584.
[1312] Matti Joutsen, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 8 < http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021) 29, 30.
[1313] Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93, 105; Larry E Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553, 574.
[1314] Ole Elgstrom and M Smith, 'Introduction: Negotiation and policy-making in the European Union: processes, system and order' (2011) Journal of European Public Policy 673.

positive) harmonisation – and avoid the temptation of any overly broad interpretations that would in effect amount to *Moro*-style, "Al Capone" stratagems.[1315]

There is another potential cost here, relating to the perceived legitimacy of the EU. If doctrine proves to have minor or no impact, there is the risk that the member states will turn against the one producing the norms – that is, the EU itself, as policymaker (via the Parliament, Council, and Commission, or the judicial activism of the CJEU), or supervisor of the application of implemented norms (via the CJEU and the Commission). In other words, if harmonization fails, and detention conditions persist in their current disparate, harsh state, the Union will be held accountable for such failings. Such developments could further undermine legitimacy and hinder trust, both in respect to fellow states, and the EU itself.

This risk is only enhanced should one consider that national authorities may be unwilling or unable to concede to the already existing detention standards in place, much less allow new ones.

National authorities may be unwilling to accept the EPC. This may be due to political or management arguments. The coherence, binding nature, and enforcement mechanisms that an EU Charter would introduce, would allow it to have a greater impact compared to the regulatory framework currently in force. From a political point of view, it is submitted that prisons serve as a tool in the

[1315] Csongor István Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States' (2017) 27 Indiana International & Comparative Law Review 1.

state arsenal, used to control populations, secure legitimacy, and exert an image of control. Prisons are used by governors, to govern – and it may be in the governors' best interests to keep prisons in their current state.

Criminological findings suggest the following. Actual crime statistics and rates,[1316] findings deriving from criminal justice and penology research and expertise,[1317] human rights aspirations, even the perceptions of the public towards crime risk,[1318] all serve a secondary purpose. Instead, the primary purpose and objective of state actors, when regulating and enforcing prison policies, revolve around control and symbolism. State actors use detention as a tool to simultaneously foster and respond to punitiveness. States that provide for structurally inadequate and overcrowded prison regimes are often punitive,[1319]

[1316] Franklin E Zimring, 'Imprisonment rates and the new politics of criminal punishment' (2001) 3 Punishment and Society 161; Franklin E Zimring, 'The scale of imprisonment in the United States: Twentieth century patterns and twenty-first century prospects' (2010) 100 The Journal of Criminal Law and Criminology 1225.
[1317] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) 1, 142ff.
[1318] Susanne Karstedt and Rebecca Endtricht, 'Crime And Punishment: Public Opinion And Political Law-And-Order Rhetoric In Europe 1996–2019' (2022) 62 The British Journal of Criminology 1116.
[1319] Michael Tonry, 'Determinants of Penal Policies' (2007) 36 Crime and Justice 1, 5; Besiki Kutateladze, 'Measuring state punitiveness in the United States' in Helmut Kury and Evelyn Shea (eds), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (Universitatsverlag Dr. Brockmeter 2011) 1, 151, 155. See also Basiki Kutateladze, *Introducing a New Measurement of State Punitiveness and Testing it Across the United States* (ProQuest 2008).

tending towards 'tough-on-crime' policies and excessive punishment,[1320] harsh and severe penalties,[1321] cruelty,[1322] and penal harm.[1323]

On the basis of such findings, the analysis contends the following. It is scientifically probable that structurally problematic prisons that systemically undermine human rights are beneficial to the governors of a state, for they use such prisons to assert control, and gain a political advantage. In response, an EPC with binding, enforcing effect would have the potential to curb such state interests, by de-incentivizing punitive approaches to prison.

Even if states demonstrate the political will to comply with the procedural and material standards proposed by the EPC, they may simply find themselves in a position where they are unable to do so. States may prove unwilling to allow for a binding Directive on prison standards, as they are well-aware that they do not possess the resources necessary to give effect to the will of the European legislator. This holds especially true for member states suffering from the results of the Eurozone and debt crisis, inflation rates, and the global economic slowdown in the aftermath of the pandemic outbreak. The position of the Greek government in response to the CPT summarises this argument:[1324]

[1320] Roger Matthews, 'The myth of punitiveness' (2005) 9 Theoretical Criminology 175.
[1321] James P Lynch, 'A comparison of prison use in England, Canada, West Germany, and the United States: A test of the punitive hypothesis' (1988) 79 The Journal of Criminal Law and Criminology 180; Mona Lynch, 'Theorizing punishment: Reflections on Wacquant's Punishing the Poor' (2011) 37 Critical Sociology 237; James Q Whitman, *Harsh justice: Criminal punishment and the widening divide between America and Europe* (Oxford University Press 2003).
[1322] Jonathan Simon, ''Entitlement to cruelty': Neo-liberalism and the punitive mentality in the United States' in Kevin Stenson and Robert R Sullivan (eds) *Crime, risk and justice: The politics of crime control in liberal democracies* (Willan 2001) 1, 125.
[1323] Todd R Clear, *Harm in American penology* (State University of New York Press 2014).
[1324] Council of Europe, *Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011*, CPT/Inf (2012) 2, 4, 75, emphasis added.

> [There are] well-known fiscal problems that our country [has been] facing [over] the past 1.5 years. We will not get into details, because we think it is **self-evident that the lack of financial resources implies insurmountable obstacles to the implementation of an effective correctional policy**, as with any other public policy.

Indeed, and to ensure detention conditions match the required standards, national authorities may have to repair and refurbish old facilities, or construct new ones; hire the personnel necessary to operate these facilities; ensure the technological equipment is adequately updated; provide for all the required materials and supplies; arrange for training, educational, and vocational activities, and so on. Such initiatives come at a cost, and may have a considerable impact on the public budget – especially if the reforms necessary prove extensive, in order to deal with recurring, structural issues.[1325] Such a cost may generate further backlash – especially if the EU pushes states to act.

Domestic capacity arguments also loop back to political arguments, as such arguments often align more to the administration, rather than the availability of funding *per se*.[1326] In other words, it is not necessarily that the state lacks the money to ensure detention conditions align to the prescribed EPC standards; rather, allocating resources to this end would mean taking away resources from some other objective, which, in the view of the state, takes priority over prisons. This holds especially true in states with punitive, tough-on-crime policies, as indicated above. The subsequent danger is that even if national authorities decide to allocate their budget towards improving conditions of detention, it may be that

[1325] Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311, 329.
[1326] Sappho Xenakis and Leonidas K Cheliotis, 'Carceral moderation and the Janus face of international pressure: A long view of Greece's engagement with the European Convention of Human Rights' (2018) 70 Law and Social Change 37.

a weak, inefficient legal, judicial, or executive structure further delimits any capacity to comply – in this sense, institutional constraints.[1327]

Such costs and risks raise doubts as to whether the adoption of an EPC such as the one envisioned in this analysis would be legitimate, and in line with the proportionality arguments.

10.6 Conclusion

In light of such observations, the legally binding nature, coherence, and enforcement mechanisms of the EPC could prove very beneficial – though it is disputed whether the EU has the legal capacity to actually adopt an EPC in the form envisaged in this thesis. Simultaneously, these very traits may pose a challenge, by disincentivizing states that lack the political will or capacity from agreeing with the EU institutions and scholars. Further, the adoption of such a Charter by the EU specifically would be contested, and generate backlash. This is no less due to the lack of the Union's perceived legitimacy to act in the field. Indeed, the EU penal imaginary is not part and parcel of the EU agenda, nor is in the mind of the EU citizen or scholar, the same way that e.g. the ECHR is. The moral authority of the ECHR and the Strasbourg Court is definitely stronger and better-established in the field.[1328]

[1327] Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 European Journal of International Law 205; Nikos K Koulouris, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (Nomiki Vivliothiki 2009).

[1328] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 260; K Karsai and L Wörner, 'European Union and Council of Europe' in Kai Ambos and Peter Rackow (eds) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 5ff.

The following chapter turns to EU actions that could help in this regard.

CHAPTER 11

ENHANCING THE UNION'S LEGITIMACY AS A DETENTION ACTOR

11.1 Introduction

The EPC adoption remains elusive, at least until further Treaty reform, or at least via some "surgical strike"[1329] that would specifically target detention regimes. In the current political climate, this is unlikely to happen anytime soon. Yet, the situation in prisons may not well be ignored – and the current EU initiatives, while commendable, fall short of the task. What is to be done with prisons in the EU, *today*?

This chapter lays out a few considerations in response. The thesis so far focused on the problems caused by prisons to the EU, and examined EU initiatives in prison law. Following up on such findings, it is submitted that the EU should redefine its current initiatives, with a focus particularly on acknowledging the impact of its judicial cooperation policies on the individual. Further, the EU should account for the effect of its criminal policies in *ius puniendi.*

If the previous chapter examined the potential of regulating the behaviour of the orchestra members, this chapter focuses on the behaviour of the conductor – the EU itself.

11.2 Accounting for the impact of EU judicial cooperation on the individual

[1329] I owe this expression to Andrew Duff, 'Five Surgical Strikes on the Treaties of the European Union' (2023) 8 European Papers 9.

The EU penal imaginary has not been ingrained in the public conscience, in the same fashion as the CoE standards has.[1330] To legitimately emerge as a detention actor, the EU should reaffirm its commitment to its own values, and acknowledge the place of the individual detainee in EU law.

To this end, the EU should add a *de iure* refusal ground to the EAW and ToP FDs; revisit the *Aranyosi* two-step approach; monitor detention conditions on the ground; and interpret the mutual recognition and trust principles under the lens of article 2 TEU, rather than in opposition to that article.

These propositions flow from the analysis conducted in previous chapters already, and have also been periodically analysed by scholars and policymakers. To this end, I shall only succinctly outline them, before proceeding to discuss the issue of EU criminal law, which has largely escaped the discussion so far.

11.2.1 Adding a *de iure* refusal ground to the EAW/ToP FDs

As already noted, the EU has established its very own "(quasi) automatic system of forced movement of persons".[1331] Mutual recognition instruments, specifically the EAW and the ToP FDs, allow for detainees to be transferred from one EU prison to another. The decision of issuing a EAW or ToP request lies on the member state. Similarly, the regulation and enforcement of detention regimes remains a state prerogative. Nevertheless, it is exactly in the aftermath of mutual

[1330] András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 260; K Karsai and L Wörner, 'European Union and Council of Europe' in Kai Ambos and Peter Rackow (eds) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 5ff.
[1331] Leandro Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61, 77.

recognition proceedings that individuals find themselves exposed in a structurally inadequate prison system that poses systemic risks to their individual prerogatives. It is EU law itself that has provided for a regulatory framework that allows the issuing state to demand the surrender or transfer of the individual – further, the EU and the CJEU have considerably delimited the power of either executing state or individual to refuse such requests.[1332]

Markedly, while both FDs acknowledge the place of rights in the EU *acquis*,[1333] human rights concerns *do not* constitute a *de iure* ground of refusal.[1334] This means that the executing state has to surrender/transfer, unless the (rather strict) *Aranyosi* two-step test conditions are met. Granted that the effect of successful implementation of both FDs is detention, this placement of the individual – the rights of who assume a secondary role, rather than being placed firmly at the centre of mutual recognition mechanisms – is rather unusual and deeply problematic for coercive measures of such consequence. The EAW and ToP FDs are designed to facilitate the job of the issuing national authorities, rather than safeguard individual prerogatives. The mutual recognition structure emerges as an effective, automated procedure characterised by unilateral decisions made by

[1332] See chapters 4, 7, and 8 of this thesis.
[1333] Article 1 para 3 EAW and Article 3 para 4 ToP both declaring "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".
[1334] Nina Marlene Schallmoser, 'The European arrest warrant and fundamental rights' (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 135.

the issuing state, which both executing state and individual have to respect,[1335] and "suffer what they must".[1336]

To address such concerns, the EU should add an explicit *de iure* refusal ground of refusal to the EAW and ToP FDs. This would considerably empower both the executing state and the individual concerned. This approach would also support the reintegration function and objective of the EAW and ToP FDs. The FD EAW[1337] aims to facilitate "the execution of the sentence passed in the country of arrest **when it is there that the person is most likely to achieve integration**".[1338] Similarly, the FD ToP,[1339] which seeks to transfer the detainee to where her "centre of interests and social links are located",[1340] seems to hold, through its very purpose, a rehabilitative function.[1341] The reintegrative function of cross-border detainee transfer in the EU should not be forgotten.On a more

[1335] Adriano Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 New Journal of European Criminal Law 43.
[1336] Thucydides, *The History of the Peloponnesian War* (Richard Crawley trans, Project Gutenberg 2003) 1, 5.89 < https://www.gutenberg.org/files/7142/7142-h/7142-h.htm> (accessed 20 July 2023).
[1337] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.
[1338] European Commission, *Proposal for a Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* [2002] COM(2001) 522 final, emphasis added.
[1339] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.
[1340] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2018) 25 Maastricht Journal of European and Comparative Law 672, 684.
[1341] Eveline De Wree, Tom Vander Beken and Gert Vermeulen, 'The transfer of sentenced persons in Europe' (2009) 11 Punishment and Society 111; Dirk Van Zyl Smit and Róisín Mulgrew, *Handbook on the International Transfer of Sentenced Persons* (United Nations 2012) 1, 10.

symbolic level, this would send a message to the member states: human rights matter, more so than quasi-automatic judicial cooperation and forced movement.

Granted, doing so would delimit the functional objective – yet inversely promote the axiological one. Progressively, and as prison systems improved, the executing states would have to rely less on such a refusal ground.

11.2.2 Rethinking the *Aranyosi* two-step approach

In the same spirit, the *Aranyosi* two-step test should be revisited. The burden of proof should be reversed; and the two-step test should be transformed into a one-step limb.

Currently, it falls on the executing state and the individual concerned to prove the existence of a systemic *and* individualised risk. I believe this to be unfair and detrimental for individual prerogatives. It is submitted that the burden of proof should be reversed to better reflect principled considerations and the place of the individual. It is maintained that the executing state and the individual should be required to provide evidence relating to the existence of structural deficiencies that give rise to systemic risks, in line with the *Aranyosi* requirements (objective, reliable, properly updated evidence).[1342] Once such evidence has been provided, it should give rise to a presumption that the individual concerned will suffer, in case of surrender/transfer. It should then fall to the issuing state to provide concrete evidence that discounts the individualised risk and refutes the presumption of non-compliance.[1343] This would take the onus away from the

[1342] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198, para 89.
[1343] Albeit relating to the rule of law and mutual recognition more generally, a similar point has been recently advocated by Cecilia Rizcallah, 'The principle of mutual trust and the protection of

individual/executing state to have to come up with concrete evidence that disproves the assurances of the issuing state – instead, the latter would have to disprove a presumption formed against it. Interestingly, the CJEU has already adopted such an approach, in its rule of law jurisprudence. Indicatively, in its *LM* judgment, the Court stated that if the information provided by the issuing judicial authority to the executing state cannot disprove the real risk to the individual, then the executing state must refuse.[1344] In such a fashion, the CJEU placed the burden of proof on the issuing state. A similar clause should be inserted to the EAW and ToP FDs.This would also be in line with ECtHR jurisprudence.[1345] To disprove the assumption against it, the issuing state should provide concrete evidence that extends beyond mere assurances. In response, the individual should have the potential to challenge such evidence, and the executing state should be allowed to receive individual claims challenging the validity of the evidence provided.

In addition, the EU should have in place an investigatory mechanism to check the validity of such evidence – the FRA would be one candidate.[1346] The EU should

fundamental rights in the Area of Freedom, Security and Justice: A critical look at the Court of Justice's stone-by-stone approach' (2023) Maastricht Journal of European and Comparative Law https://journals.sagepub.com/doi/10.1177/1023263X231205826 (accessed 30 October 2023).

[1344] Case C-216/18 PPU, *LM*, para 59, and paras 73ff.

[1345] See the analysis in Cecilia Rizcallah, 'The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice: A critical look at the Court of Justice's stone-by-stone approach' (2023) Maastricht Journal of European and Comparative Law https://journals.sagepub.com/doi/10.1177/1023263X231205826 (accessed 30 October 2023); referring further to *Avotins v Latvia* App no 17502/07 (ECtHR, 23 May 2016), para 116; and *Bivolaru and Moldovan v France* App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021), para 106.

[1346] Gabriel N Toggenburg and Jonas Grimheden, 'The Rule of Law and the Role of Fundamental Rights Seven Practical Pointers' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 1, 166; see also section 3.2 of this thesis. It is indeed telling that the bulk of the primary data on detention is deriving from the CoE – the legitimate, effective development of the EU as a detention actor should see this addressed.

be allowed to monitor post-execution detention conditions. In case the individual concerned suffers, then the effects of the mutual recognition instrument should be annulled *ex tunc* and the individual transferred to another prison (or state, if necessary) until the risk can be safely discounted.

Finally, and to supplement such measures, any individual claim of a real risk in case of surrender/transfer, should give rise to a presumption that the issuing state should have to disprove. This should be the case even if such an individual claim is not backed up by evidence of structural, generalised deficiencies (though such evidence could be used as evidence to support such claim). This would be similar in outcome to the *E. D. L.* case.[1347]

In sum: should the individual or executing state present a properly evidentiated claim of structural deficiencies *or* a real risk, the burden of proof should fall on the issuing state; and the EU should monitor detention conditions on the ground, and reverse the effects of successful mutual recognition requests, when necessary.

Granted, such venues would once more likely hinder the functional objective of judicial cooperation in the AFSJ. However, this would only be temporary. Long term mutual trust would be enhanced, as it would be real rather than presumed – and individual prerogatives would be safeguarded more effectively.

11.2.3 Promoting mutual recognition instruments alternative to detention

[1347] For a slightly different approach, advocating for a singular one-limb test that focuses exclusively on an individualised, real risk, see Cecilia Rizcallah, 'The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice: A critical look at the Court of Justice's stone-by-stone approach' (2023) Maastricht Journal of European and Comparative Law https://journals.sagepub.com/doi/10.1177/1023263X231205826 (accessed 30 October 2023).

It was already shown that detention (especially PTD) is all too often (ab)used at domestic level.[1348] Interestingly, data suggests that the same holds true in regards to mutual recognition instruments that result in detention – in particular the EAW.[1349] The EU should strive towards promoting measures alternative to detention. The Commission has already pushed for this.[1350] Of particular importance here would be the mutual recognition of financial penalties, as provided in Framework Decision 2005/214/JHA;[1351] the FD on the European Supervision Order (ESO), imposing non-custodial pre-trial measures and having them supervised in the suspect's state of lawful and ordinary residence;[1352] and the FD on Probation and Alternative Sanctions.[1353]

Another idea to prevent the disproportionate use of mutual recognition instruments that result in the detention of the individual would be to allow the executing authority to conduct a proportionality test.[1354] The CJEU already has allowed such a proportionality assessment to be undertaken, albeit only in

[1348] Chapters 2 and 10 of this thesis.
[1349] Fair Trials: *European Parliament's proposals will not prevent abuse of European Arrest Warrants* (2021) https://www.fairtrials.org/news/european-parliament%E2%80%99s-proposals-will-not-prevent-abuse-european-arrest-warrants (accessed 25 May 2023).
[1350] Commission European Commission, Commission Notice: 'Handbook on how to issue and execute a European arrest warrant' (European Commission 2017) 2017/C 335/01, OJ C 335/1.
[1351] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16; European Commission, Commission Notice: 'Handbook on how to issue and execute a European arrest warrant' (European Commission 2017) 2017/C 335/01, OJ C 335/1, para 2.5.5.
[1352] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20; European Commission, Commission Notice: 'Handbook on how to issue and execute a European arrest warrant' (European Commission 2017) 2017/C 335/01, OJ C 335/1, para 2.5.3.
[1353] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16 December 2008; European Commission, Commission Notice: 'Handbook on how to issue and execute a European arrest warrant' (European Commission 2017) 2017/C 335/01, OJ C 335/1, para 2.5.4.
[1354] Similar to the AG's Bot proposition, see section 7.2 of this thesis.

relation to EAWs issued by some body of the issuing authority that is not itself a court.[1355] Such a possibility should be extended to all bodies participating in the administration of justice, courts or otherwise.

In similar fashion, the EU could push for the use of remote hearings undertaken by means of video conferencing/audio calls.[1356] The rationale here is to allow state A to try a wanted individual while the latter is still in the territory of state B. This would eliminate the need for state A to issue a EAW – in practice, the length of pre-trial detention would be diminished if not altogether eliminated, since the executing state would not have to arrest the individual for the purposes of surrender. The trial would occur without delay, and only a guilty verdict would result in detention.[1357]

Once more, such measures would only be temporary, and in place to properly safeguard individual prerogatives, until the situation improves on the ground. Their symbolic and practical significance (no less because of the pressure exerted on EU states to address prison issues, so as to resume judicial cooperation) should not be underestimated.

11.2.4 Interpreting mutual trust and recognition in light of the EU penal imaginary

[1355] Joined Cases C-508/18 and C-82/19 *PPU OG and PI* [2019] ECLI:EU:C:2019:456, para 75.
[1356] *EU 2019-2023 Action Plan European e-Justice* [2019] OJ C 96/05; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Digitalisation of Justice in the European Union: A toolbox of opportunities* (European Commission 2020) COM(2020) 710 final.
[1357] Gwen Jansen, 'The need for a new roadmap of procedural safeguards: a lawyer's perspective' (2021) 22 ERA Forum 279, 284; see also Vânia Costa Ramos, Michiel Luchtman, and Geanina Munteanu, 'Improving Defence Rights Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings' (2020) 3 eucrim 230.

More generally, the EU should reframe its initiatives. Mutual trust flows from the EU human rights *acquis,* and mutual recognition is a tool to safeguard the EU values and goods. Granted, both mutual trust and recognition are of paramount importance in the AFSJ. Yet they remain in place to promote other functions, they do not constitute self-standing objectives, goods, or values in themselves.

It follows that current EU initiatives in detention, while commendable, should take care to not lose focus of the principled objective. Ever since the very early days of mutual recognition and trust, the EU placed its values firmly on the forefront of judicial cooperation.[1358] It should now abide by such ideals in practice, and escape any *Melloni* and *Opinion 2/13* tendencies.[1359] In simple terms, the EU should acknowledge the adverse consequences that mutual recognition instruments, in their current form, inflict on the individual.[1360]

This holds especially true for the CJEU. Besides the *Aranyosi* saga, the CJEU has dealt with mutual recognition instruments in a number of cases. It was noted previously that the mutual recognition instruments (particularly the EAW and ToP FDs) enshrine rehabilitation as a key principle and justification of criminal punishment. Nevertheless, in a series of contested cases, the CJEU – and while seemingly acknowledging rehabilitation as key for EU law – opted for a rather restrictive reading of mutual recognition instruments, prioritising their

[1358] European Parliament, *Resolution on respect for human rights in the European Union* [1997] OJ 1999 C 98/279, para 78.
[1359] Note the discussion in chapter 9 of this thesis.
[1360] Thomas Elholm, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?' (2009) 17 European Journal of Crime, Criminal Law and Criminal Justice, 191, 224; see also Irene Wieczorek, 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2019) 25 Maastricht Journal of European and Comparative Law 655.

effectiveness over the rehabilitative interests of the individual.[1361] I shall briefly analyse three cases of particular relevance, to showcase the general tendency of the CJEU to disregard individual rights and reintegration purposes even outside the criminal detention setting – I will then criticize this approach, and argue against it.

The specific CJEU cases are: *Wolzenburg, Popławski,* and *Ognyanov.*

Wolzenburg[1362] concerned a German citizen given a custodial sentence by German courts, with the sentence conditionally suspended.[1363] Subsequently, Wolzenburg moved, resided, and was employed in the Netherlands. Eventually, the German court revoked the suspension of his sentence, and issued a EAW to have him surrendered to Germany.[1364] Wolzenburg did not consent to his surrender, invoking instead article 4 FD EAW,[1365] so that he could stay and serve his sentence in the Netherlands.[1366] This would be in line with both individual rights and rehabilitation purposes.[1367] However, the CJEU ruled against Wolzenburg's request, on the grounds (*inter alia*)[1368] that he failed to present a

[1361] Adriano Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer' (2018) 9 New Journal of European Criminal Law 43.
[1362] Case C-123/08 *Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) – European arrest warrant issued against Dominic Wolzenburg* [2009] ECR I-9621.
[1363] ibid para 29.
[1364] ibid paras 30ff.
[1365] FD EAW, art 4 para 6, explicitly allowing the executing authority may refuse to surrender "if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law".
[1366] Case C-123/08 *Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) – European arrest warrant issued against Dominic Wolzenburg* [2009] ECR I-9621, paras 36ff.
[1367] Case C-66/08 *Kozłowski* [2018] EU:C:2008:437, para 46; see further Tony Marguery, 'EU citizenship and European arrest warrant: The same rights for all?' (2011) 27 Utrecht Journal of International and European Law 84.
[1368] For a full analysis of the relevant issues, see indicatively Agnieszka Grzelak, 'ECJ Judgment in case C-123/08 *Dominic Wolzenburg*' (2012) Polish Review of International and European Law

residence permit.[1369] Yet Wolzenburg could never have presented such a permit, because under national (Dutch) law such permits are issued after a period of five years.[1370]

In its reasoning the CJEU considered that article 4 EAW seeks to improve the individual's chances of reintegration.[1371] It also acknowledged that the existence or not of a residence permit is no more than a national administrative requirement serving a declaratory purpose (rather than giving rise to any substantive rights).[1372] The CJEU also considered the potential of such a requirement being discriminatory.[1373] Nevertheless, the CJEU concluded that the administrative formality is to be allowed, and article 4 EAW is to be interpreted restrictively.[1374] On the basis of such a technical, bureaucratic justification, the CJEU refused Wolzenburg's request, going against his rights and the reintegration ideal.

Such a verdict has been aptly criticized, as "[t]his is only consistent with the EAW objective of easing the surrender of requested persons and fundamentally disregards their prospects of rehabilitation".[1375] In other words, the CJEU allows

191; Ester Herlin-Karnell, 'Case comment Wolzenburg C-123/08' (2010) 73 The Modern Law Review 824; Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 338ff; Tony Marguery, 'EU citizenship and European Arrest Warrant: The Same Rights for All?' (2011) 27 Utrecht Journal of International and European Law 84; Christine Janssen, *The Principle of Mutual Recognition* (Oxford University Press 2013) 1, 207ff.

[1369] Case C-123/08 *Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) – European arrest warrant issued against Dominic Wolzenburg* [2009] ECR I-9621, paras 62ff.

[1370] ibid paras 20ff.

[1371] ibid para 62.

[1372] ibid para 53.

[1373] ibid paras 43 and 53.

[1374] ibid para 62.

[1375] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2019) 25 Maastricht Journal of European and Comparative Law 672, 683; see further Leandro Mancano, 'The place of prisoners in European Union law?' (2016) 22 European Public Law 717.

the rehabilitation ideal to hinge on an administrative task, a piece of paper – a conscious choice, to promote the effectiveness of mutual recognition, and give power to the issuing state. The individual, once more, comes as an afterthought.

In *Popławski*[1376] the CJEU indicated that just because an individual is a permanent resident in the executing country, the mutual recognition request of the issuing country should not be automatically declined. Rather, the executing state should proceed to a case-by-case assessment,[1377] and, in case it decides that, for whatever reason, it cannot enforce the custodial sentence itself, it should surrender, as this is in line with "the principle of mutual recognition and the need to eliminate any risk of impunity".[1378] In the Court's reasoning, security and the effectiveness of EU law and the interests of the state once more trump any consideration of the individual or the rehabilitation principle,[1379] and the EU seems to emerge primarily as an Area of Security, rather than an AFSJ or Union of Values.

In *Ognyanov*,[1380] the individual concerned was a Bulgarian national sentenced by a Danish court. Whilst detained in Denmark, he performed labour as part of his sentence.[1381] Eventually, Ognyanov was transferred to Bulgaria under the ToP

[1376] Case C-579/15 Popławski, EU:C:2017:503
[1377] ibid para 22.
[1378] Case C-579/15 *Openbaar Ministeri v. Daniel Adam Popławski* [2018] ECLI:EU:C:2018:957, Opinion of Advocate General Bot, para 57.
[1379] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2019) 25 Maastricht Journal of European and Comparative Law 672, 683.
[1380] Case C-554/14 *Ognanyov*, EU:C:2016:835. See further J Ddamulira Mujuzi, 'The transfer of offenders between European countries and remission of sentences' (2017) 7 European Criminal Law Review 289.
[1381] Case C-554/14 *Ognanyov* [2016] EU:C:2016:835, para 21.

FD.[1382] Under the Danish detention regime, any work conducted was attached to the prison regime and did not imply any remission of the sentence. On the contrary, Bulgarian law allowed work activities to be calculated towards the reduction of the length of the custodial sentence imposed.[1383] Consequently, the Bulgarian court referred to the CJEU, asking whether Bulgarian authorities could take into account the work undertaken by Ognyanov during his stay in Denmark, for the purposes of early release.[1384] The answer given by the EU Court was negative. The reasoning was that allowing for such a possibility would go against the principle of mutual recognition. Essentially, the CJEU argued that if the Bulgarian authorities were allowed their request:[1385]

> [T]he national court of the executing State would then be applying, retroactively, its national law to the part of the sentence served on territory subject to the jurisdiction of the court of the issuing State. The former court would thus be re-examining the period of detention served on the territory of the issuing State, which would be in breach of the principle of mutual recognition.

Such a line of reasoning fails to consider the application of the principle of *lex mitior,*[1386] disregards the criminal justice ideal that detainees should in any event be valued and rewarded for any labour[1387] and "the progress made whilst serving

[1382] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.
[1383] Case C-554/14 *Ognanyov* [2016] EU:C:2016:835, Opinion of AG Bot, para 33.
[1384] Case C-554/14 *Ognanyov* [2016] EU:C:2016:835, para 29.
[1385] ibid para 49.
[1386] See, for an argument in favour of the application of the principle in cross-border cases, Gert Vermeulen et al, *Cross-Border Execution of Judgements Involving Deprivation of Liberty in the EU* (Maklu 2011) 1, 94ff; note also the discussion under subsection 3.2.1 of this thesis.
[1387] Eveline De Wree, Tom Vander Beken and Gert Vermeulen, 'The transfer of sentenced persons in Europe' (2009) 11 Punishment and Society 111, 118.

their sentence", [1388] and ultimately sits at odds with the key purpose of rehabilitation in criminal punishment.

The CJEU seems to regard reintegration not as an individual right or a criminal justice ideal, but rather a state interest, and another tool towards the objective of tackling recidivism, and providing for an Area of Security. The cases identified above fit neatly within the *Aranyosi* and *Melloni* spirit, and also within the broader framework of the CJEU's jurisprudence.[1389] For its approach, the CJEU has been criticised for yielding "a rich body of harmful, dull and unconvincing jurisprudence in the field boasting no clear positive effects",[1390] following a reasoning "not far short of irresponsible, as well as standing out as highly atypical in the world of constitutional democracies today, particularly in the European context".[1391] It has been accused of no less than "cheap talk",[1392] and been deemed to deify mutual

[1388] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2019) 25 Maastricht Journal of European and Comparative Law 672, 685.

[1389] See, indicatively, Case C-579/15 *Popławski*, EU:C:2017:503; Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979; Case C-378/12 *Onuekwere* [2014]; Case C-400/12 *MG* [2014]; see, further, H van Eijken and Tony Marguery, 'The Federal Imbedding of Citizens in the European Union Member States' Criminal Law; Or How EU Citizenship Is Shaping Criminal Law' in Dimitry Kochenov (ed), *European Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2016) 1, 561; Stephen Coutts, "Citizenship of the European Union" Justice' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 92; Tony Marguery, 'European Union Fundamental Rights and Member States Action in EU Criminal Law' (2013) 2 M.J. 282; Ester Herlin-Karnell, 'Is the Citizen Driving the EU's Criminal Law Agenda?' in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 1, 203.

[1390] Uladzislau Belavusau and Dimitry Kochenov, 'Kirchberg dispensing the punishment: Inflicting ''civil death'' on prisoners in Onuekwere (C-378/12) and MG (C-400/12)' (2016) 41 European Law Review 557.

[1391] ibid.

[1392] Peter J Spiro, 'Expatriating Terrorists' (2014) 82 Fordham Law Review 2169, 2171. It does not help that the CJEU has suggested that the EAW should be interpreted in light of the objective of preserving the offender's links with the community and preparing a successful resettlement after imprisonment. In *Tsakouridis*, AG Bot stated that a measure resulting in the expulsion of an EU citizen from the host member state must not jeopardise the reintegrative function of criminal sanctions. This integration-oriented approach was confirmed by AG Bot in the subsequent *P.I.* case as well. An analysis of these cases suggests that the CJEU is pushing for a common undertaking of rehabilitation of wrongdoers that extends to all EU citizens, not just the citizens of

trust. Instead of promoting a model whereby cooperation on the basis of mutual trust must be underpinned by an effective protection of fundamental rights, the CJEU endorses a system whereby the protection of fundamental rights must be subsumed to the abstract requirements of upholding mutual trust and the effectiveness of EU law,[1393] while disregarding the will of the individual.

The EU (and CJEU) should avoid treating detainees "as a mere object", rather than a subject of rights and persons to be respected and re-integrated into society.[1394] This should change, as it practically dilutes the protection of individual rights, undermines the legitimacy of the EU as a detention actor, and sends the wrong symbolic message to the member states.

11.3 Accounting for the symbolic effect of EU criminal law on national *ius puniendi*

In a recent report produced for the European Parliament, it was noted that:[1395]

> […] it is crucially important to address the root causes of the problem of poor detention conditions through a comprehensive/holistic approach that takes into

the member state in question. Yet, in practice, the CJEU seems more concerned with advancing security and effectiveness, rather than individual prerogatives. See Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2018) 25 Maastricht Journal of European and Comparative Law 672, 683; referring further to the Opinion of Advocate General Mengozzi in Case C-42/11 Lopes da Silva, EU:C:2012:151. See also Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979, paras 51ff; and Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* [2012]. For further analysis, see Leandro Mancano, 'The place of prisoners in European Union law?', (2016) 22 European Public Law 717, 743ff.

[1393] Valsamis 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, 472.

[1394] Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 216.

[1395] Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU* (European Parliament Directorate-General for Internal Policies 2023) 1, 101.

> account all relevant criminal justice measures that have a decisive influence on the flow of incarceration and involves all relevant actors.

I agree with this assessment – and for that reason, I find it surprising that the discussion on prisons in the EU has omitted the importance of EU criminal law. This section addresses that gap, by inviting consideration to the EU criminal law policies that shape detention flows and national *ius puniendi*. I shall first define this last term, before proceeding to discuss specific EU criminal law provisions, and their impact.

11.3.1 Conceptualising (EU) *ius puniendi*

Previous parts of the thesis focused on prison law, and its impact on detention conditions and detainee rights. *Ius puniendi* is equally significant to the discussion.[1396]

Ius puniendi literally translates to the 'right to punish', an entity's right to impose punishment, traditionally understood as the infliction of the deliberate (rather than

[1396] Both concepts may be better understood on the basis of the following hypothetical.
Short, an EU citizen, wakes up in a room, suffering from an apparent case of selective amnesia. Besides her own clothing, her only property takes the form of a single document: a passport, issued in the name of her own country, and that of the EU. Upon trying to make her way out, she discovers the room is locked, and guarded by an individual, who informs her he is a warden, and that Short is, in fact, in custody. Piqued, Short poses a series of questions, demanding to know on whose authority she has been detained; who made the laws that made her behaviour criminal and worthy of detention; and who determined that she be placed in custody. Further, Short demands to know who determined the specific establishment to be her cage, and the duration she must remain in detention; who placed the wardens and governors that shall oversee her stay; who has created, designed, funded, and overall regulated this prison; and who shapes the environment she will call home for the duration of her stay.
To determine the answer to such queries, it proves prerequisite to first comprehend their nature. Hence, the former string of questions focuses on incidents and points in time that are significant in determining the narrative that led to her detention. The latter questions, on the other hand, revolve around incidents and points in time that shape her detention environment. In essence, Short is inquiring to know who detained her, and who regulates her detention: in other words, whose ius puniendi and prison law is applicable.

incidental) infliction of harm, as a response to legal wrongdoing.[1397] It has been a traditional axiom of criminal justice that the state has a monopoly on punishment – an axiom so deeply rooted within doctrine, that it has come to constitute part and parcel of the very definition of *ius puniendi* itself.[1398] *Ius puniendi* is relevant to pre- and post-trial criminal detention both. Indeed, it determines both who is to be detained awaiting trial, or having been punished for a crime.[1399]

It may seem intuitive, based on such a conceptualisation, to think of *ius puniendi* in terms of infringement, and prison law in terms of protection. In other words, it may seem that *ius puniendi* is aimed towards delimiting individual rights, by detaining and taking away certain rights, whereas prison law is aimed towards safeguarding the rights of the detainee, by setting parameters that ensure that the individual retains her rights even while in detention.[1400]

Yet such a dichotomy would fail to capture the full picture. Both *ius puniendi* and prison law simultaneously function defensively and offensively, as regards human

[1397] Lívia Horgos, 'Thoughts about the Definition of Ius Puniendi in Legal Theory' (2021) 1 Belügyi Szemle 9; see also Anthony Flew, 'The Justification of Punishment' (1954) 29 Philosophy 291; SI Benn, 'An Approach To The Problems Of Punishment' (1958) 33 Philosophy 325; HLA Hart, 'The Presidential Address: Prolegomenon to the Principles of Punishment' (1959) 60 Proceedings of the Aristotelian Society 1.

[1398] The 'prima facie authority of the state to punish' is fairly undisputed, see for a discussion with further references Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State' in AP Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014) 1, 3, 7.

[1399] Karsai Krisztina, 'Ius Puniendi of the European Union' in Péter Hack and Koósné Mohácsi Barbara (eds) *Emberek őrzője Tanulmányok Lőrincz József tiszteletére* (Budapest 2014) 1, 117.

[1400] In line with this understanding, ius puniendi has alternatively been referred to as *ius gladii* (the right of the sword), whereas prison law has been considered in terms of *dignitas*, conceptualised as one's entitlement to respect and proper treatment, due to their moral standing and ethical worth. See Peter Garnsey, 'The Criminal Jurisdiction of Governors' (1968) 58 The Journal of Roman Studies 51; see also Gustaaf van Nifterik, 'Grotius and the Origin of the Ruler's Right to Punish' (2008) 26 Grotiana Koninklijke Brill NV 396; and Eleanor Cowan, 'Contesting Clementia: the Rhetoric of Severitas in Tiberian Rome before and after the Trial of Clutorius Priscus' (2016) 106 The Journal of Roman Studies 77.

rights.[1401] The power to punish serves to delimit individual rights, yet also protects the rights of both victim(s) and society at large. The same holds true for prison law, which simultaneously safeguards and delimits detainee rights. The relationship between prison law, *ius puniendi,* and human rights is thus a delicate, if not outright paradoxical[1402] balancing act between rights of victim, society, and detainee-suspect/convict of crime. Indeed, it has been noted that:[1403]

> The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved in favor of guaranty and against threat.

Having conceptualised *ius puniendi,* the analysis turns to the EU.

As already noted, the EU has no *ius puniendi* of its own. However, it is maintained that EU law shapes national *ius puniendi*, and holds a profound negative effect on the individual. This occurs via the exercise of its competence on criminal matters. Should the EU wish to address the prison crisis, and if EU action in detention ever hopes to be comprehensive and legitimate, it must ensure it

---

[1401] . These two functions have been 'eloquently' referred to as sword and shield. See Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Françoise Tulkens, 'Human Rights as the Good and the Bad Conscience of Penal Law' in Sonja Snacken and Els Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2011) 1, 160; Alvaro P Pires, 'Quelques obstacles à une mutation du droit pénal' (1995) 26 Revue générale de droit 133, 136; Mireille Delmas-Marty, 'Le paradoxe pénal' in Mireille Delmas-Marty and Claude Lucas de Leyssac (eds), *Libertés et droits fondamentaux* (Seuil 1996) 1, 368 ; Erik Luna, 'Sentencing' in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1, 964; Jack Donnelly and Daniel J Whelan, *International Human Rights* (6th edn Routledge 2020); Richard Bellamy (ed) *Beccaria: 'On Crimes and Punishments' and Other Writings* (Cambridge University Press 2012) 1, 10;

[1402] As described by Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 577.

[1403] Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 1, 366.

accounts for both its offensive and defensive aspects. Hence, the EU should enact "measures for self-protection against destructive elements in its midst",[1404] while equally striving to ensure "as little interference with the free life of its members as is consistent with such social self-protection".[1405]

In other words, and if the Union hopes to advance detainee rights and enhance detention conditions on the ground, it should simultaneously try to acknowledge and control its impact on national *ius puniendi*.

The analysis examines the triggering of national *ius puniendi* as a result of the following factors: the EC Recommendation; the harmonisation of substantive criminal law and sanctions at EU level under article 83 TFEU; and the establishment and operation of the European Public Prosecutor's Office (EPPO) under article 86 TFEU. Together, these articles comprise a substantial portion[1406] of the discipline that has come to be known as 'EU criminal law'.[1407] The latter

[1404] As argued already, particularly under chapter 10 of this thesis.
[1405] Sheldon Glueck, 'Principles of Rational Penal Code' (1928) 41 Harvard Law Review 453, 455.
[1406] Besides the key themes covered in this chapter (judicial cooperation in criminal matters, harmonisation of offences and sanctions, and the EPPO), EU criminal law also extends to police cooperation, and harmonisation of procedural rights (such as e.g. via the Directives examined already under chapter 7 of this thesis).
[1407] Term coined by Hans Heinrich Jescheck, 'Die Strafgewalt übernationaler Gemeinschaften' (1953) 65 Zeitschrift für die gesamte Strafrechtswissenschaft 496, 498.

covers all EU action[1408] in criminal matters,[1409] all instances where EU law exerts normative influence on national substantive or procedural criminal law.[1410]

11.3.2 Harmonisation of crimes and sanctions under article 83 TFEU

Via its article 83 TFEU harmonisation competences, the EU influences national *ius puniendi.* Article 83 TFEU allows for the harmonisation of criminal offences and sanctions.[1411] Provisions enacted on the basis of that article demand that national authorities criminalise certain behaviours, while also delimiting national discretion in sentencing, by prescribing minimum-maximum sanctions to be imposed. In practice, this means that while both *actus reus*[1412] and penalties for specific crimes are determined at the domestic level, the national legislator has no choice but to follow a line imposed at the EU level.[1413]

[1408] Such action may not necessarily be legislative, but instead refer to policy documents, strategic directions, or decisions; see Estella Baker, 'Governing Through Crime: the Case of the European Union' (2010) 7 European Journal of Criminology 187, 190; Jörg Monar, 'Decision-Making in the Area of Freedom, Security and Justice' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 1, 67. EU criminal law, in this sense, essentially serves as "amalgamated term used to denote a miscellany" of substantive offences, procedural rules, and institutional arrangements which supplement criminal governance at national level; see Liz Heffernan, 'The European Court System and Its Role in Shaping European Criminal Law' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 33.
[1409] Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022).
[1410] Jacob Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (1st edn, Hart 2017) 1, 10; André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 1.
[1411] While Article 83 TFEU, serving as the primary legal basis, refers to sanctions, most Directives adopted on the basis of this provision refer to penalties. The two terms seem able to be used interchangeably. See Athina Giannakoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals' (2015) 5 European Criminal Law Review 133.
[1412] Literally translated to 'guilty act', alternatively referred to as the objective or external element of a criminal offence.
[1413] Estella Baker, 'The emerging role of the EU as penal actor' in Tom Daems, Dirk Van Zyl Smit and Sonja Snacken (eds) *European Penology?* (Bloomsbury 2017) 1, 77.

The Union's competence to harmonise or approximate[1414] substantive criminal law and sanctions is to be found in article 83 TFEU which is divided into two paragraphs. The analysis shall examine each one in turn, submitting that the harmonisation of crimes and sanctions at EU level is to be assessed on the basis of security, EU law effectiveness, and symbolic considerations.

11.3.2.1 Securitised harmonisation

The first paragraph, Article 83(1) TFEU, notes the following:[1415]

> The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of **particularly serious crime with a cross-border dimension** resulting from the nature or impact of such offences or form a special need to combat them on a common basis.

This first paragraph provides the Union with its primary competence to harmonise criminal law. A textual interpretation[1416] allows for the provision to be dissected into four components, as it states that harmonisation of crimes and sanctions shall i) follow the ordinary legislative procedure; ii) manifest in the form of

[1414] A note on terminology: while different EU jurisdictions and scholars discuss on the subtle conceptual variance between the concepts of 'harmonisation' and 'approximation', the EU legislator does not acknowledge different connotations, using both terms interchangeably – this contribution shall do the same. It should be further noted that recently the term 'standarisation' has been used. On a discussion surrounding the terms, see André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 1, 32ff; see also Alessandro Bernardi, 'L'armonizzazione delle sanzioni in Europa: linee ricostruttive' in Giovanni Grasso and Rosaria Sicurella (eds), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (Giuffrè 2008) 1, 76ff. For examples of the EU legislator utilising both terms interchangeably, see TFEU, art 114. For examples of the CJEU, see Case C-66/04 *United Kingdom v European Parliament and Council* [2005] ECR I-10553, paras 45–50; Case C-217/04 *United Kingdom v European Parliament and Council* [2006] ECR I-3771.

[1415] TFEU, art 83, emphasis added.

[1416] Wolfgang Bogensberger, 'Article 83 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 896.

Directives; iii) occur via minimum rule-setting, and; iv) concern areas of particularly serious crime with a cross-border dimension, or, as dubbed in EU law literature, *Eurocrimes*.[1417]

The first two components describe fundamental procedural requirements of EU law, and hence need not be analysed any further.[1418] The one point of relevance, though, should be the choice of form: harmonisation occurs via Directives, adopted under the ordinary legislative procedure, via majority voting (rather than unanimity), thus depriving states of any veto power.[1419]

Regarding the final two components, the analysis draws attention to the following.

Minimum rules, as a concept, proves rather elusive, and the subject of academic debate.[1420] In a nutshell, and by examining the various legal instruments establishing minimum definitions and sanctions, it seems that the philosophy of minimum-rule-setting may be expressed following a simple numerical value, or range: ≥ *n*. To translate both symbols: the former, ≥, refers to 'a value greater than or equal to'. The latter, *n*, refers to the offence or sanction in question.

A concrete example shall clarify.

[1417] Marianne L Wade, 'Cross-Border Crimes' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 204.

[1418] See the discussion in chapters 3 and 10 of this thesis. Nevertheless, it is important to note that the choice of Directives presupposes some cooperation from the member states, reflecting on the former Third Pillar and intergovernmental nature of EU criminal law; note Petter Asp, 'Harmonisation of Penalties and Sentencing within the EU' (2013) Bergen Journal of Criminal Law and Criminal Justice 53.

[1419] TFEU, arts 83 and 289ff.

[1420] For a comprehensive analysis of the doctrinal issues relating to the concept of minimum rules within the context of EU criminal law, see Konstantinos Zoumpoulakis, 'From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion' (2020) 5 European Papers 1289. While the article focuses on the use of minimum rules in procedural law, the queries and findings raised there remain very much relevant for the purposes of harmonisation of offences and sanctions, since the same legal instrument applies.

Article 2 of the EU Directive on human trafficking[1421] declares that all member states:

> […] shall take the necessary measures to ensure that the following intentional acts are punishable: The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Subsequent sections of the article define further components of the *actus reus*, including what is to be understood as 'a position of vulnerability' [1422] and 'exploitation', [1423] while also clarifying the role of the victim's consent in determining liability,[1424] and providing for specific reference in case the victim is a child.[1425] Article 3 further criminalises "incitement, aiding and abetting, and attempt", extending the scope of the Directive. Article 4 provides that national authorities must take care to ensure that the offences contained in the Directive are "punishable by a maximum penalty of **at least five years of imprisonment**".[1426]

[1421] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, art 2.
[1422] ibid section x.
[1423] ibid section y.
[1424] ibid section z.
[1425] ibid section xx.
[1426] ibid emphasis added. Though heavier penalties are in place; see Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, see art 4 section 2.

With these specific provisions in mind, the semantics behind the ≥ *n* representation become transparent. Via minimum rules established in Directives, the EU legislator is essentially transmitting two commands to the national authorities: *criminalise this behaviour*, and, *punish it in this nature*. Both commands carry an implied clarification: 'criminalise and punish *at least* in this manner'. Whether the member states choose to criminalise other behaviours as well, or whether they elect to surround the harmonised crime with punishments of a more severe nature, is their choice – as long as they *at least* do what the Directives oblige them to.

Returning to the specific example of the trafficking Directive, what matters is that EU states criminalise *at least* the behaviours of recruitment, transportation, reception, and other acts prescribed in the Directive, and that they punish such behaviours with a maximum sanction of *at least* imprisonment of five years. The commands of the EU legislator are to be carried out *at the minimum*, represented as *n*. While the national authorities may choose to go above the *n* and provide for criminalisation and punishment of >*n*,[1427] they are in no way allowed to provide for criminalisation and punishment of <*n* – that is to say, avoid criminalising the behaviours prescribed, or punishing them with a lesser maximum sentence. Again, resuming the example of the trafficking Directive, member states are allowed to criminalise further behaviours besides those prescribed by the Directive, or to provide for a maximum punishment of more than 5 years of incarceration – but they are under no circumstances allowed to *not* criminalise all

[1427] Hence, harmonisation is 'minimum', as opposed to 'maximum' or 'full', which would catholically bar and disallow any divergence; see Marcus Klamert, 'What We Talk About When We Talk About Harmonisation' (2015) 17 Cambridge University Press 360, 364.

behaviours included in the Directive, nor are they allowed to criminalise them, but impose a maximum penalty of less than 5 years in prison.

Overall, n+1 is allowed, n-1 is not.[1428] Instead, member states have to, at all times, remain within the ≥ *n* range, abiding by the will of the EU legislator– such is the supreme and primary nature of EU law.[1429]

As one may already suspect, harmonisation at EU level has not been confined to the specific crime of trafficking in beings.[1430] To provide a full, exhaustive list of legal instruments, the behaviours they criminalise, and their respective sanctions, escapes the scope of the present thesis – instead, one may refer to relevant sources which have undertaken the task before.[1431] For the purposes of this analysis, it should be noted that criminalisation at EU level expands to include, *inter alia*, terrorism,[1432] trafficking in human beings[1433] and sexual exploitation of

[1428] See also Konstantinos Zoumpoulakis, 'Approximation of criminal sanctions in the European Union: A wild goose chase?' (2022) 13 New Journal of European Criminal Law 333.
[1429] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.
[1430] Though it should be noted that harmonisation of offences and sanctions is so far limited to the *actus reus* and punishment components, and does not expand to the general part of criminal law, such as e.g. principles or definitions of attempt; a comprehensive criminal code thus remains elusive; see Peter Csonka and Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" Is the Substantive Criminal Law in the EU?' (2019) 4 eucrim 261, 262. Nevertheless, each specific crime harmonised may refer to general aspects of criminal law (as in the example of the trafficking Directive noted above). In this sense, a General Part of EU criminal law is at its embryonic stages. See Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections' (2005) 12 Maastricht Journal of European Comparative Law 173, 175; and Samuli Miettinen, *Criminal Law and Policy in the European Union* (Taylor & Francis Group 2012) 1, 134.
[1431] See instead Council of the European Union, *General Secretariat of the Council, European Union instruments in the field of criminal law and related texts* [2019]; Samuli Miettinen, *Criminal Law and Policy in the European Union* (Taylor and Francis Group 2012) 1, 146ff; Athina Giannakoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals' (2015) 5 European Criminal Law Review 133.
[1432] Directive (EU) 2017/541 of the EP and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.
[1433] Directive 2011/36/EU of the EP and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

women and children,[1434] illicit drug trafficking,[1435] illicit arms trafficking,[1436] money laundering,[1437] corruption,[1438] counterfeiting of means of payment,[1439] computer crime[1440] and organised crime.[1441] Such areas, as falling under the auspices of article 83(1) TFEU, have been dubbed by the literature as *Eurocrimes.*[1442]

It is important to note that this list is not exhaustive, but rather indicative, and may be expanded upon.[1443] Article 83(1) TFEU itself leaves the doors open for new crimes to be added, with a unanimous decision of the Council members – that is, the member states themselves.[1444] According to the provision, all "areas of particularly serious crime with a cross-border dimension"[1445] are potentially

[1434] Directive 2011/92/EU of the EP and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.
[1435] Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8.
[1436] Council Directive (91 /477/EEC) of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L 256/51.
[1437] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime [2001] OJ L182/1.
[1438] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2003] OJ L192/54; and Convention on the fight against corruption involving officials of the European Communities or officials of the EU MS [1997] OJ C 195/2.
[1439] Directive 2014/62/EU of the EP and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1.
[1440] Directive 2013/40/EU of the EP and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L218/8.
[1441] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008], OJ L300/42.
[1442] TFEU, art 83, paras 1-2. Marianne L Wade, 'Cross-Border Crimes' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 204.
[1443] Peter Csonka and Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" Is the Substantive Criminal Law in the EU?' (2019) 4 eucrim 261, 262.; Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 1, 320; Jannemieke W Ouwerkerk, 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?' (2012) 3 New Journal of European Criminal Law 228, 233.
[1444] H Schermers and N Blokker, International Institutional Law (4th edn Mārtiņus Nijhoff 2003) 1, 36ff; P Sands and P Klein, *Bowett's Law of International Institutions* (5th edn Sweet & Maxwell 2001) 1, 16ff
[1445] TFEU, art 83 para 1.

subject to harmonisation at EU level. Indeed, it is likely that conducts including hate speech,[1446] gender-based violence,[1447] and the violation of EU-imposed sanctions,[1448] may soon join the Eurocrimes fold, and be prescribed a min-max sanction at EU level.

It should also be noted that the fourth criterion ('concern areas of particularly serious crime with a cross-border dimension') has been considerably diluted by the CJEU. Indeed, the Court seems to be pushing for an application of article 83 TFEU in *all* areas of serious crime, regardless whether they present a cross-border element or not.[1449] In a ruling concerned with the Directive on the freezing and confiscation of instrumentalities and proceeds of crime,[1450] and involving drug trafficking at a purely domestic level,[1451] the Court dictated that the Directive, as adopted under article 83 TFEU, could apply.[1452] The justification of the CJEU lied in reading the facts of the case, and the criminal incidents occurred, as entailing a *legal* element of cross-borderness. In turn, this legal element was enough to bring the proceedings under Article 83 TFEU – the fact that the case did not showcase any *material* elements of cross-borderness was deemed null and irrelevant.[1453] In his Opinion, the AG stood behind the Court, stating that

[1446] See Directorate-General for Justice and Consumers, Roadmap, available at https://op.europa.eu/en/publication-detail/-/publication/0d868aaf-75df-11eb-9ac9-01aa75ed71a1/language-en (last accessed 5 March 2023).
[1447] European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence against Women, 2013/2004(INL).
[1448] European Commission Proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures, 2022
[1449] Reminiscent of its *Moro* judgment; see chapters 7 and 9 of this thesis.
[1450] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/50.
[1451] Joined Cases C-845/19 and C-863/19 *Criminal Proceedings against DR and TS* [2021] ECLI:EU:C:2021:864, paras 16–23.
[1452] ibid.
[1453] ibid para 33.

Article 83(1) TFEU refers to behaviours with a cross-border *dimension*; hence, establishing a material cross-border *element* in each specific case is not mandatory.[1454]

By dropping the cross-border element, the Court seems to further expand the potential for criminalisation and penalty-setting at EU level.[1455]

It is concluded that the competence of the Union in criminal matters, as evidenced by the overall legislative sum of EU criminal law under article 83(1) TFEU, "is developing from a highly sensitive policy area into an important measure to tackle serious forms of crime on a common basis".[1456]

11.3.2.2 Functional harmonisation

Besides the explicit reference to criminal areas under the first paragraph of article 83 TFEU, which serves as the primary legal basis, the second paragraph of the same article expands:[1457]

> If the approximation of criminal laws and regulations of the Member States proves essential **to ensure the effective implementation of a Union policy** in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

[1454] Joined Cases C-845/19 and C-863/19 *Criminal Proceedings against DR and TS* [2021] ECLI:EU:C:2021:864, Opinion of AG Pikamäe, para 40.
[1455] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378.
[1456] Sanne Buisman, 'The Future of EU Substantive Criminal Law Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) 30 European Journal of Crime, Criminal Law and Criminal Justice 161, 164.
[1457] TFEU, art 83 para 2.

Here, the EU legislator provides for a second, so-called ancillary or annex legal basis.[1458] While the first provision of article 83 TFEU refers to specific areas of crime, this second paragraph allows the EU to harmonise crimes and sanctions in areas of general policy.[1459] Such areas are not defined; rather, *any* area of EU law may fall under the scope of article 83(2) TFEU, as long as the following three criteria are fulfilled.[1460] First, the area in concern must be subject to the *prior adoption of harmonisation measures*. Areas of EU law that have not been subject to any harmonisation, may not be subjected to criminal harmonisation. [1461] Second, harmonisation of crimes and sanctions within that area proves *essential*. Concerningly, the term 'essential' is rather ambiguous, and not defined.[1462] Third and final, harmonisation must prove essential *to ensure the effective implementation of EU law*.[1463]

To this day, a limited number of Directives find their legal basis on article 83(2),[1464] the most notable of which is the so-called PIF Directive, seeking to

[1458] Kai Ambos, *European Criminal Law* (Cambridge University Press 2018).
[1459] ibid 322.
[1460] Jan Stajnko, Petra Weingerl and Miha Šepec, 'Further Areas' in Kai Ambos (ed) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 206, 209; Ester Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) 1, 333.
[1461] Steve Peers, *EU Justice and Home Affairs Law* (4th edn, Oxford European Union Law Library 2016) 1, 121.
[1462] Valsamis Mitsilegas, *EU Criminal Law* (2nd edn Hart 2022) 1, 108.
[1463] For a commentary on the role of effectiveness as a principle in EU law, see Ester Herlin-Karnell, 'Effectiveness and constitutional limits in European criminal law' (2014) 5 New Journal of European Criminal Law 267; Matej Accetto and Stefan Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 European Public Law 375; Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 55ff. See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECLI:EU:C:1996:79.
[1464] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179; and Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29.

protect the Union's financial interests.[1465] Nevertheless, scholars have identified a number of EU areas which could come under the scope of article 83(2).[1466] These range from environmental protection to the labour market, the integrity of public administration, fair administration of justice, and public health – a considerable number of areas which could potentially expand in the future.[1467]

It is also interesting to note the sanctions which accompany the offences harmonised at EU level, regarding article 83(1) and 83(2) both. A holistic review reveals that the penalties dictated by the EU legislator range from 1 to 15 years of imprisonment. In practice, the majority of EU legal acts do not make use of either lowest or highest penalties, providing instead for those of 2, 3, 5, and 8 years. It is notable that, while initially EU law made reference to ranges of penalties, recent acts refer instead to a single number, becoming increasingly more specific.[1468]

Nevertheless, it is rather noteworthy that all of the EU criminal law approximation measures require the use of imprisonment.[1469] Especially as regards article 83(2)

[1465] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) [2017] OJ L198/29.
[1466] Jan Stajnko, Petra Weingerl and Miha Šepec, 'Further Areas' in Kai Ambos (ed) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 206, 212ff; referring also to André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 1, 231. See further Stephen Coutts, 'Supranational Public Wrongs: The limitations and Possibilities of European Criminal Law and a European Community' (2017) 54 Common Market Law Review 771, 787.
[1467] Marta Miglietti, 'The First Exercise of Article 83(2) TFEU under Review: An Assessment of the Essential Need of Introducing Criminal Sanctions' (2014) 5 New Journal of European Criminal Law 5, 8. This is likely to happen!
[1468] Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union - A New Approach' (2019) 2 eucrim 115.
[1469] The only exceptions are Directives 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28, and Directive 2009/52/ EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L168/24. As Mancano notes, this is because these

TFEU, it should be reminded that, unlike its sister provision, article 83(2) TFEU imposes no threshold of seriousness; much less serious conduct could be the subject of criminalisation.[1470] Regardless, incarceration remains the sole penalty prescribed under the secondary provisions adopted under this ancillary legal basis.[1471] It should also be noted that suspects of crimes that carry a custodial sentence often end up in pre-trial detention as well.

Criminalisation under article 83 TFEU has progressed at a rapid pace. Granted, such EU criminalisation has been characterised by lacunae, in the sense that its development has been a rather ad-hoc, patchwork process.[1472] Even where the EU has legislated in criminal matters, it has no power to actually ensure the enforcement of its criminal policies. Indeed, it has been noted that approximation efforts at EU level, while regulated, have been faced with implementation issues.[1473] Further, EU law has (so far) harmonised 'merely' the minimum-maximum penalties, hence allowing national authorities a wide margin of discretion in regards to their sentencing practices.[1474] Besides, and as noted before, the legal vehicle of choice is a Directive, which lacks direct applicability, and does no more than set the objective, leaving the details behind its realisation

specific Directives were adopted prior to the Lisbon Treaty; hence, it seems that it is solely through their timing that they have escaped the tendency to prescribe incarceration as a penalty. See Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 55ff.

[1470] Anabela Miranda Rodrigues, 'Fundamental rights and punishment: Is there an EU perspective?' (2019) 10 New Journal of European Criminal Law 17, 20.

[1471] André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 1, 354ff.

[1472] John AE Vervaele, 'Harmonised Union Policies and the Harmonisation of Substantive Criminal Law' in Francesca Galli and Anne Weyembergh (eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université de Bruxelles 2012) 1, 57.

[1473] Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union - A New Approach' (2019) 2 eucrim 115.

[1474] Petter Asp, 'Harmonisation of Penalties and Sentencing within the EU' (2013) 1 Bergen Journal of Criminal Law and Criminal Justice 53, 62.

up to the member states. In this sense, and in line with the Westphalian doctrine, the power to detain remains part and parcel of sovereignty, and the state retains its monopoly on violence, in line with the tenet of "criminal justice should be local justice".[1475]

Nevertheless, and as proven, the EU exerts a considerable influence in criminal justice policies, the practical impact of which should not be underestimated. It is important to understand that EU criminal law under article 83 TFEU[1476] is of supranational nature, binding across all EU states, and with a monitoring, judicial, and sanctions mechanism to back it up, in case states prove less cooperative than originally hoped.[1477] This primary, supranational body of law explicitly dictates that certain behaviour be made criminal, and penalized, stipulating further that sanctions are to be imposed, encouraging states to make use of custodial sentences, and determining the minimum-maximum span of these sentences. If an individual in EU territory is found to behave in a way that falls under the harmonised agenda, EU law dictates that states hold this individual criminally liable, and potentially placed behind bars.

The fact that article 83 TFEU imposes *minimum* rules should raise concern, rather than drown it. This is because the sole discretion left to the national authorities is to adopt more, rather than less, repressive criminal law.[1478] Hence, "[m]inimum

[1475] See Mireille Hildebrandt, 'European criminal law and European identity' (2007) 1 Criminal Law and Philosophy 57, 66; Samuli Miettinen, *Criminal Law and Policy in the European Union* (Taylor & Francis Group 2012) 1, 9; Erik Luna, 'Sentencing' in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1, 964.
[1476] TFEU, arts 82 and 86.
[1477] See chapter 10 for a discussion on the EU enforcement mechanism.
[1478] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378, 400, referring to Bernd D Hecker, *Europaisches Stratfrecht* (3rd edn, Springer 2010) 1, 371. See also Petter Asp, *The Substantive*

rules cannot logically provide any added value unless the minimum level is set above the existing minimum level within the Union [...]".[1479] In practice, each and every Directive imposing minimum rules will either have no effect, or will lead to an increased level of repression in the EU states. Article 83 TFEU serves to trigger (rather than delimit) *ius puniendi,* state power to punish.

Such concerns are only exacerbated once one considers the following: as AG Bot has noted, the *minimum standards* character of EU law adopted under article 83 TFEU does not mean that they are not equally binding to other standards of EU law. On the contrary, "minimum standards must be **interpreted broadly, to ensure the effectiveness of EU law** in a field which is marked by considerable diversity between national legal systems".[1480] EU law seems to disregard the divergence in national prison systems. States' freedom of choice and margin of discretion is restricted.[1481] Indeed, min-max penalties are notorious for their tendency to "rely on numeric values which are identical for all states".[1482] However, this hardly accounts for the parcelled approach across national prison systems.

Criminal Law Competence of the EU (StiftelsenSkrifter utgivna avJuridiska fakulteten vid Stockholms universitet 2012) 1, 111.

[1479] Petter Asp, *The Substantive Criminal Law Competence of the EU* (StiftelsenSkrifter utgivna avJuridiska fakulteten vid Stockholms universitet 2012).

[1480] Valsamis Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) 12 Review of European Administrative Law 117, 130; referring to AG Bot, paras 32-33, emphasis added.

[1481] ibid 322.

[1482] Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union: A New Approach' (2019) 2 eucrim 115.

To put it bluntly: a member state that rents out its prisons may afford to criminalise and increase its sentences, to satisfy the EU legislator. A member state that is reaching breaking point, less so.

The approximation of substantive criminal law and sanctions at EU level, which occurs under article 83 TFEU, has a profound impact on both *ius puniendi* and individual rights. While article 83(1) may be said to not truly 'create' any new crimes,[1483] merely codifying behaviours that have already been criminal across all member states, the same is not true in regards to article 83(2) TFEU, which holds the potential to criminalise *any* behaviour, regardless of seriousness, long as it promotes the effectiveness of EU law. Indeed, the PIF Directive revolves around crimes against the financial interests of the EU, introducing a new 'harm' or public good to be protected by EU law. The limits of article 83 TFEU are ever-expanding, with more crimes added. The Union's criminal policy is geared towards extending the scope of criminalisation,[1484] generally increasing the repressiveness and punishing power of national criminal justice in the EU,[1485] leading to increased criminalisation, punitiveness, pre-trial detention, and custodial sentencing.

11.3.2.3 Symbolic harmonisation

While not explicitly stated within article 83 TFEU itself, the harmonisation of offences and penalties at EU level serves a third, underlying purpose. This is

[1483] As Ambos has observed in this regard, "strictly speaking, we are dealing with Europeanised criminal law"; see Kai Ambos, *European Criminal Law* (Cambridge University Press 2018)1, 15.
[1484] European Criminal Policy Initiative, 'Manifesto on European Criminal Policy' (2009) Zeitschrift für Internationale Strafrechtsdogmatik 707.
[1485] Noelia Corral-Maraver, 'Irrationality as a Challenge to European Criminal Policy' (2017) 7 European Criminal Law Review 123; Bernd D Hecker, *Europaisches Stratfrecht* (3rd edn, Springer 2010) 1, 21.

none other than the *symbolic* purpose of criminalisation, what Durkheim referred to as the influence of penal law in the conscience collective.[1486] Criminal law serves more than the pragmatic purpose of preventing or suppressing crime, or ensuring the effectiveness of other policies.[1487] Instead, it further expresses the *ethos* of the time and place in which it is enforced, simultaneously shaping the morality and values of society – criminalisation and punishment serve, *inter alia*, to express society's disapproval.[1488] In this sense, "punishment is a result of violations of strong sentiments or emotions deeply rooted and integrated in a society".[1489]

By assuming and exercising its competence in criminal matters, EU law inexorably shapes morals and values across the Union. This effect, even if not explicitly acknowledged as a purpose under the Treaty framework, is nevertheless regarded in policy documents[1490] and scholarship.[1491]

[1486] For an analysis, see Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice (Cambridge University Press 2016) 1, 48ff; referring to Emile Durkheim, *The Division of Labour in Society* (George Simpson transl, The Free Press of Glencoe 1993). See further Edward A Tiryakian, 'Durkheim's "Two Laws of Penal Evolution" (1964) Journal for the Scientific Study of Religion 261, 262.

[1487] See indicatively George H Mead, 'The Psychology of Punitive Justice' (1918) 13 The American Journal of Sociology 577; Carlo E Paliero, 'Consenso sociale e diritto penale' (1992) 35 Rivista italiana di diritto e procedura penale 849; Alessandro Baratta, 'Les fonctions instrumentales et les fonctions symboliques du droit pénal' (1991) 15 Déviance et Société 1.

[1488] Emile Durkheim, *The Division of Labour in Society* (George Simpson transl, The Free Press of Glencoe 1993) 1, 228.

[1489] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49.

[1490] See indicatively European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law* (European Commission 2011) COM(2011) 573 final, para 1; and European Commission, *Green Paper on the approximation, mutual recognition and enforcement of criminal sanction in the European Union* [2004] COM/2004/0334 final.

[1491] Ester Herlin-Karnell, 'Is the Citizen Driving the EU's Criminal Law Agenda?' in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 1, 203, 222.

This is especially evident regarding article 83(1) TFEU, which serves to address citizens' concerns by responding to cross-border crime.[1492] Directives adopted under this provision serve to "give the general public a shared sense of justice".[1493] By way of example, the terrorism Directive acknowledges acts of terrorism as:[1494]

> one of the **most serious violations of the universal values** of human dignity, freedom, equality and solidarity, and enjoyment of human rights and fundamental freedoms on which the Union is founded. They also represent **one of the most serious attacks** on democracy and the rule of law, **principles which are common to the Member States and on which the Union is based**.

Similarly, EU criminal law adopted on the basis of article 83(2) TFEU 'to ensure the effective implementation of a Union policy'[1495] is not immune from this expressive dimension. For instance, the 2008 Directive on the protection of the environment states that: "compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a **social disapproval** of a qualitatively different nature".[1496]

In this fashion, EU criminal law exerts a symbolic influence, and "should also be seen as a statement of values and a device to express judgments of disapproval

---

[1492] Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019) 1, 55ff.
[1493] European Commission, 'Green Paper on the approximation, mutual recognition and enforcement of criminal sanction in the European Union', COM(2004)334 final, 9; for an analysis see Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49.
[1494] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6, recital 2, emphasis added.
[1495] TFEU, art 83 para 2.
[1496] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28, recital 3, emphasis added.

and reprobation".[1497] Those who break criminal law harmonised by the EU are stigmatised as having breached not solely domestic, but also EU values.[1498] This symbolic effect arising from the EU-level prescription of criminalisation and carceral punishment has the potential to considerably impact state practices and levels of punitiveness. As expressed by Hart, "crime is … conduct which [..] incur[s] a formal and solemn pronouncement of the moral condemnation of the community".[1499] Consequently, any act adopted under Article 83 TFEU signals states to push towards punitiveness[1500] - especially if one considers that the offences and penalties are deemed so reprehensible, so disreputable, that they need to be regulated at EU level.[1501] If (EU) criminal law educates in the positive, it can educate in the negative.[1502] Indeed, scholars have commended on the

[1497] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49, 56.
[1498] See e.g. Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979; see also Dora Kostakopoulou, *EU Citizenship Law and Policy* (Edgar 2020) 1, 38; and Elspeth Guild, 'Migration, security and European citizenship' in Engin Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 1, 418, 422.
[1499] Henry M Hart, 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems 401.
[1500] Joel Feinberg, 'The Expressive Function of Punishment' in Joel Feinberg (ed), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970) 1, 95.
[1501] Similar argument made by Kai Ambos regarding behaviours deemed so reprehensible that they need to be regulated and combatted at the international level; see also Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (Albert 1966) 1, 34; and more recently, Gerhard Werle, Principles of International Criminal Law (2nd edn, Asser Press 2009) 1, 42.
[1502] Kimmo Nuotio, 'A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all' (2020) 11 New Journal of European Criminal Law 20.

ability of EU criminal law to constitute a European *demos,*[1503] determining who is to belong and who is to be ostracised from it.[1504]

In sum, neither Union nor scholars may have any legitimate discussion without addressing the (invisible, indirect, yet ever-present, ever-increasing, and significant) effects of EU criminal law in prisons. Going forward, this should be acknowledged and accounted for.

11.3.3 The influence of the EPPO: article 86 TFEU

Another manner in which EU criminal law shapes detention is via the establishment and functioning of a European Public Prosecutor's Office (EPPO). The argument here is that the EPPO has the power to investigate and prosecute certain crimes (crimes already harmonised under article 83 TFEU). The natural conclusion and purpose of this investigation and prosecution is none other than to bring individuals to justice, hold them accountable, and impose detention before and after the proceedings – including a sanction which, as already identified before, is to follow an EU-harmonised min-max custodial sentence.

The EPPO's creation is provided under article 86 TFEU, which states the following:[1505]

[1503] Power in ancient Greek translated as kratos; hence demos + kratos equals democracy. Αντώνιος Μανιτάκης, 'Η Αθηναϊκή Δημοκρατία ως παράδειγμα αυτοπροσδιορισμού του πλήθους μέσω της αυτοκυβέρνησης του Δήμου' στο Ελίζα Αλεξανδρίδου (εκδ) *Τιμητικός Τόμος για τον Ιωάννη Μανωλεδάκη* (τόμος III Σάκκουλας 2007) 1, 43ff.
[1504] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49.
[1505] TFEU, art 86, emphasis added.

> 1. **In order to combat crimes affecting the financial interests of the Union**, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office […]
>
> 2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. **It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.**
>
> 4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to **extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension** and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

On the basis of this provision, a Regulation has been adopted, which governs the structure and functions of the EPPO.[1506] The Regulation is directly applicable, and needs not be transposed in the national legal order in order to produce legal effects.[1507]

The EPPO operates on a permanent basis, and its structure consists of two levels: the central, located at the EPPO's seat in Luxembourg, and the local, composed of a number of European Delegated Prosecutors located in the

[1506] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.
[1507] Note TFEU, art 288.

participating member states.[1508] The latter are the ones who actually conduct the investigations and prosecutions, while the former are responsible for monitoring and supervising.[1509]

So far, 22 out of the 27 EU members have joined.[1510] The EPPO is a relatively recent creature, commencing only mid-2021; though the latest annual report paints a positive image – as regards the Prosecutor's effectiveness, that is. In its brief lifespan the EPPO has, in total, received 3.318 reports, and by the end of 2022 had 1.117 active investigations, of which 28.2% had a cross-border dimension (defined by the report as "acts either committed on the territory of several countries, or which caused damages to several countries"). "[1511] Further, the report notes that "there are now more investigations into EU fraud initiated in the 22 participating Member States than the historical average before the EPPO's establishment",[1512] and overall "the EPPO's activity brought about a first positive evolution, with regard to the level of detection of fraud affecting the financial interests of the EU in some Member States".

While this is good news for the financial interests of the Union, it means, in practice, that more people end up in the criminal justice system, facing a very real possibility of ending up in pre- or post-trial detention, all on the basis of

[1508] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 8 para 1.
[1509] ibid art 9 para 2.
[1510] While five have decided not to participate (Sweden, Hungary, Poland, Ireland and Denmark).
[1511] European Public Prosecutor's Office, *EPPO Annual Report 2022* [2023] 1, 10. Somewhat noteworthy how the EPPO encompasses a distinct definition and understanding of cross-borderness, compared to the CJEU.
[1512] ibid.

supranational EU law.[1513] Since the EPPO deals with relatively grave crimes, the risk of EPPO-prosecuted individuals ending up in detention is considerable. It is interesting to note also that the prison systems in the EU suffering from structural shortcomings are the ones that also seem to present relatively elevated levels of corruption[1514] - it seems likely that the prison systems suffering the most will feel the EPPO's force the bluntest.

In regards to material competence, the EPPO is – so far – competent to prosecute, investigate, and bring to justice[1515] all offences related to the PIF Directive. Specifically, the following acts fall under the EPPO's remit: fraud relating to EU expenditure and revenues; cross-border value-added tax ("VAT"); fraud involving total damages of at least EUR 10,000 (ten thousand); passive and active corruption (covering both requesting/receiving bribes by a public official and offering/giving bribes to a public official) that damages, or is likely to damage, the EU's financial interests; misappropriation of EU funds or assets by a public official; money laundering involving property derived from one of the above-listed offences; and incitement, aiding and abetting, or attempted commission of the above-listed offences.[1516]

[1513] Petter Asp (ed), *The European Public Prosecutor's Office:Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, Stockholm 2015); Katalin Ligeti, *Toward a Prosecutor for the European Union: Volume 1* (Hart 2012); John AE Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in Willem Geelhoed, Leendert H Erkelens and Arjen WH Mei (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (T.M.C. Asser Press 2018) 1, 11.

[1514] Transparency international, Perception Corruptions Index; see also Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311.

[1515] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 4.

[1516] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) [2017] OJ L198/2, arts 3 and 4.

The EPPO's competence expands to include all offences that are 'inextricably linked' to these offences.[1517] In this fashion, the EPPO has an ancillary competence,[1518] which, besides sparking academic debate on whether is compatible with the principle of conferral and legitimate,[1519] further broadens the scope of criminalisation and punishment. This ancillary competence has been justified on the basis of effectively protecting the EU financial interests.[1520] I do not dispute that – the EPPO is good, from the point of view of protecting the EU interests – yet what about individual interests? The very existence of such an ancillary competence is problematic, as it leaves the EPPO's scope of powers poorly defined, and potentially very broad.[1521]

There is another worrisome factor to be addressed. It may seem that the EPPO may only exercise its material competence in cases where the damage to the Union's financial interests equals or exceeds EUR 10,000 (ten thousand).[1522] However, the EPPO may in fact act towards any criminal offence that has "repercussions"[1523] at Union level or involves EU officials. This considerably

[1517] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 22 para 3.
[1518] A Nieto Martín and M Muñoz de Morales Romero, 'The Office of the European Public Prosecutor and Related Offences: Deconstructing the Problem' in Petter Asp (ed), *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, Stockholm 2015) 1, 120.
[1519] See Diane Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?' (2016) 35 Yearbook of European Law 5.
[1520] Jacob Öberg, 'The European Public Prosecutor: Quintessential Supranational Criminal Law?' (2021) 28 Maastricht Journal of European and Comparative Law 164, 167.
[1521] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 22; see also Jacob Öberg, 'The European Public Prosecutor: Quintessential Supranational Criminal Law?' (2021) 28 Maastricht Journal of European and Comparative Law 164, 167.
[1522] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 25 para 2.
[1523] ibid recital 59.

expands the EPPO's scope of competence even more, since it allows for action in a very broad range of cases:[1524]

> inter alia, where a criminal offence has a transnational nature and scale, where such an offence involves a criminal organisation, or where the specific type of offence could pose a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence.

This understanding of "repercussions' is indicative, rather than exhaustive, as evidenced by the use of language ('inter alia'). This is troublesome, and offers no guarantee that the EPPO's reach will not expand further – on the contrary.

Indeed, and similarly to article 83 TFEU described before, article 86 TFEU leaves the door open to expand the EPPO's powers. The Commission is already contemplating including terrorism offences,[1525] while member states have further called for an inclusion of the EU sanctions violations under the EPPO's wing; a proposal to which both President of the EU Parliament and European Chief Prosecutor have expressed a certain openness.[1526]

The problems for the individual emerge clearly: the EU is pushing for the effective protection of its financial (and other, potentially soon) interests, using criminal investigation and prosecution as a tool to that end. This has an indirect, albeit considerable, impact on domestic orders. The message to the member states is

---

[1524] ibid.

[1525] European Commission, *Communication from the Commission to the European Parliament and the European Council – A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes* [2018] COM/2018/641 final.

[1526] Norbert Nolte, Florentine Schulte-Rudzio and Louis Goral-Wood, 'Prosecuting EU sanctions offences: will the EPPO take over in 2023?' (2022) Risk and compliance blog < https://riskandcompliance.freshfields.com/post/102i45t/prosecuting-eu-sanctions-offences-will-the-eppo-take-over-in-2023> (accessed 20 July 2023).

clear: criminalise, detain, prosecute – do what it takes to safeguard the EU interests.

The place of the individual is hardly accounted for.

11.3.4 EU initiatives nudging towards actuarial justice and segregation

It was noted that the EC Recommendation has a negative effect in terms of individual rights prerogatives, for it prioritises mutual trust and recognition over higher conflicting domestic standards of protection.[1527] It is maintained that, simultaneously, the EC Recommendation has the capacity to trigger national *ius puniendi,* encouraging member states to place individuals in pre-trial detention.

The EC Recommendation encourages states to "limit the legal grounds for pretrial detention to: (a) risk of absconding; (b) risk of re-offending; (c) risk of the suspect or accused person interfering with the course of justice; or (d) risk of a threat to public order".[1528] While seemingly this provision may be deemed positive for individual rights, as it *limits* the reasons that a state may rely on to place individuals in PTD, it is nevertheless a problematic provision. This is because of the very factors included. In particular, it is worrisome that the EC Recommendation invites states to take into "particular consideration"[1529] previous convictions, and also the nature and seriousness of the alleged offence.[1530]

[1527] See chapter 9 of this thesis.
[1528] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 19.
[1529] ibid art 20.
[1530] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 20; for a criticism see Adriano Martufi and Christina Peristeridou, 'The Purposes of Pre-Trial Detention and the Quest for Alternatives' (2020) European Journal of Crime, Criminal Law and Criminal Justice 153. Note also Marianne L Wade,

Considering previous convictions may affect proportionality of punishment, while building on the gravity of the offence to predict the risk of re-offending logically implies (if not presupposes) that the suspect has committed such an offence.[1531] Such considerations raise serious questions in regards to individual rights, especially the presumption of innocence,[1532] as guaranteed under both the EU[1533] and the CoE[1534] legal order.

In addition, the EC Recommendation urges member states to "carry out an initial risk assessment to determine the appropriate detention regime"[1535] for detainees suspected or convicted of terrorist and violent extremist offences. The notion of *risk* proves key. By relying on such a notion, the Recommendation nudges states towards models of risk assessment and actuarial justice,[1536] allowing for the pre-emptive or 'smart' detection of radicalised offenders.[1537] Such encouragement of criminalization of pre-crime behaviour fosters a process of penalization of suspect

'The EPPO and the pitfalls of actuarial justice' (2021) 28 Maastricht Journal of European and Comparative Law 265.

[1531] Thomas Weigend, 'Assuming the defendant is not guilty: The presumption of innocence in the German System of Criminal Justice' (2014) 8 Criminal Law and Philosophy 285, 298: the very fact of assessing whether the suspect might 're-offend' builds upon the assumption that the suspect has committed the offence. See further Antony Duff, *Trials and Punishments* (Cambridge University Press 1986) 1, 139.

[1532] For a theoretical discussion, see Peter-Alexis Albrecht, 'Die Untersuchungshaft – ein Straf oder Schuldspruch? Ein Pläydoyer fûr den Grundsatz der Unschuldvermutung in Haftrech' in A Donatsch (ed), *Strafrecht, Strafprozesrecht und Menschenrecthen. Festschrift für Stefan Trechsel zum 65 Geburstag* (Schulthess 2003) 1, 357ff; Antony Duff, 'Pre-trial detention and the presumption of innocence' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the limits of criminal law* (Oxford University Press 2013) 1, 128f.

[1533] CFREU, art 48.

[1534] ECHR, art 6 paras 2 and 3.

[1535] European Commission, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44, art 82.

[1536] Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 Criminology 449; Malcolm M Feeley and Jonathan Simon, 'Actuarial Justice: the Emerging New Criminal Law' in David Nelken (ed) *The Futures of Criminology* (Sage 1994) 1, 173.

[1537] George Wenzelburger and Pascal D König, 'The liberal dream of smart detention? Algorithms and the politics of pretrial detention in the US states' (2022) 44 Law & Policy 325.

populations that contrasts with the individual human rights-based approach adopted by the CoE.[1538] The effectiveness and legitimacy of such practices are far from self-evident, with scholarship criticising whether they result in profiling, discrimination, abuse of power, disregarding criminal justice principles in favour of mere *probabilités,*[1539] and tipping the balance once more in favour of security, rather than individual rights.[1540]

Granted, the practical impact of the EC Recommendation on the ground is limited. It only constitutes soft-law, and confers no power to the Union. However, there are strong symbolic connotations here that need to be acknowledged and dealt with.[1541]

Besides the EC Recommendation, other EU initiatives nudge states towards actuarial justice. Such an approach is particularly profound in the context of the

[1538] Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11 Theoretical Criminology 261.
[1539] Je vois. Les gens sont devenus esclaves des probabilites.1 Secret Agent Lemmy Caution in Alphaville, Jean-Luc Godard (1965); see further Bernard E Harcourt, 'The shaping of chance: Actuarial models and criminal profiling at the turn of the twenty-first century' (2003) 70 The University of Chicago Law Review 105.
[1540] Gil Rothschild-Elyassi, Johann Koehler and Jonathan Simon, 'Actuarial Justice' in Mathieu Deflem (ed) *The Handbook of Social Control* (Wiley 2018) 1, 194ff; Robert Werth, 'Risk and punishment: The recent history and uncertain future of actuarial, algorithmic, and "evidence-based" penal techniques' (2018) 13 Sociology Compass 1.
[1541] Adriano Martufi and Christina Peristeridou, 'The purposes of pre-trial detention and the quest for alternatives' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 153.

EU Directive on the protection of the Union's financial interests;[1542] and also the Terorrism Directive,[1543] which explicitly states that:[1544]

> prevention of radicalisation and recruitment to terrorism, including radicalisation online, requires a long-term, **proactive** and comprehensive approach. Such approach should combine measures in the area of criminal justice […] as well as the provision of effective deradicalisation or disengagement and exit or rehabilitation programmes, including in the prison and probation context.

In similar fashion, the EU is promoting the implementation of special security measures and segregation regimes for 'terrorists' in separate wings in high-security prisons. This occurs notably through EU programmes that finance studies analysing and even promoting the benefits and advantages of such segregated prison regimes. Such programmes and regimes, which endanger prisoners' rights through segregation, systematic strip searches and lack of activities and support, have been criticised by the CPT.[1545]

[1542] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.
[1543] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.
[1544] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6; emphasis added.
[1545] See, for an analysis, Gaëtan Cliquennois, Sonja Snacken and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11; see also EU Penal Programmes 2015–2019.

Overall, such efforts promote security as a value in and of itself,[1546] and a public good[1547] that, if needs be, trumps individual rights – including the rights of those individuals who have yet to commit a crime.

11.3.5 National *ius puniendi* as the hole of the doughnut

National *ius puniendi* has been undoubtedly shaped by the ever-expanding and broadly interpreted EU criminal law.

In light of such findings, I submit that it is proper to think of EU member states as masters of their own penal systems, *except* when EU law forces them to surrender and transfer detainees, criminalise, prosecute, and punish certain behaviours in a specific manner. In this sense, state *ius puniendi* in today's EU is very much like the proverbial "hole of a doughnut", which "does not exist except as an area left open by a surrounding belt of restriction"[1548] – a belt woven by EU law itself, of supranational nature, and with the entire EU judicial, monitoring, and enforcement apparatus at its back.

At this point, an important caveat should be addressed. A counterargument to my assertion could rest on the fact that it was the member states themselves who chose to allow the Union to act in this fashion – consequently, my critique on EU

[1546] Ester Herlin-Karnell, 'The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice' (2017) 8 Transnational Legal Theory 79; Alun Howard Gibbs, 'Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice' (2010) 17 European Law Journal 121.
[1547] For discussion on public goods in criminal justice, see indicatively Joseph Raz, 'Right Based Moralities' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 1, 182; for security in the AFSJ context, see Alun Howard Gibbs, 'Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice' (2010) 17 European Law Journal 121. See also the discussion in chapter 6 of this thesis.
[1548] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 1, 31. While Dworkin was referring to human rights delimiting state discretion in sentencing, the same principle holds true for EU criminal law.

law, and my claim that the EU shapes and delimits national *ius puniendi*, is unfounded. In response, I should note that, whilst the member states are still formally the "captain of the ship"',[1549] it has been noted that members of the EU Council act "as an entity separate from national governments with a distinct [European] loyalty and which exercises some measure of genuine autonomous power".[1550] The symbolic effect of EU criminal law and policy is not codified in the Treaties, nor did the member states give licence to the Commission to publish the Recommendation, or shape it in this specific manner. The field of EU criminal law is increasingly turning more and more supranational, with states finding themselves unable to react to EU criminal policies[1551] – a point exacerbated by the interpretation and ever-increasing competence of the Union in the area, in the name of promoting the effectiveness of EU law,[1552] spiralling towards "turbo-penalisation".[1553]

The Union is unequivocally emerging as a penal policy actor,[1554] shaping national criminal justice systems, and honing in on their *offensive* function of criminal law and *ius puniendi*. In simple terms: the EU is nudging (often actively pushing)

[1549] Jacob Öberg, 'Exit, Voice and Consensus: A Legal and Political Analysis of the Emergency Brake in EU Criminal Policy' (2021) 46 European Law Review 506, 530.
[1550] ibid.
[1551] For an analysis on the emergency brake procedure and the (ever-diminishing) powers of the member states to react, see Jacob Öberg, 'Exit, Voice and Consensus: A Legal and Political Analysis of the Emergency Brake in EU Criminal Policy' (2021) 46 European Law Review 506, 530.
[1552] Valsamis Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) 12 Review of European Administrative Law 117, 130; referring to Advocate General Bot, paras 32-33.
[1553] Els Dumortier et al, 'The rise of the penal state: What can human rights do about it?' in Sonja Snacken and Els Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2011) 1, 107ff; see also Gaëtan Cliquennois, Sonja Snacken and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11.
[1554] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378, 400.

states towards the use of criminal detention. Such a development has attracted various criticisms, revolving around democracy,[1555] subsidiarity and conferral,[1556] fragmentation and lack of coherence,[1557] state sovereignty[1558] and national identity.[1559] Indeed, scholars have argued that the EU should either refer from further criminalising,[1560] or, alternatively, and if harmonisation is to continue, it must be accompanied by a Treaty amendment, which will ensure the coherence and legitimacy of the supranational legal order.[1561] In addition to these critiques, it is submitted here that the EU stance further affects the individual, who suffers the profound (albeit indirect and invisible) effects of EU criminal law. Harmonisation of crimes and sanctions under article 83 TFEU delimits state *ius puniendi,* prohibiting national authorities from adopting more lenient for the individual definitions, but rather pushing them to adopt more repressive criminal

[1555] Indicatively, Jacob Öberg, 'Legal Diversity, Subsidiarity and Harmonisation of EU Regulatory Criminal Law', Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Diversity* (Cambridge University Press 2016) 106, 109.
[1556] Kai Ambos, *European Criminal Law* (Cambridge University Press 2018) 1, 320; Jacob Öberg, 'Subsidiarity and EU Procedural Criminal Law' (2015) 5 European Criminal Law Review 1, 19; further, Steve Peers, *EU Justice and Home Affairs Law* (4th edn, Oxford European Union Law Library 2016) 1, 670ff.
[1557] Anne Weyembergh and Irene Wieczorek, 'Is There an EU Criminal Policy?' in Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 30ff.
[1558] Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] 2 BvE/08 *Lisbon Case* [2009]; see also Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] *Re Wünsche Handelsgesellschaft* BVerfGE 73 339 [1986].
[1559] Mireille Hildebrandt, 'European Criminal Law and European Identity' (2007) 1 Criminal Law and Philosophy 57, 64.
[1560] Petter Asp, *The Substantive Criminal Law Competence of the EU* (StiftelsenSkrifter utgivna avJuridiska fakulteten vid Stockholms universitet 2012); Maria Fletcher, Robin Lööf, and Bill Gilmore, *EU Criminal Law and Justice* (Edward Elgar 2008), 1, 20.
[1561] Hans G Nilsson, 'Where Should the European Union Go in Developing Its Criminal Policy in the Future' (2014) 1 eucrim 21.

law,[1562] which necessarily constrains individual liberties.[1563] Further, such standards are to be interpreted broadly, to ensure the effectiveness of EU law.[1564] EU states have to follow the definition of crimes and sanctions set at EU level, or suffer the consequences. Recently, and with the competence of the EPPO ever-increasing, the EU has also placed itself as a key actor in matters of investigation and prosecution as well. Coupled with the expressive function of criminal law, the EU competence in criminal matters seems to lead to "an ongoing repressive development and to penal hypertrophy".[1565] Where a Eurocrime is committed, this is also being viewed as a breach of important values, meaning that its qualification as such has profound effects for individuals suspected or convicted of these offences.[1566] Taken in conjunction, the EU influence on prisons only enhances the risk of human rights violations. In a Union of disparate and all-too-often inadequate conditions of detention, EU law mandates push states further towards criminalisation and punitiveness.[1567] This will simply not do.

[1562] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378, 400; further referring to Bernd D Hecker, *Europaisches Stratfrecht* (3rd edn, Springer 2010) 1, 371. See also Petter Asp, *The Substantive Criminal Law Competence of the EU* (StiftelsenSkrifter utgivna avJuridiska fakulteten vid Stockholms universitet 2012) 1, 111.
[1563] Irene Wieczorek, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378, 400.
[1564] Valsamis Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) 12 Review of European Administrative Law 117, 130; referring to Advocate General Bot, paras 32-33.
[1565] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49.
[1566] Marianne L Wade, 'Cross-Border Crimes' in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 204.
[1567] Carlo Sotis, 'Criminaliser sans punir: Réflexion sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne' (2010) 65 Revue de science criminelle et de droit pénal comparé 773. Yes, the EU may regulate but not enforce – but it may make its member states enforce. As Simester, Spencer, Sullivan and Virgo state, 'criminal law is the means by which the State forces citizens into complying with its injunctions.' Similarly, EU criminal law is the means by which the EU forces states into the same situation. Note also Andrew

The symbolic and at least effect of EU criminalisation should not be underestimated.[1568] Member states have primary competence in prosecuting, criminalising, and punishing individuals. Nevertheless, the EU has a profound impact on national penal policies, affecting the flow of incarceration, and nudging states towards penal excess. This is apparent particularly upon closer examination of both the EPPO, and the criminalisation tendencies of article 83 TFEU – especially considering that custodial measures and min-max imprisonment sentences remain the norm.[1569]

The risk here is simple: such practices may well sabotage EU efforts towards lowering detention flows, and undermine the entire legitimacy of EU action in prisons. As already stated,[1570] voices have been raised in favour of EU harmonisation of prison law, and *ius puniendi.* The added value of such propositions lies in their potential to improve detention conditions both directly and indirectly. The direct impact of such EU law would be to provide for legally binding, justiciable, and enforceable standards that all national authorities would have to respect. As for the indirect impact of such EU legislation: this lies in its capacity to act as a factor of penal moderation, nudging (if not obliging) member states to direct individuals away from detention, and into alternative (non-

P Simester et al, Simester and Sullivan's Criminal Law: Theory and Doctrine (5th edn, Hart Publishing 2013) 1, 6.

[1568] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 49.

[1569] Cf Valsamis Mitsilegas, 'From Overcriminalisation to Decriminalisation The Many Faces of Effectiveness in European Criminal Law' (2015) 5 New Journal of European Criminal Law 416, where the point is made that EU criminal law policies could also lead to decriminalisation, in case the member states make excessive use of their *ius puniendi* to the point that criminalisation undermines free movement and the operation of the Single Market.

[1570] Note chapter 10 of this thesis.

custodial) measures.[1571] This would result in a decrease of admissions, higher turnover ratios, and long-term drop of detainee numbers. Conditions of detention would improve as a consequence.[1572]

Such efforts are to be applauded, for they have considerable potential to tackle the prison crisis on the ground, by complementing policies directed to *prison law* with policies targeted at *ius puniendi*. In simple terms: it is proper for the Union to adopt a holistic approach, acting towards improving detention standards both directly (via standard-setting) and indirectly (by lowering admissions in prison). Nevertheless, the EU should avoid any mismatch between the two policy strands. It would be paradoxical for the Union to demand that national authorities adopt standards and take action to improve the quality of prison life, *while simultaneously* triggering national *ius puniendi,* nudging states towards making increased use of custodial measures. The latter policies have the capacity to undermine the practical effectiveness and perceived legitimacy of the former. This holds especially true when considering the contested potential of article 82 TFEU to act as a legal basis for the adoption of EU measures in detention.[1573]

11.4 Conclusion

The chapter has argued for the reinterpretation of the judicial cooperation regulatory framework, and the careful assessment of the effect of EU penal policies on detention. Such an exercise would allow the EU to emerge as a

[1571] Note Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221.
[1572] Note the discussion in section 2.2 of this thesis.
[1573] Note Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 eucrim 221; also the discussion in section 10.4 of the thesis.

legitimate actor in detention, and avoid the paradoxical scenario where the EU strives to enhance detention standards or at least keep individuals out of structurally problematic detention regimes, while simultaneously pushing its states towards punitiveness, delimiting the power of the executing state or individual to react to mutual recognition requests, and overall promoting the functional objective of effective cooperation in lieu or blatantly against individual prerogatives.

Current EU initiatives may be in the right direction – yet there is a lot left to be desired. If the music is to keep on going, the conductor should make sure to provide the right example, before demanding her peers do the same.

CHAPTER 12

SYNTHESIS AND CONCLUSIONS

12.1 Answering the research question(s)

All the key points have been submitted. It is time for the analysis to turn to synthesis, providing an answer to the research question(s), before submitting a few concluding thoughts.

It shall be reminded that the overarching query the thesis set out to address is as follows:

- Should and could the EU secure the creation and maintenance of detention conditions that actually safeguard detainee rights in the prison systems of its member states – and, if so, how?

In light of the analysis undertaken in previous chapters, and bringing everything together, the following focal points – answers to the sub-questions emerge:

The nexus between EU and detention is reciprocal, with the EU simultaneously shaping and being shaped by detention. The EU relies on a presumption of equivalent detainee rights protection; such values fall under the scope of article 2 TEU. On the basis of this presumption, mutual recognition instruments operate to maintain and propel the Union as an AFSJ. To rescue these principles and address the landscape of disparate and inadequate detention regimes, the Union has been pushing for harmonisation of prison law at EU level, initiating a range of measures, the EC Recommendation is the latest of which. Simultaneously, and

to promote the effectiveness of EU law and the protection of its interests, the EU has relied on triggering the use of national *ius puniendi.*[1574]

The nexus is also problematic. Disparate and inadequate conditions of detention undermine the mutual trust and recognition principles, sabotaging the AFSJ. The current prison reality simultaneously undermines the effectiveness and legitimacy of EU law, and constitutes a systemic and direct assault on the Union of values. There is a principled and functional imperative both for EU action in prisons.[1575]

The objective should be the establishment and maintenance of detention regimes that effectively regulate and actually safeguard detainee rights across all EU member states, and in light of the principle of universality of human rights and human dignity, while accounting for CoE and UN standards as well. The instrumentalization of individual prerogatives in the name of mutual trust and recognition is to be avoided.[1576]

Current EU initiatives seek to enhance detention standards, while keeping the individual outside structurally problematic prisons that pose an actual human rights risk. While commendable, such EU action falls short, as it prioritises functional concerns over individual rights and values.[1577]

Going forward, the EU has certain options. The baseline scenario consists of doing nothing, relying instead on current EU, national, CoE, and UN initiatives.

[1574] Such observations provide an answer to the query: What is the place of prisons in the EU *acquis*?
[1575] Such observations provide an answer to the query: What is the problem, and why is it a problem for the EU?
[1576] Such observations provide an answer to the query: What should be achieved?
[1577] Such observations provide an answer to the query: Wow has the EU reacted to the problem, and how is such EU action to be assessed?

Such a course of action is undesirable, as it allows the issues to foster. The EU should act, to safeguard its legal foundations, identity, values, and policy objectives.[1578]

Current EU initiatives should be maintained, yet modified to seek protection of individual rights as an end in itself. Going forward, the EU should push towards the adoption of an EU Prison Charter, redefine the *Aranyosi* two-tiered test, set up detention supervisory mechanisms, promote alternatives to detention, and assess the impact of its judicial cooperation and wider penal policies on detention.[1579]

Regarding the adoption of an EU Prison Charter, the principle of subsidiarity is fulfilled. Action from the member states or other pan-European organisations (CoE and UN) alone is in no position to satisfactorily address the issue. In light of the gravity and extent of the problem, it seems the EU is best placed to do so. It is disputed whether, in its current form, the Union has the right to act (i.e. a legal basis), and whether utilising the dominantly proposed legal basis (article 82 TFEU) would be in line with the principle of proportionality. It seems Treaty reform proves prerequisite, before allowing for the lawful and legitimate adoption of hard-law standards in detention. To address such legitimacy concerns in the long term, a shift in direction regarding the EU judicial cooperation and penal policies seems promising and feasible currently.[1580]

[1578] Such observations provide an answer to the query: Why should the EU act?
[1579] Such observations provide an answer to the query: What are the various options to achieve these objectives?
[1580] Such observations provide an answer to the query: How do the different options compare, and how could and should the EU proceed?

In light of these observations, it is submitted that the EU indeed must, could, and should secure the creation and maintenance of detention conditions that actually safeguard prisoner rights in the penal systems of its member states – though there remain steps to be taken to this end, and to make such action legitimate, comprehensive, and effective.

12.2 Shaping the future of EU Prisons: *quo vadis?*

Thus concludes the narrative – both analysis and synthesis have been provided. A few departing considerations are in order.

The EU may have developed its own human rights *acquis* of relevance to detention – yet its mere existence does not justify EU action in prisons, unless a concrete nexus may be identified. The analysis has identified two triggers – the CFREU in mutual recognition proceedings, and articles 2 and 7 TEU at all times. Ultimately, and in the current form and shape of the Union, a robust detention system that safeguards, respects, and promotes detainee rights proves a *sine qua non* for the functioning, existence, and further evolution of the EU. The connection between EU and detention is a reality, one that came to be on the basis of the states' own decisions in the aftermath of Tampere, and also with the decision to ground the Union's foundations firmly in rights and dignity. Granted, it is doubtful whether either the Union or its states considered detention matters, when making such choices. Yet the connection between EU and prisons may not be denied by either the Union nor its states, as it is of their own making.

All 27 states must provide for equivalent levels of protection; if but one falters, the whole of the EU crumbles. It is a case of all-or-nothing, where *26 out of 27* equals *0 out of 27*.[1581]

Some answer has been provided, at EU level. The CJEU, faced with external pressure, had no choice but to acknowledge the tension between mutual trust and detainee rights; in an attempt of reconciliation, it introduced the two-step approach. While commendable in spirit, the judicial approach remains problematic, a patchwork approach, and long-term myopic by design. The EU has strived to complement the CJEU efforts, yet such efforts focus primarily and almost exclusively on mutual trust.

Going forward, I believe it is inevitable that the EU Prison Charter will be adopted. The recent adoption of the EC Recommendation only strengthens such suspicions. I further believe that the two-tiered approach shall be redefined, and the EU shall seek to delimit the impact of its judicial cooperation policies. This is already happening, with the Union exploring some of the suggestions outlined previously,[1582] and with *E. D. L*. proving a step in the right direction – though the CJEU needs to prove more decisive in its reasoning, and align itself to the Strasbourg case-law.

The immediate risk is not inaction, but rather incomprehensive, functionalist action. The danger here is not that the EU forgets the prison problem. The danger

[1581] In line with Joutsen's theory of harmony. For a vivid representation of mutual (dis)trust and the effects of eroding harmony, see indicatively John RR Tolkien, 'Ainulindalë' in *The Silmarillion* (George Allen and Unwin 1977).
[1582] Referring to section 11.2 of this thesis; see also Julia Burchett, Anne Weyembergh and Marta Ramat, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023).

is that the Union persists on a rather piece-meal, economistic, functionalist approach[1583] that tackles said problem on the basis of mutual trust and recognition considerations solely. While the operation of the EAW and ToP FDs, and the violation of article 4 CFREU, constitute the most visible factors at play, the systemic risks at place go much deeper and broader than that. The rule of law crisis already demonstrated the importance of safeguarding the EU values. Structurally problematic detention regimes pose an equal issue – albeit much more silent, due to the secluded nature of detention itself. It is paramount to acknowledge this, and structure all future EU initiatives with this point in mind. Hopefully this happens sooner rather than later.

At any rate, the EU and detention are, and shall remain, intrinsically connected. The European project may have indeed commenced on a strictly resource- and market-oriented basis. Nevertheless, and since the early days of the ECSC, the seeds for a Europe united in diversity in *all* aspects, including detention, are to be detected. The very abstract of the Treaty of Rome reads:[1584]

> RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a **broader and deeper community among peoples** long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared

[1583] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549, 552; referring further to Philipp Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002) 1, 250ff.

[1584] The original Treaty was drafted in French, and reads: RÉSOLUS à substituer aux rivalités séculaires une fusion de leurs intérêts essentiels, à fonder par l'instauration d'une communauté économique les premières assises d'une communauté **plus large et plus profonde entre des peuples** longtemps opposés par des divisions sanglantes, et à jeter les bases d'institutions capables d'orienter un destin désormais partagé; own emphasis.

Une communauté plus large et plus profonde; this has always been the original end-goal of the EU. Such an end, naturally, was not to be accomplished in the 1950s – arguably, the time is still not ripe, in light of legitimacy and proportionality considerations. While challenging, the road ahead is clear: further, broader, deeper integration. Europe in prisons "will not be made all at once, or according to a single plan: it will be formed through concrete measures which bring about a de facto solidarity."[1585]

The key challenge is ensuring that such solidarity goes deeper than purely practical, functionalistic considerations, accounting instead for the ethos of the EU, and placing the individual at the heart of the discussion.[1586] The EU should not force its way to the objective.[1587] The game here is not one of power, but rather negotiation – and one may not well hope to legally *regulate and enforce* values, without acknowledging the moral and political dimension of the issue.[1588] If hoping to proceed legitimately, the EU should build one brick at a time. Indeed, I maintain that these words echo true today:[1589]

> [...] it is a mistake to depict Europe as a kind of renaissance cathedral entirely designed by a powerfully-minded architect. To stick to religious architecture, one could say it is more like a medieval cathedral, patiently built by several generations

[1585] To paraphrase the Schuman Declaration.
[1586] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549, 552; referring further to Philipp Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002) 1, 250ff; this escapes the scope of prisons; see for an example re migrants, Valsamis Mitsilegas, 'The EU external border as a site of preventive (in)justice' (2022) 28 European Law Journal 263.
[1587] See Christos Papachristopoulos, 'On the Legitimacy of the European Prison Charter' (Maklu forthcoming).
[1588] For a similar point re the rule of law, see Matteo Bonelli, 'From a Community of Law to a Union of Values Hungary, Poland, and European Constitutionalism' (2017) 13 EuConst 793.
[1589] R Dehousse, 'Rediscovering Functionalism' in C Joerges, Y Mény and Joseph HH Weiler (eds) *What Kind of Constitution for What Kind of Polity?* (RSC 2000) 1, 195.

> of craftsmen with the materials available to them, in response to what they perceived as the needs of their time [...] Making a success of enlargement and **preserving the `virtuous' character of European integration are noble aspirations. Their chances of success are dependent on our ability to conceive of ways to make them palatable to political leaders and public opinion alike**. What one needs today are not only imaginative political thinkers, but also talented political entrepreneurs.

The EU is already emerging as a detention actor. To ensure its legitimacy, effectiveness, and long-lastidness, there is a need for the EU to step away from pursuing effectiveness as a priority objective, and focus instead on its own values, and the place of the individual. Before embarking on a quest to litigate, alternative options, such as management and persuasion, should be explored and refined further.[1590] Besides arguments addressed to the member states and the EU *demos,* EU law itself should strive towards human rights, to achieve internal harmony. Indeed, a Union that advocates for criminalisation, punitiveness, and retribution, will understandably be perceived as less legitimate in its quest to regulate and enforce detention standards, compared to a Union that strives for rehabilitation, and sees the individual in light of the values of *misericordia* and *dignitas*.[1591] Accession of the EU to the ECHR, if at all possible in the post-*Opinion 2/13* era, would be a welcome step to this direction, as it would signal the Union's commitment to human rights and individual-centred law-making.[1592]

[1590] Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311.
[1591] For an analysis on the symbolism of EU criminal law, see Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law' in Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 48ff.
[1592] *Opinion 2/13* Accession of the European Union to the ECHR ECLI:EU:C:2014:2454 – some have noted that accession may never (should never) occur; see, among others, Steve Peers,

If impractical, the EU should at least strive to align its approach to its own penal imaginary, accounting for the international human rights norms already in place.

12.3 Future research areas

The eventual adoption of an EPC (in whichever form it comes), further *Aranyosi* case-law, and EU initiatives in detention, shall provide for a fruitful investigation ground.

In the meantime, scholarship may turn to the following tasks.

The research concerns itself with an issue that is, at its core, interdisciplinary.[1593] Detention conditions and penology; prison law and individual rights; *ius puniendi* and EU criminal law, EU competence, sovereignty, and compliance theories: all issues of relevance. The complexity of the issue poses challenges, and calls for close and careful balance. Yet it is exactly the same complexity that may provide answers. While black-letter research in EU law remains essential, novel normative boundaries and idiosyncrasies of the *acquis communautaire* demand an evolved methodological toolbox, to better reflect the inherent interdisciplinarity of both EU and prisons.

To design such a toolbox, researchers could look beyond the issue at hand, seeking to examine similar issues in other areas. They would not have to look far, as the EU itself presents a fruitful field. The analysis draws attention to a few key areas that may be used as springboards. These include the rule of law crisis; the

'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 German Law Journal 213.

[1593] See Christos Papachristopoulos and Denise Di Nica, 'To Err Twice: Methodological Pluralism Through the Lens of EU Prison Policy' (forthcoming) Goettingen Journal of International Law.

Single Market; immigration detention; and national detention regimes. Each point shall now be examined in brief, to highlight its parallels with the issue at hand, and the potential research questions that may be raised under a comparative lens.

The tension between EU and detention reveals a crisis of values. In theory, all member states equivalently respect and safeguard human rights – yet in practice enforcement levels vary considerably. The same statement holds true for another article 2 TEU value: the rule of law (RoL). Human rights and the RoL present striking similarities: both encapsulate EU values, which, to a large extent, have been codified and made clear. Both are fundamental to the EU legal order, and constitute essential criteria of EU membership. In paper, all member states abide by and respect these common values. In practice, there is a vacuum in enforcement.[1594] Detainee problems are often invisible. The RoL crisis, perhaps due to its high-profile political dimension and the coverage it has received in the EU and internationally, is well-known to academics, practitioners, and laymen as well. It follows that the EU RoL crisis has drawn the scholars' attention. It would be interesting to study their conclusions, as there may be findings of relevance and applicability in prisons – or, at least, errors that should not be repeated. It is interesting to note that there is a direct match between states that are currently suffering from a profound RoL crisis, and states that are faced with structural deficiencies in their detention systems.[1595]

[1594] It is interesting to note another parallel: both the RoL crisis (the dismantling of judicial independence) and the prison crisis are financed with the money of the EU taxpayer. Note also the discussion in RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 Journal of European Public Policy 481.
[1595] Just to note Poland and Hungary, among others.

In addition, and when looking to regulate the tension between mutual recognition and detention, one may well look at the individual actors: mutual recognition, and detention, as they appear in other fields.

Mutual recognition is itself a legal transplant,[1596] having emigrated to the AFSJ from the Single Market. The same principle has also been developed in various other areas since, including mutual recognition of diplomas and professional qualifications, EU judicial cooperation in civil matters, as well as in the area of the common asylum policy. It would be interesting to study the functioning of the principle (and its twin mutual trust) in these areas: does it work, and, most importantly, why? By understanding the effectiveness and challenges surrounding the principle in other areas of law, one may thus better understand it in the context of anti-crime judicial cooperation in the AFSJ.[1597]

Similarly, detention does not only occur within the criminal justice system, but may instead result from administrative decision-making, as in immigration detention. This practice has also been applied in the EU. Albeit not officially recognised as EU migration law, the Union has forged an agreement with two of its member states, Italy and Greece, the result of which has been the (rather notorious) hotspot approach. Initially, hotspots were meant to serve as first points

[1596] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

[1597] Many an (EU) criminal law scholar would disagree, citing the unique nature of criminal justice as a field. I agree with the latter observation. Yet mutual recognition is ultimately an EU mode of governance employed in more than one EU areas of competence. There are potential findings here – if only to confirm the uniqueness of (EU) criminal law, and acknowledge the limitations of such research. Regardless, the research should be conducted – for a general discussion already, see Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 j. eur. pub. pol'y 762; and Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy 682.

of receipt for migrants coming to the EU shores. Swiftly and decisively, these centres have turned to *de facto* immigration detention camps. Interestingly for our purposes, these camps are characterised by structurally poor living conditions, which result in systemic rights violations. Due to the (once more) high profile of the situation, the issue has drawn considerable attention. The EU has legislated on the field, trying to regulate living conditions in hotspots; further, it has provided Italian and Greek authorities with generous funding in support programmes, and has invited them to improve the situation time after time, switching between a carrot and a stick approach.[1598] What has been done there, what measures have been implemented, to what extent have they proven effective, to what extent have EU states accepted such measures as legitimate – and, most of all, why? Once more, the fact that the two member states housing hotspots also belong among the most problematic detention systems proves noteworthy.

Finally, and since prisons formally remain (for now) within state competence, one may do well to seek the answer there. Such a task would likely fall to local researchers, who are familiar with and comprehend local idiosyncrasies (and are also better equipped practically, in terms of location, language etc.). It seems logical to expect that such efforts would have to be undertaken by interdisciplinary teams, comprising criminal justice lawyers and legal scholars, but also scholars and practitioners from all related disciplines, such as psychologists, economists, historians, linguists, sociologists, criminologists, penologists, and, of course, under the auspices of those familiar with the EU legal order. Initiatives seeking to

[1598] See, among others, Chiara Loschi and Peter Slominski, 'The EU hotspot approach in Italy: strengthening agency governance in the wake of the migration crisis?' (2022) 44 Journal of European Integration 769.

identify the root causes of the problematic situation, alongside local needs and peculiarities, should be supported and developed further. Prisons do not exist *in vitro*, but rather form part and parcel of the state in which they operate.[1599] There is a plethora of factors that shape and influence life behind bars. The EU penal imaginary is, of course, one of these factors, but far from the sole (or, for that matter, the more influential) one: instead, detention is the product of a melting pot of history, economy, societal perceptions, political agendas, judicial behaviour, and other factors, the exact influence of which is tough to measure or qualify *in exacto*. When pondering on all matters of detention, one may well end up wondering, 'what's law got to do with it?'[1600] The criminal justice principle of 'one size does not fit all' holds true in this context, and intervention that is based on evidence, and occurs close to the ground, demonstrates perhaps the greatest promise, while being in line with the principle of subsidiarity and the current political landscape.[1601]

12.4 Conclusions

The Union needs to march forward.[1602] The logic of Westphalian states holding exclusive authority over a clearly defined geographic territory or policy area may

[1599] See indicatively Sonja Snacken, Kristel Beyens and Hilde Tubex, 'Changing Prison Populations in Western Countries: Fate or Policy?' (1995) 3 European Journal of Crime, Criminal Law and Criminal Justice 18.
[1600] To quote the phrase made famous by Sara Sun Beale, 'What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law' (1997) 1 Buffalo Criminal Law Review 23.
[1601] In this sense, calls for the establishment of communication links between prison authorities and the local community are to be celebrated; see European Parliament resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI)), para 18.
[1602] On this point see also Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311, 333ff.

have worked during the early days of the European community. Not anymore. The Union has long evolved, and so must its mode of governance.

Traversing from the abstract to the factual will undoubtedly prove a challenging process. By building on presumptions and fictitious common normative threads, the Union has painted itself into the proverbial corner. Policymakers and scholars should not repeat this mistake, by assuming that intervention of any form would readily resolve the situation. Compliance mechanisms, through persuasion, monitoring, enforcement, litigation, and capacity building, all have the potential to prove consequential – yet, they should not be regarded as panacea, nor promoted without consideration for the complexity of the issue, and multitude of factors at play. Before committing to any single course of action, the Union should conduct a thorough ex-ante evaluation, to assess the anticipated impact of any action, and plan accordingly. As already suggested, comparative research and local initiatives will prove of paramount importance to this end, and should be encouraged.

In the (recent) past, contemplating the potential of Europe in prisons would likely be dismissed as another rather extreme view of pro-European federalists, incompatible and far detached from the perceivable. Today, such notions prove a necessity. Embarking on a quest to rescue the AFSJ and the Union of Values is in line with the European ideal, while also serving the common interests, security, and individual prerogatives of the entire *populus*. Advocating for EU action in domestic prisons is no pretext for erasing national diversities. On the contrary, it constitutes a call for addressing systemic human rights issues that burden a considerable number of penitentiaries across the continent. While

cognizant of the legal, political, and pragmatic considerations that emerge, and making no claim of providing any definitive answers, this contribution is meant to advance the debate on how best to ensure unity of values in a diverse setting, and account for the place of the individual detainee in the emerging world of the EU as a penal actor – thus shaping the future of prisons in Europe, and Europe in prisons.

CASES

From the Court of Justice of the EU

Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

Case 1/58 *Stork v. High Authority* [1959] ECR 43.

Case 176/03 *Commission v Council* [2005] ECR I–7879.

Case 181/73 *Haegeman v Belgian State* [1974] EU:C:1974:41.

Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend and Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECLI:EU:C:1969:57.

Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

Case 45/86 *Commission v Council* [1987] EU:C:1987:163.

Case 5/88 *Hubert Wachauf v. The State* (Bundesamt für Ernährung und Forstwirtschaft) (Federal Office for Food and Forestry) [1989] ECR 2609.

Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

Case C 201/13 *Deckmyn and Vrijheidsfonds* [2014] ECLI:EU:C:2014:458, Opinion of AG Cruz Villalón.

Case C 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

Case C 249/86 *Commission v Germany* [1989] ECR 1290.

Case C 36/75 *Roland Rutili v. Ministre de l'interieur´* [1975] ECR 1219.

Case C 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491.

Case C 409/06 *Winner Wetten* [2010] ECR I 8015.

Case C-105/03 *Pupino* [2005] ECR I-05285.

Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltungfiir Branntwein (Cassis de Dijon)* [1979] ECR-1979-00649.

Case C-123/08 *Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) – European arrest warrant issued against Dominic Wolzenburg* [2009] ECR I-9621.

Case C-128/18 *Dimitru-Tudor Dorobantu* [2019] ECLI:EU:C:2018:589.

Case C-129/19 *Presidenza del Consiglio dei Ministri* v *BV* [2020] ECLI:EU:C:2020:375, Opinion of AG Bobek.

Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979, Opinion of AG Bot.

Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2010] ECR I-11979.

Case C-150/05 *van Straaten* [2006] I–9331 Opinion of AG Ruiz-Jarabo Colomer.

Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] I-4685.

Case C-162/96 *Racke GmbH and Co. v Hauptzollamt Mainz* [1998] ECR I-3655.

Case C-166/07 *International Fund for Ireland* [2009] ECR I-07135.

Case C-168/13 *PPU Jeremy F. v Premier ministre* [2013] ECR I-0000.

Case C-179/97 *Spain v Commission* [1999] EU:C:1999:109.

Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECLI:EU:C:1990:322.

Case C-198/13 *Hernández* [2014] ECLI:EU:C:2014:2055.

Case C-217/04 *United Kingdom v European Parliament and Council* [2006] ECR I-3771.

Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589, Opinion of AG Campos Sánchez-Bordona.

Case C-220/18 *PPU ML* [2018] ECLI:EU:C:2018:589.

Case C-227/97 *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711.

Case C-237/15 *PPU Lanigan* EU:C:2015:474.

Case C-243/01 *Gambelli and Others* [2003] ECR I-13031.

Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

Case C-256/11 *Dereci and Others* [2011] ECR I-11315.

Case 25/62 *Plaumann and Co v Commission* [1963] ECLI:EU:C:1963:17.

Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECR I-2925.

Case C-27/11 *Vinkov* [2012] ECLI:EU:C:2012:326.

Case C-28/12 *Commission v Council* [2015] EU:C:2015:282.

Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aix apatrides* [2014] ECR I-(nyr).

Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419.

Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] PPU JZ ECR I – 610.

Case C-299/95 *Kremzow* [1997] ECR I-2629.

Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436.

Case C-309/96 *Annibaldi* [2007] ECR I-7493.

Case C-333/13, *Dano* [2014] ECLI:EU:C:2014:2358.

Case C-339/89, *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] EU:C:1991:28.

Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177, Opinion of AG Eleanor Sharpston.

Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177.

Case C-341/05 *Laval* [2007] ECR-I 11767.

Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* [2012].

Case C-349/07 *Sopropé* [2008] ECR I-10369.

Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614

Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürger-meisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614

Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864.

Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

Case C-376/98, Germany v European Parliament and Council (Tobacco Advertising) [2000] ECR I-8419.

Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079.

Case C-378/12 *Onuekwere* [2014].

Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Poiares Maduro.

Case C-390/12 *Pfleger and Others* [2014] ECLI:EU:C:2014:281.

Case C-394/07 *Gambazzi* [2009], I-2563 Opinion of AG Kokott.

Case C-396/11 *Radu* [2013] ECLI:EU:C:2013:39.

Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

Case C-400/10 *PPU J McB v LE* [2010] ECR I 000.

Case C-400/12 *MG* [2014].

Case C-42/11 *Lopes da Silva Opinion of Advocate General Mengozzi* EU:C:2012:151.

Case C-420/07 *Apostolides* [2009], I-3571 Opinion of Advocate General Kokott.

Case C-436/04 *Léopold Henri van Esbroeck v Openbaar Ministerie* [2005] EU:C:2005:630. Opinion of AG Ruiz-Jarabo Colomer.

Case C-438/05 *Viking* [2007] ECR I-10779.

Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] EU:C:2010:309.

Case C-455/15 *PPU*, P, EU:C:2015:763.

Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.

Case C-554/14 *Ognanyov* [2016] EU:C:2016:835, Opinion of AG Bot.

Case C-554/14 *Ognanyov* [2016] EU:C:2016:835.

Case C-579/15 *Openbaar Ministeri v. Daniel Adam Popławski* [2018] ECLI:EU:C:2018:957, Opinion of Advocate General Bot.

Case C-579/15 *Openbaar Ministeri v. Daniel Adam Popławski* [2018] ECLI:EU:C:2018:957.

Case C-584/10 P (Joined Cases C-584/10 P, C-593/10 P, C-595/10 P) *Commission v. Kadi* [2013] ECLI:EU:C:2013:518.

Case C-6/64 *Costa v ENEL* [1964] EU:C:1964:66.

Case C-60/00, *Carpenter* [2002] I-06279.

Case C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105.

Case C-64/16 *Associação Sindical dos Juízes* Portugueses [2018] ECLI:EU:C:2018:117.

Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489.

Case C-646/17 *Criminal proceedings against Gianluca Moro* [2019] ECLI:EU:C:2019:489, Opinion of AG Bobek.

Case C-653/19 *Criminal proceedings against DK* [2019] ECLI:EU:C:2019:1024, Opinion of AG Pitruzzella.

Case C-66/04 *United Kingdom v European Parliament and Council* [2005] ECR I-10553.

Case C-66/08 *Kozłowski* [2008] EU:C:2008:437.

Case C-67/14, *Alimanovic* [2015] ECLI:EU:C:2015:597.

Case C-699/21 *E. D. L.* [2023] OJ C 73/22, Opinion of AG Sánchez-Bordona.

Case C-699/21 *E. D. L.* [2023] OJ C 73/22.

Case C-86/90 *Poulsen and Diva Navigation* [1992] ECR I-6019.

Case C-94/00 *Roquette Frères* [2002] ECR I-9011.

Case T-10/93 *A v Commission* ECLI:EU:T:1994:39.

Case T-315/01 *Kadi v Council and Commission* [2005] E.C.R. II-3649.

Case T-44/14, *Costantini* [2016] EU:T:2016:223.

Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, Opinion of AG Maduro.

Case C-496/16 *Aranyosi* [2017] ECLI:EU:C:2017:866.

Joined cases 281, 283–285 and 287/85 *Germany v Commission* [1987] ECR 3203.

Joined cases C-187/01 and C-385/01 *Gözütok* and *Brügge* [2003] ECR I-01345.

Joined cases C-187/01 and C-385/01 *Gözütok* and *Brügge* [2003] ECR I-01345, Opinion of AG Ruiz-Jarabo Colomer.

Joined Cases C-402&415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* [2008] ECR I-6351 ('Kadi I').

Joined cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] EU:C:2008:461.

Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198.

Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECR I – 198*,* Opinion of AG Bot.

Joined Cases C-411/10 and C-493/10, *N.S. v. United Kingdom and M.E. v. Ireland* ECLI:EU:C:2011:865.

Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECLI:EU:C:1996:79.

Joined Cases C-508/18 and C-82/19 *PPU OG and PI* [2019] ECLI:EU:C:2019:456.

Joined Cases C-845/19 and C-863/19 *Criminal Proceedings against DR and TS* [2021] ECLI:EU:C:2021:864, Opinion of AG Pikamäe.

Opinion 1/00 [2002] EU:C:2002:231.

Opinion 1/09 [2011] ECR I 1137.

Opinion 1/91 [1991] ECR I 6079.

Opinion 2/13 Accession of the European Union to the ECHR [2014] ECR I – 2454.

Opinion 2/94 Accession to ECHR (ECHR I) [2014] EU:C:1996:140.

From the European Court of Human Rights

Aerts v Belgium App no 25357/94 (ECtHR, 30 July 1998).

Al. K. v Greece App no 63542/11 (ECtHR, 11 December 2014).

Aliev v Georgia App no 522/04 (ECtHR, 13 January 2009).

Ananyev and Others v Russia App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

Avotins v Latvia App no 17502/07 (ECtHR, 23 May 2016).

Banković and others v Belgium and sixteen other States App no 52207/99 (ECtHR, 12 December 2001).

Bivolaru and Moldovan v France App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

Bouyid v. Belgium App no 23380/09 (ECtHR, 28 September 2015).

Brand v Netherlands App no 49902/99 (ECtHR, 11 May 2004).

Branko Tomašić and Others v Croatia App no 46598/06 (ECtHR, 15 January 2009).

Cara-Damiani v Italy App no 2447/05 (ECtHR, 7 February 2012).

Catan and others v the Republic of Moldova and Russia App no 3370/04 (ECtHR, 19 October 2012).

Chocholáč v Slovakia App no 81292/17 (ECtHR, 7 July 2022).

Christine Goodwin v UK App no 28957/95 (ECtHR, 11 July 2002).

Costello-Roberts v United Kingdom App no 13134/87 (ECtHR 25 March 1993).

Cyprus v Turkey (just satisfaction) App no 25781/04 (ECtHR, 12 May 2014).

D.F. v Latvia App no 11160/07 (ECtHR, 29 January 2014).

Danilczuk v Cyprus App no 21318/12 (ECtHR, 03 April 2018).

De Donder and De Clippel v Belgium App no 8595/06 (ECtHR, 6 March 2012).
Dejnek v Poland App no 9635/13 (ECtHR, 01 September 2017)
Dorneanu v Romania App no 55089/13 (ECtHR, 28 November 2017).
Dougoz v Greece App no 40907/98 (ECtHR 06 March 2001).
Duval v France App no 19868/08 (ECtHR, 26 May 2011).
Dzieciak v Poland App no 77766/01 (ECtHR, 9 December 2008).
Elefteriadis v Romania App no 38427/05 (ECtHR, 25 January 2011)
Fernandes de Oliveira v Portugal App no 78103/14 (EctHR, 7 March 2018).
Fernandes Pedroso v Portugal App no 59133/11 (ECtHR, 12 June 2018).
Florea v Romania App no 37186/03 (ECtHR, 14 September 2010).
Frâncu v Romania App no 69356/13 (ECtHR, 13 October 2020).
Grimailovs v Latvia App no 6087/03 (ECtHR, 25 June 2013).
Grosskopf v Germany App no 24478/03, (ECtHR, 21 October 2010).
Henaf v France App no 65436/01 (ECtHR, 27 November 2003).
Hirst v the United Kingdom (no. 2) App n. 74025/01 (ECtHR, 6 October 2005).
Iacov Stanciu v Romania App no 35972/05 (ECtHR, 24 July 2012).
Ilaşcu v Moldova and Russia App no 48787/99 (ECtHR, 8 July 2004).
Indelicato v Italy App no 31143/96 (ECtHR, 18 January 2002).
Ireland v United Kingdom App no 5310/71 (ECtHR, 18 January 1978).
Isyar v Bulgaria App no 391/03 (ECtHR, 20 November 2008).
Iwańczuk v Poland App no 25196/94 (ECtHR, 15 November 2001).
J.M.B. and Others v France App no 9671/15 (ECtHR, 30 January 2020).
Jakóbski v Poland App no 18429/06 (ECtHR, 07 December 2010).
Jasinska v Poland App no 28326/05 (ECtHR, 1 September 2010).
Kadiķis v Latvia (no. 2) App no 62393/00 (ECtHR, 4 May 2006).
Kafkaris v Cyprus App no 21906/04 (ECtHR, 12 February 2008).
Keenan v the United Kingdom App no 27229/95 (ECtHR, 4 March 2001).
Ketreb v France App no 38447/09 (ECtHR, 19 October 2012).
Khodorkovskiy and Lebedev v Russia App no 11082/06 and 13772/05 (ECtHR, 25 October 2013).
Klibisz v Poland App no 2235/02 (ECtHR, 4 October 2016).
Kokkinakis v Greece App no 14307/88 (ECtHR, 25 May 1993)
Kučera v Slovakia App no 48666/99 (ECtHR, 17 July 2007).
Kudła v Poland App no 30210/96 (ECtHR, 26 October 2000).
Kurt v Austria App no 62903/15 (ECtHR, 04 July 2019).
Ladent v Poland App no 11036/03 (ECtHR, 18 March 2008).

Lawless v Ireland (no. 3) App no 332/57 (ECtHR, 1 July 1961).

Léger v France App no 19324/02 (ECtHR, 11 April 2006).

Loizidou v Turkey App no 15318/89 (ECtHR, 23 March 1995).

Longin v Croatia App no 49268/10 (ECtHR, 06 November 2012).

M v Germany App no 19359/04 (ECtHR, 17 December 2009).

M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011).

Mandić and Jović v Slovenia App nos 5774/10 and 5985/10 (ECtHR, 20 October 2011).

Mouisel v France App no 67263/01 (ECtHR, 14 November 2002).

Muršić v Croatia App no 7334/13 (ECtHR, 20 October 2016).

Neshkov and Others v Bulgaria App nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015).

Norbert Sikorski v Poland App no 17599/05 (ECtHR, 22 October 2009).

OAO Neftyanaya Kompaniya Yukos v the Russian Federation (just satisfaction) App no 14902/04 (ECtHR, 8 March 2011).

Orchowski v Poland App no 17885/04 (ECtHR, 22 October 2009).

Osman v the United Kingdom App no 23452/94 (ECtHR, 28 October 1998).

Pankiewicz v Poland App no 34151/04 (ECtHR, 25 February 2008).

Pantea v Romania App no 33343/96 (ECtHR, 3 June 2003).

Petrescu v Portugal App no 23190/17 (ECtHR, 02 December 2019).

Płoski v Poland App no 26761/95 (ECtHR, 12 November 2002).

Price v United Kingdom App no 33394/96 (ECtHR, 10 July 2001).

Renolde v France App no 5608/05 (EctHR, 16 October 2008).

Rezmiveș and Others v Romania App nos 61467/12, 39516/13, 48231/13 and 68191/13 (ECtHR, 25 July 2017).

Ribitsch v Austria App no 18896/91 (ECtHR, 4 December 1995).

Roth v Germany App nos 6780/18 and 30776/18 (ECtHR, 22 October 2020).

RR and Others v Hungary App no 36037/17 (ECtHR, 02 March 2021).

S., V. and A. v Denmark App nos 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018).

S.F. v Switzerland App no 23405/16 (ECtHR, 30 June 2020).

Samaras and Others v Greece App no 11463/09 (ECtHR, 28 February 2012).

Schemkamper v France App no 75833/01 (ECtHR, 18 October 2005).

Selmouni v France App no 25803/94 (ECtHR, 28 July 1999).

Serifis v Greece App no 27695/03 (ECtHR, 2 November 2006).

Stanev v Bulgaria App no 36760/06 (EctHR, 17 January 2012).

Štrucl and Others v Slovenia App nos 5903/10, 6003/10 and 6544/10 (ECtHR, 20 October 2011).

SW v United Kingdom App no 20166/92 (ECtHR, 22 November 1995).

Sy v Italy App no 11791/20 (ECtHR, 24 January 2022)

Sylla and Nollomont v Belgium App nos 37768/13 and 36467/14 (ECtHR, 16 May 2017).

Syrianos v Greece App no 49529/12 (ECtHR, 7 October 2021).

Szafrański v Poland App no 17249/12 (ECtHR, 15 March 2016).

Torreggiani and Others v Italy App nos 43517/09, 46882/09, 55400/09 *et al* (ECtHR, 08 January 2013).

Tyrer v United Kingdom App no 5856/72 (ECtHR, 25 April 1978).

Tzamalis and Others v Greece App no 15894/09 (ECtHR, 04 December 2012).

Valašinas v Lithuania App no 44558/98 (ECtHR, 24 July 2001).

Van der Graaf v the Netherlands App no 8704/03 (ECtHR, 1 June 2004).

Van der Ven v the Netherlands App no 50901/99 (ECtHR, 4 February 2003).

Varga and Others v Hungary App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015).

Vartic v Romania (No 2) App no 14150/08 (ECtHR, 17 December 2013).

Vasilescu v Belgium App no 64682/12 (ECtHR, 25 November 2014).

Vasilică Mocanu v Romania App no 43545/13 (ECtHR, 6 December 2016).

Vinter and Others v the United Kingdom App nos 66069/09, 130/10 and 3896/10 (ECtHR, 09 July 2013).

Wenerski v Poland App no 44369/02 (ECtHR, 20 January 2009).

Wenner v Germany App no 62303/13 (ECtHR, 1 September 2016).

Witold Litwa v Poland App no 26629/95 (ECtHR, 4 April 2000).

Xiros v Greece App no 1033/07 (ECtHR, 9 September 2010).

Younger v the United Kingdom App no 57420/00 (ECtHR, 7 January 2003).

Z.H. v Hungary App no 28973/11 (ECtHR, 8 November 2012).

Other

Corte Costituzionale [Italian Constitutional Court], No. 183/73 *Frontini* [1973]; No. 170/1984 *Granital* [1984]. No. 232/1989 *Fragd* [1989].

Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] 197/83 *Solange II* [1986].

Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] 2 BvE/08 *Lisbon Case* [2009].

Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] *Re Wünsche Handelsgesellschaft* BVerfGE 73 339 [1986].

Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], 2 BvL 52/71 *Solange I* [1974].

Customs and Excise Commissioners v ApS Samex [1983]1 All ER 1042.

LEGISLATION

Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000.

Charter of Fundamental Rights of the European Union (2016/C 202/02).

Committee of Ministers of Council of Europe, *White paper on prison overcrowding* (Council of Europe 2016) CM(2016)121-add3 1.

Committee of Ministers, *14th Annual Report of the Committee of Ministers* (Council of Europe 2021) 1.

Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 16th Annual Report of the Committee of Ministers (Council of Europe 2022) 1.

Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 21) On The Position Of The United Kingdom And Ireland In Respect Of The Area Of Freedom, Security And Justice [2016] OJ C 202/295; and Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 22) On The Position Of Denmark [2016] OJ C 202/295.

Convention on the fight against corruption involving officials of the European Communities or officials of the EU MS [1997] OJ C 195/2.

Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015).

Council conclusions on mutual recognition in criminal matters — 'Promoting mutual recognition by enhancing mutual trust' [2018] ST/15272/2018/INIT OJ C 449/6.

Council Directive (91 /477/EEC) of 18 June 1991 on control of the acquisition and possession of weapons [1991] OJ L 256/51.

Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime [2001] OJ L182/1.

Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime [2001] OJ L182/1.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L 190.

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [2003] OJ L192/54.

Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8.

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime [2008] OJ L300/42.

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

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

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

Council of Europe, Recommendation 1656 (2004) of the Parliamentary Assembly.

— —, Committee of Ministers, Recommendation No. R (98) 7 Concerning the Ethical and Organisational Aspects of Health Care in Prison (Council of Europe 1998).

— —, *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)* (Council of Europe 1950) European Treaty Series - No. 5.

— —, *Convention on preventing and combating violence against women and domestic violence* (Council of Europe 2011) Treaty Series no. 210.

— —, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Text of the Convention and Explanatory Report [2002] CPT/Inf/C* (2002) 1.

— —, *European Convention on Extradition of 13 December 1957* (Council of Europe 1957) European Treaty Series - No. 24.

— —, *Recommendation 1656 (2004) of the Parliamentary Assembly* [2004] CM/AS(2004)Rec1656-final.

— —, Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011, CPT/Inf (2012) 2, 4, 75.

Council of the EU, Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW [2017] 15207/17.

Council of the European Union, *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty* (Council of the European Union 2023) 6741/23.

Council of the European Union, *General Secretariat of the Council, European Union instruments in the field of criminal law and related texts* [2019].

Council of the European Union, Opinion of the Legal Service: Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties (Council of the European Union 2014) 10296/14.

Council of the European Union, *Resolution of the Council of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* [2009] OJ C 295/1.

Council of the European Union, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 19 May 2014 (OR. en) 9956/14

Council of the European Union, *the Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism of 2015* [2015].

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.

Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences Official Journal C 326, 26/10/2012 P. 0001 – 0390.

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) [2017] OJ L198/2.

Directive (EU) 2017/541 of the EP and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, 77–123; alongside its current consolidated version of 16/06/2011.

Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, [2008] OJ L328/28, 6.12.2008.

Directive 2009/52/ EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L168/24.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

Directive 2011/36/EU of the EP and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

Directive 2011/92/EU of the EP and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013, p. 60–95

Directive 2013/40/EU of the EP and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [2013] OJ L218/8.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/50.

Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179.

Directive 2014/62/EU of the EP and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1.

Directive 2014/62/EU of the EP and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1.

Directives 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28, and Directive 2009/52/ EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L168/24.

Directorate-General for Justice and Consumers, Roadmap, available at https://op.europa.eu/en/publication-detail/-/publication/0d868aaf-75df-11eb-9ac9-01aa75ed71a1/language-en (accessed 5 March 2023).

European Commission, *A new EU framework to strengthen the rule of law* (European Commission 2014) COM (2014) 158 final/2.

— —, *Action Plan Implementing the Stockholm Programme* (European Commission 2010) COM171 final.

— —, *Better regulation toolbox* 1, 108 <https://commission.europa.eu/system/files/2023-07/BRT-2023-Chapter%202-How%20to%20carry%20out%20an%20impact%20assessment.pdf> (accessed 24 July 2023).

— —, *Commission Communication on Mutual Recognition of Final Decisions in Criminal Matters* (European Commission 2000) COM 495 final.

— —, *Commission Communication: Towards an Area of Freedom, Security and Justice* (European Commission 1998) COM (1998) 459 1.

— —, *Commission Notice: 'Handbook on how to issue and execute a European arrest warrant'* (European Commission 2017) 2017/C 335/01, OJ C 335/1.

— —, Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States (European Commission 2018) COM(2018)324 final.

— —, *Commission Recommendation C(2022) 8987 of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions* [2022] OJ L 86/44.

— —, *Commission Staff Working Documents Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant years 2014,2015,2016, 2017, 2018 and 2019 – reference SWD(2017)319 final, SWD(2017) 320 final, SWD(2019) 194 final SWD(2019) 318 final, SWD(2020) 127 final, SWD(2021) 227 final* https://ec.europa.eu/info/publications/replies-questionnairequantitative-information-practical-operation-european-arrest-warrant_en (accessed 05 September 2023).

— —, Communication COM (2003) 606 final of 15 October 2003 from the Commission on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based (European Commission 2003).

— —, *Communication COM(2016) 715 final of 9 November 2016 from the Commission on EU Enlargement Policy* [2016] 1.

— —, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 final).

— —, *Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters* [2000] COM/2000/0495 final.

— —, *Communication from the Commission to the Council and the European Parliament: Towards enhancing access to information by law enforcement agencies* [2004] COM/2004/429 final.

— —, *Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations* [2004] COM/2004/401 final 1.

— —, *Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters (n 1)* COM/2000/0495 final.

— —, *Communication from the Commission to the European Parliament and the European Council – A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes* [2018] COM/2018/641 final.

— —, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Digitalisation of Justice in the European Union: A toolbox of opportunities* (European Commission 2020) COM(2020) 710 final.

— —, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law* (European Commission 2011) COM(2011) 573 final.

— —, *Convention: Final Report of the Working Group X 'Freedom, Security and Justice* (European Commission 2002) Conv426/02.

— —, *Eighth General Report on the Activities of the Community* (European Commission 1975) http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/ EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB0174064 (accessed 05 November 2022).

— —, *Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* [2003] COM/2003/0075 final.

— —, *Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention* [2011] COM/2011/327 final.

— —, *Green Paper on the approximation, mutual recognition and enforcement of criminal sanction in the European Union* [2004] COM/2004/0334 final.

— —, *Judicial Cooperation* <http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm> (accessed 13 May 2023).

— —, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union Green Paper* (European Commission 2003) COM75 final.

— —, *Proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures* [2022].

— —, *Proposal for a Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* [2002] COM(2001) 522 final.

— —, *Report From The Commission To The European Parliament And The Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention* (European Commission 2014) COM 57 final.

— —, Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism (2012) COM(2012)411 final 1, 5.

— —, *Strengthening mutual trust in the European judicial area: A Green Paper on the application of EU criminal justice legislation in the field of detention* (European Commission 2011) COM/2011/0327 final.

— —, *The abolition of internal border controls cannot come at the expenses of security* (European Commission 2018).

— —, *Commission's Opinion of July 1997 on Bulgaria's EU membership application* [1997].

European Committee on Crime Problems (CDPC) *White Paper on Prison Overcrowding* (Council of Europe 2016) PC-CP (2015) 6 rev 7.

European Council, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* [2001] OJ C12/10.

— —, *Cardiff European Council Presidency Conclusions of 15–16 June 1998* (European Council 1998).

— —, *Conclusions of the Presidency - Copenhagen, June 21-22 1993* https://www.consilium.europa.eu/media/21225/72921.pdf (accessed 11 October 2022).

— —, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, as amended (Council of Europe 2020) < https://rm.coe.int/09000016809ee581> (accessed 24 July 2023).

— —, *The Stockholm Programme: An open and secure Europe serving and protecting citizens* (European Council 2010) OJ C115/1.

European Court of Human Rights, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances* (Council of Europe 2002).

European Council, *European Council Presidency conclusions, the Hague Programme* [2004] 14292/1/04 REV 1.

European Ombudsman, *Decision following the strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints* [2017] https://www.ombudsman.europa.eu/en/cases/decision.faces/en/83646/html.bookmark (accessed 21 July 2023).

European Parliament, *European Parliament resolution of 15 December 2011 on detention conditions in the EU* [2011] P7_TA (2011)0585.

— —, *resolution of 27 February 2014* (2013/2109(INL)), P7_TA (2014)0174 1.

— —, *Draft report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (European Parliament 2017) EP-Document 2017/2131(INL).

— —, *European Council Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999* (1999) <https://www.europarl.europa.eu/summits/tam_en.htm> (accessed 24 July 2023).

— —, *European Parliament recommendation to the Council on the rights of prisoners in the European Union* (2003/2188(INI)) OJ C 102E/154.

— —, *European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States'* [2021] (2019/2207(INI)).

— —, *European Parliament Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations* [2015] (P8_TA(2015)0410).

— —, *European Parliament resolution of 5 October 2017 on prison systems and conditions* (2017) 2015/2062(INI).

— —, *Résolution du Parlement européen du 8 mai 1969, sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités adoptée à la suite du rapport fait au nom de la Commission juridique par M. Burger* [1969] OJ C63/18.

— —, *Resolution of 25 February 2014 with recommendations to the Commission on combating Violence against Women* [2014] 2013/2004(INL).

— —, *Resolution on respect for human rights in the European Union* [1997] OJ 1999 C 98/279.

— —, *recommendation of 6 November 2003 to the Council on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union* [2003].

European Prison Litigation Network (EPLN), *Bringing justice into prison: for a common European approach* (2019), <http://www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf> (accessed 13 October 2023).

EU 2019-2023 Action Plan European e-Justice [2019] OJ C 96/05.

Joint Declaration by the European Parliament, the Council and the Commission, *Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1977] OJ C I03 1.

Jurisdiction of the European Commission of the Danube (1927) PCI J. Series B, no 14, 64.

Official Journal of the European Union C 303/17 - 14.12.2007 Preamble - Explanations relating to the Charter of Fundamental Rights.

Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, as amended (Council of Europe 2020) < https://rm.coe.int/09000016809ee581> (accessed 24 July 2023).

Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (Text with EEA relevance.) PE/70/2018/REV/1 [2019] OJ L 91/1, art 1.

Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.

The European Convention, *Draft sections of Part Three with comments* [2003] CONV 727/031.

The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 – 0062.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.

Protocol (No 19) On The Schengen Acquis Integrated Into The Framework Of The European Union.

Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the treaties.

United Nations, *Convention on the Rights of Persons with Disabilities* (United Nations 2006) United Nations Treaty Series vol. 2515 1, 3.

— —, *Universal Declaration of Human Rights* (United Nations 1948) General Assembly resolution 217 A.

— —, *International Covenant on Civil and Political Rights* [1966] resolution 2200A (XXI).

— —, *International Covenant on Economic, Social and Cultural Rights* [1966] resolution 2200A (XXI).

— —, *Vienna Convention on the Law of Treaties* (United Nations 1969) Treaty Series, 1155, 331.

— —, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [1984] resolution 39/46.

— —, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* [2002] resolution A/RES/57/199.

Yogyakarta Principles <https://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/#:~:text=Q.,which%20all%20States%20must%20comply. > (accessed 04 June 2023).

BIBLIOGRAPHY

Abbott KW and Snidal D, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

Abbott KW et al, 'The Concept of Legalization' (2000) 54 International Organization 401.

Abdelgawad ÉL, 'The Enforcement of ECtHR Judgments' in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 326.

Accetto M and Zleptnig S, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 European Public Law 375.

Aebi MF and Tiagoet MM, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report* (Council of Europe 2019) 1.

Aebi MF et al, *Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report* (Council of Europe, 2022) UNILCRIM 2022/3 1.

— —, *Prisons and Prisoners in Europe 2022: Key Findings of the SPACE I report* (Council of Europe 2023) UNILCRIM 2023/2 1.

Ahmed T and de Jesús Butler I, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 European Journal of International Law 771.

Aizpurúa E and Rogan M, 'Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies' (2020) 11 New Journal of European Criminal Law 204.

Akandji-Kombe JF, *Positive obligations under the European convention on human rights* (Council of Europe 2007).

Albrecht PA, 'Die Untersuchungshaft – ein Straf oder Schuldspruch? Ein Pläydoyer fûr den Grundsatz der Unschuldvermutung in Haftrech' in Donatsch A (ed), *Strafrecht, Strafprozesrecht und Menschenrecthen. Festschrift für Stefan Trechsel zum 65 Geburstag* (Schulthess 2003) 1, 357ff.

Aldea A, 'The Legal Nature of Administrative Detention' (2012) 5 Bulletin of the Transilvania University of Braşov 27.

Allott P, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002).

Alston P, Bustelo M and Heenan J (eds), *The EU and Human Rights* (Oxford University Press 1999).

Alter KJ and Meunier-Aitsahalia S, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comp. Pol. Stud. 535.

Alter KJ, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (2003) 52 International Organization 121.

Ambos K, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections' (2005) 12 Maastricht Journal of European Comparative Law 173.

— —, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293.

— —, *European Criminal Law* (Cambridge University Press 2018).

Anagnostopoulos I, 'Criminal Justice Cooperation in the European Union after the First Few "Steps": a Defence View' (2014) 15 ERA Forum 9.

Anagnostou D and Mungiu-Pippidi A, 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 European Journal of International Law 205.

Anagnostou D and Skleparis D, 'Human Rights in European Prisons: Can the Implementation of Strasbourg Court Judgments Influence Penitentiary Reform Domestically?' in Tom Daems and Luc Robert (eds) *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Macmillan 2017) 1, 37ff.

Ancel M, 'Principal Aspects of Modern European Penology' (1974) 118 Proceedings of the American Philosophical Society 254.

Anderson M, 'The Transformation of Border Controls: What is different about Europe?', in Apap J (ed), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Edward Elgar 2004).

Anderson M and Bigo D, 'What are EU frontiers for and what do they mean?' in Groenendijk K, Guild E and and Minderhoud P (eds), *In search of Europe's borders* (Kluwer Law International 2003) 1, 7.

Apap J (ed), *Justice and Home Affairs in the EU; Liberty and Security Issues after Enlargement* (Edward Elgar 2004).

Arcarazo DA and Murphy CC, 'Rethinking Europe's Freedom, Security and Justice' in Arcarazo DA and Murphy CC (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 9.

Arnull A, 'From Charter to Constitution and Beyond: Fundamental Rights in the New European Union' [2003] Public Law 774.

— —, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 Law Quarterly Review 95.

Ashworth A and Zedner L, 'Punishment Paradigms and the Role of the Preventive State' in AP Simester, du Bois-Pedain A and Neumann U (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2014) 1, 3, 7.

Ashworth A, 'Four threats to the presumption of innocence' (2006) 10 The International Journal of Evidence and Proof 241,

— —, 'Security, Terrorism and the Value of Human Rights' in Lazarus L and Goold BJ (eds), *Security and Human Rights* (Hart 2007) 1, 212.

Askew-Renaud E and Mirwald K, 'Conference Report: A Critical Assessment of the EU Constitutional Treaty' (2005) 2 Essex Human Rights Review 79.

Asp P, *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015).

— —, 'Harmonisation of Penalties and Sentencing within the EU' (2013) Bergen Journal of Criminal Law and Criminal Justice 53.

— —, *The Substantive Criminal Law Competence of the EU* (Stiftelsen Skrifter utgivna avJuridiska fakulteten vid Stockholms universitet 2012).

Austin J, *Three Strikes and You're Out: The Implementation and Impact of Strike Laws* (National Institute of Justice 1999).

Auty KM and Liebling A, 'Exploring the relationship between prison social climate and reoffending' (2020) 37 Justice Quarterly 358.

Avbelj M, 'Human dignity and EU legal pluralism' in Davies G and Avbelj M (eds) *Research handbook on legal pluralism and EU* law (Edgar 2018) 1, 95, 108.

— —, 'Human rights inflation in the European Union' in Violini L and Baraggia A (eds) *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edgar 2018) 1, 7ff.

— —, 'Pluralism and Systemic Defiance in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 44.

— —, 'Theorizing Sovereignty and European Integration' (2014) 27 Ratio Juris 344.

Baker E, 'Governing Through Crime: the Case of the European Union' (2010) 7 European Journal of Criminology 187.

— —, 'The emerging role of the EU as penal actor' in Daems T, Van Zyl Smit D and Snacken S (eds) *European Penology?* (Bloomsbury 2017) 1, 77.

Baker E et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 Eucrim 221.

Baldwin DA, 'The Concept of Security' (1997) 23 Review of International Studies 9.

Ballegooij VW, 'European Implementation Assessment 2004–2020 on the EAW', (2020) eucrim 149.

— —, 'Measuring the Added Value of EU Criminal Law' (2016) 2 eucrim 90.

— —, European Arrest Warrant European Implementation Assessment (EPRS European Parliamentary Research Service 2020).

— —, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS European Added Value Unit 2017).

Balzacq T and Carrera S (eds), *Security versus Freedom?: A Challenge for Europe's Future* (Ashgate 2006).

Baratta A, 'Les fonctions instrumentales et les fonctions symboliques du droit pénal' (1991) 15 Déviance et Société 1.

Barbara A Misztal, 'Trust and Cooperation: The Democratic Public Sphere' (2001) 37 Journal of Sociology 371.

Barber NW, Cahill M and Ekins R (eds), *The Rise and Fall of the European Constitution* (Hart 2019).

Barents R, *The Autonomy of Community Law* (Kluwer Law International 2004) 1, 112.

Barnard C, *The Substantive Law of the EU: The Four Freedoms* (6th edn, Oxford University Press 2019).

Barnhizer DR, What *Causes Laws to Succeed or Fail?* (Cleveland-Marshall Legal Studies 2016) Paper No. 297.

Beale SS, 'What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law' (1997) 1 Buffalo Criminal Law Review 23.

Becchi P, 'Human Dignity in Europe: Introduction' in Becchi P and Mathis K (eds), *Handbook of Human Dignity in Europe* (Springer 2019).

Behme C, 'The Principle of Mutual Recognition in the European Internal Market With Special Regard to the Cross-Border Mobility of Companies' (2016) 13 European Company and Financial Law Review 31.

Belavusau U and Kochenov D, 'Kirchberg dispensing the punishment: Inflicting ''civil death'' on prisoners in Onuekwere (C-378/12) and MG (C-400/12)' (2016) 41 European Law Review 557.

Bellamy R (ed), *Beccaria: 'On Crimes and Punishments' and Other Writings* (Cambridge University Press 2012).

Benedek W, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 1 European Convention on Human Rights Law Review 151.

Benekos PJ and Merlo AV, 'Three Strikes and You're Out!: The Political Sentencing Game' (1995) 59 Federal Probation 3.

Benn SI, 'An Approach To The Problems Of Punishment' (1958) 33 Philosophy 325.

Bentham J, *An Introduction to the Principles of Morals and Legislation*, 1789, reprinted in the Works of Jeremy Bentham 86-87 (Jonathan Bennett 2017) <https://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf> (accessed 25 July 2023).

Bernardi A, 'L'armonizzazione delle sanzioni in Europa: linee ricostruttive' in Giovanni Grasso and Rosaria Sicurella (eds), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (Giuffrè 2008).

Besson S and Utzinger A, 'Towards European Citizenship' (2008) 39 j. soc. phil. 185.

Bishop N, 'Prisoner participation in prison management' (2006) 3 Champ pénal/Penal field <https://journals.openedition.org/champpenal/487> (accessed 24 July 2023).

Bloks SA and van den Brink T, 'The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant' (2021) 22 German Law Journal 45.

Bobek M, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2017) 14 Cambridge Yearbook of European Legal Studies 529.

Boekestein TL, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 German Law Journal 431.

Bonelli M, 'From a Community of Law to a Union of Values Hungary, Poland, and European Constitutionalism' (2017) 13 EuConst 793.

Börzel TA, Hofmann T and Sprungk C, *Why Do States not Obey the Law? Lessons From the European Union* (2003) https://userpage.fu-berlin.de/~europe/forschung/docs/boerzel_hofmann_sprungk_2003.pdf (accessed 25 November 2022).

Bogensberger W, 'Article 82 TFEU' in Kellerbauer M, Klamert M and Tomkin J (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 875.

— —, 'Article 83 TFEU' in Kellerbauer M, Klamert M and Tomkin J (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 896.

Border Controls Vanish in Eastern Europe (Spiegel Online 2007) https://www.spiegel.de/international/europe/momentous-day-border-controls-vanish-in-eastern-europe-a-524887.html (accessed 04 September 2020).

Bort E, 'The Frontiers of *Mitteleuropa*: Problems and Opportunities at the Eastern Frontier of the European Union' in den Boer M (ed), *Schengen Still Going Strong: Maastricht* (European Institute of Public Administration 2000) 1, 85.

— —, *Illegal Migration and Cross-Border Crime: Challenges at the Eastern Frontier of the European Union* (European University Institute Working Paper 2000/9).

Bosniak L, 'Persons and Citizens in Constitutional Thought' (2010) 8 icon 9.

Bosworth M, *Engendering Resistance: Agency and Power in Women's Prisons* (Ashgate 1999).

Boulding KE, 'The Boundaries of Social Policy' (1967) 12 Social Work 3.

Bovend'Eerdt K, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32 Utrecht Journal of International and European Law' 112.

Brady H, The EU and the fight against organised crime (2007) <https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/wp721_org_crime_brady-1484.pdf> (accessed 24 July 2021).

Brasoveanu F, Petru A and Lisievici Brezeanu, 'The Schengen Agreement and the Free Movement within the European Union' (2010) 10 Ovidius University Annals 376.

Brittain S, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis' (2015) 11 European Constitutional Law Review 482.

Brouwer E, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust' in Brouwer E and Gerard D (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU law* (Cadmus 2016) 1, 59.

Buisman SS, 'The Future of EU Substantive Criminal Law Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) European Journal of Crime, Criminal Law and Criminal Justice 161.

Burchett J, Weyembergh A and Ramat M, *Prisons and detention conditions in the EU, Policy Department for Citizens' Rights and Constitutional Affairs* (European Parliament Directorate-General for Internal Policies 2023).

Burgueño BF, 'The Usefulness of the Legal Concept of Human Dignity in the Human Rights Discourse: Literature Review' (2016) 9 Oximora Revista Internacional de Etica y Politica 9.

Buyse A, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 Nomiko Vima (The Greek Law Journal) 1890.

Caeiro P, Fidalgo S, Prata Rodrigues J, 'The evolving notion of mutual trust' (2018) Maastricht Journal of European and Comparative Law 689.

Callewaert J, 'One step is enough? Judgment of the CJEU in E.D.L.' (2023) < https://johan-callewaert.eu/one-step-is-enough-judgment-of-the-cjeu-in-e-d-l/?fbclid=IwAR3XTF5EWn1qNEIonUrIxkTJBtCrhEnTeiOssKu9wje58zCUfycS_g8H2ZM > (accessed 04 June 2023).

Cambien N, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93, 105.

Cameron I, 'The Court and the Member States: Procedural Aspects' in Føllesdal A, Peters B and Ulfstein G (eds), *Constituting Europe* (Cambridge University Press 2013) 1, 43.

Campbell A, 'The Limits of the Powers of International Organisations' (1983) 32 ICLQ 523.

Canestrini N, <https://canestrinilex.com/en/readings/trust-needs-facts-not-words-diplomatic-assurances-in-extradition-proceedings> (accessed 21 October 2023).

Cannizzaro E, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case' (2009) 28 Y.B. E UR. L. 593.

Carlen P (ed), *Imaginary Penalities* (1st edn, London Willan 2008).

Carlos C, 2016, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals, and Procedural Limitations', in Carlos C and Dimitry K (eds), *Reinforcing Rule of Law Oversight in the European Union* (Oxford University Press 2016) 1, 35.

CEP Probation, *Expert Group meeting on Radicalisation and Violent Extremism* (CEP 2022) https://www.cep-probation.org/expert-group-meeting-on-radicalisation-and-violent-extremism-29-march-2022-cologne-germany/ (accessed 13 May 2023).

Chinkin CM, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850.

Cini M, 'The Soft Law Approach: Commission Rule-Making in the EU's State aid Regime' (2001) 8 Journal of European Public Policy 192.

Claes M, 'The Primacy of EU Law in European and National Law' in Chalmers D and Arnull A (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 1, 178ff.

Clear TR, 'The Effects of High Imprisonment Rates on Communities' (2008) 37 Crime and Justice 97.

— —, *Harm in American penology* (State University of New York Press 2014).

Cliquennois G, Snacken S and Van Zyl Smit D, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11.

Closa C and Kochenov D (eds), *Reinforcing Rule of Law Oversight in the European* Union (Cambridge University Press 2016).

Coli M, 'Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?' (2018) 10 Perspectives on Federalism 272.

Comparato FK, *A afirmação histórica dos direitos humanos* (Saraiva 2001) 1.

Conseil d'État, Rapport Public 1992, collection 'Études et documents', Documentation française 44, 1993, Paris, 22–23.

Cormon T, *A Utopia of Mutual Trust: Fundamental Rights in the European Arrest Warrant* (University of Ghent 2015) <https://lib.ugent.be/fulltxt/RUG01/002/213/622/RUG01-002213622_2015_0001_AC.pdf> (accessed 04 December 2019).

Corral-Maraver N, 'Irrationality as a Challenge to European Criminal Policy' (2017) 7 European Criminal Law Review 123.

Cortés-Martín J, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 REALaw 5, 8.

Costa JP, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in McCrudden C (ed), *Understanding Human Dignity* (Oxford University Press 2014) 1, 393–402.

Costelloe A and Warner K, 'Prison education across Europe: Policy, practice, politics' (2014) 12 London Review of Education 175.

Council of Europe, *High-level Conference on prison overcrowding* (Council of Europe 2019) https://www.coe.int/en/web/cdpc/high-level-conference-on-prison-overcrowding (accessed 07 July 2023).

— —, *Prison: a breeding ground for radicalisation and violent extremism?* (Council of Europe 2018).

— —, *Survey of Activities, European Court of Human Rights* http:// www.echr.coe.int/Eng/InfoNotesAndSurveys.htm (accessed 5 June 2023).

— —, *The implementation of judgments of the European Court of Human Rights* [2020] Doc. 15123.

Coutts S, 'Supranational Public Wrongs: The limitations and Possibilities of European Criminal Law and a European Community' (2017) 54 Common Market Law Review 771.

— —, "Citizenship of the European Union" Justice' in Arcarazo DA and Murphy CC (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 92.

— —, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 Cambridge Y.B. Eur. Legal Stud. 318.

Coventry TAC, 'Pretrial detention: Assessing European Union Competence under Article 82(2) TFEU' (2017) 8 New Journal of European Criminal Law 43.

Cowan E, 'Contesting Clementia: the Rhetoric of Severitas in Tiberian Rome before and after the Trial of Clutorius Priscus' (2016) 106 The Journal of Roman Studies 77.

Craig P, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395.

— —, 'The evolution of the Single Market' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart 2003) 1, 1.

Crewe B, Laursen J and Mjåland K, 'Comparing deep-end confinement in England & Wales and Norway' (2022) Criminology 1.

Cristobal KS, 'From Law in Blackletter to "Blackletter Law"' (2016) 108 Law Library Journal 181.

Cryer R et al, *Research Methodologies in EU and International Law* (Bloomsbury 2011).

Csonka P and Landwehr O, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) 4 Eucrim 261.

Daems T and Robert L (eds), *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems* (Palgrave 2018).

Daems T, Van Zyl Smit D and Snacken S (eds) *European Penology?* (Bloomsbury 2017).

Ddamulira Mujuzi J, 'The transfer of offenders between European countries and remission of sentences' (2017) 7 European Criminal Law Review 289.

de Búrca G, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168.

— —, *Europe's Raison d'Etre* (NYU School of Law 2013) Public Law Research Paper No 13-09.

— —, 'New Modes of Governance and the Protection of Human Rights' in Philip Alston and Olivier de Schutter (eds), *Monitoring Fundamental Rights in the EU* (Hart 2005) 1, 25.

— —, 'The Evolution of EU Human Rights Law' in Craig P and de Búrca G (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 1, 480ff.

— —, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649.

— —, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105.

De Capitani E, 'The Schengen system after Lisbon: from cooperation to integration' (2014) 15 ERA Forum 101, 115.

de Castro Sánchez C, 'Security, Migrant Flows, and Terrorism in the European Area of Freedom, Security and Justice' (2006) 72 Radicalism and Terrorism in the 21st Century 231.

De Hert P, 'EU criminal law and fundamental rights' in Mitsilegas V, Bergström M and Konstadinides T (eds), *Research Handbook on EU Criminal Law* (Edgar 2016) 1, 105, 112.

de Jesús Butler I and de Schutter O, 'Binding the EU to International Human Rights Law' (2008) Yearbook of European Law 277, 285

de Jesús Butler I, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law* (Intersentia 2007) 1, 31.

De Schutter O, 'The Balance Between Economic and Social Objectives in the European Treaties' (2006) 5 Revue française des affaires sociales 119, 119.

de Silva M, *Accession of the European Union to the United Nations Human Rights Treaties: Explaining the Reasons for Inaction* (College of Europe 2020) EU Diplomacy Papers 7/2020 1 http://aei.pitt.edu/103407/1/edp_7_2020_de_silva.pdf> (accessed 24 July 2023).

de Visser M, 'Case Notes: Dealing with Divergences in Fundamental Rights Standards: Case C-399/11 Stefano Melloni v. Ministerio Fiscal' (2013) 20 Maastricht Journal of European and Comparative Law 576.

de Vries GM, 'The European Union's Role in the Fight Against Terrorism: Opening Address - The Role of the EU in the Fight Against Terrorism' (2005) 16 Irish Studies in International Affairs 3.

— —, 'De recidivegronden voor voorlopige hechtenis getoetst aan artikel 5 EVRM: Drie aandachtspunten voor een verdragsconforme Nederlandse praktijk' (2022) 17 Nederlands Juristenblad 1380.

de Witte B, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources' in d'Aspremont J and Besson S (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 1, 769.

— —, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston P (ed), *The EU and Human Rights* (Oxford University Press 1999) 1, 859.

De Wree E, Beken TV and Vermeulen G, 'The transfer of sentenced persons in Europe' (2009) 11 Punishment and Society 111.

Dehousse R, 'Rediscovering Functionalism' in Joerges C, Mény Y and Weiler JHH (eds.) *What Kind of Constitution for What Kind of Polity*? (RSC 2000) 1.

Delmas-Marty M, 'Le paradoxe pénal' in Delmas-Marty M and de Leyssac CL (eds), *Libertés et droits fondamentaux* (Seuil 1996) 1, 368.

Den Boer M, 'The Fight against Organised Crime in Europe: A Comparative Perspective' (2001) 9 European Journal on Criminal Policy and Research 259.

— —, 'The fight against terrorism in the second and third pillars of the Maastricht Treaty: complement or overlap?' in Reinaros F (ed), *European democracies against terrorism: governmental policies and intergovernmental cooperation* (Ashgate 2000) 1, 211.

di Martino A, 'Book Review: The Principle of Mutual Trust in EU Criminal Law, by Auke Willems' (2022) 59 Common Market Law Review 1950.

Dobinson I and Johns F, 'Legal Research as Qualitative Research' in McConville M and Chui WH (eds), Research methods for law (2nd edn, Edinburgh University Press 2017) 1, 21.

Donnelly J and Whelan DJ, *International Human Rights* (6th edn, Routledge 2020).

Donnelly J, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

Dostoyevsky F, *House of the Dead* (Hingley R (ed) and Coulson J (trans), Oxford World's Classics 2008).

— —, *Crime and Punishment* (Garnett - Neilson 1917).

Dougan M, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 Common Market Law Review 1201, 1226.

Dougan M, *National Remedies before the Court of Justice* (Hart 2004).

Douglas-Scott S, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' (2014) U.K. Const. L. Blog http://ukconstitutionallaw.org (accessed 27 October 2023).

— —, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645.

— —, 'The Problem of Justice in the EU' in Julie Dickson and Pavlos Eleftheriadis (eds), *The Philosophical Foundations of the EU* (Oxford University Press 2012) 1.

— —, 'The Rule of Law in the European Union: Putting the Security into the Area of Freedom, Security and Justice' (2004) 29 Security and Justice 219.

— —, Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR (2015) https://ssrn.com/abstract=2752133 (accessed 21 May 2023) 29.

Drago F, Galbiati R and Vertova P, *Prison Conditions and Recidivism* (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper 2009).

Duff A, 'Five Surgical Strikes on the Treaties of the European Union' (2023) 8 European Papers 9.

Duff RA, 'Pre-trial detention and the presumption of innocence' in Ashworth A, Zedner L and Tomlin P (eds), *Prevention and the limits of criminal law* (Oxford University Press 2013) 1, 128ff.

— —, 'Punishment, Dignity and Degradation' (2005) 25 Oxford Journal of Legal Studies 141.

— —, *Trials and Punishments* (Cambridge University Press 1986).

Dumortier E et al, 'The rise of the penal state: What can human rights do about it?' in Snacken S and Dumortier E (eds) *Resisting Punitiveness in Europe: Welfare, Human Rights, and Democracy* (Routledge, 2012).

Dupré C, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 European Public Law 319.

— —, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015).

Duquette ES, 'Human Rights in the European Union: Internal Versus External Objectives' (2001) 34 Cornell International Law Journal 363.

Durkheim E, *The Division of Labour in Society* (George Simpson transl, The Free Press of Glencoe 1993).

Duus-Otterström G, 'Weighing Relative and Absolute Proportionality in Punishment' in Tonry M (ed), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press 2019) 1, 30.

Düwell M et al (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014) 1, 375

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977).

— —, *Law's Empire* (Harvard University Press 1986).

Dzehtsiarou K and Tzevelekos VP, 'The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights' (2020) 1 European Convention on Human Rights Law Review 1.

ECBA, "ECBA Initiative 2017/2018: Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" 1, 3 <**http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf**> accessed 17 May 2023

Eckes C and Konstadinides T, *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011).

Eckes C, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254.

— —, 'EU competence in relation to procedural rights and detention conditions' in European Parliamentary Research Service, *Procedural Rights and Detention Conditions: Cost of non-Europe Report* (2017).

— —, 'External Relations Law: How the Outside Shapes the Inside' in Arcarazo DA and Murphy CC (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart 2014) 1, 186, 188.

Editorial Comments, 'A revival of the Commission's role as guardian of the treaties?' (2012) 49 Common Market Law Review 1553.

Eeckhout P, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 Common Market Law Review 954.

Eijsbouts WT and Reestman JR, 'Editorial - Mutual Trust' (2006) 2 European Constitutional Law Review 1.

Elgstrom O and Smith M, 'Introduction: Negotiation and policy-making in the European Union: processes, system and order' (2011) Journal of European Public Policy 673.

Elholm T and Colson R, 'The Symbolic Purpose of EU Criminal Law', in Colson R and Field S (eds.) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 48ff.

Elholm T, 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice*, 191, 224.

Enderle G, 'Human Rights as Public Goods' in Enderle G (ed) *Corporate Responsibility for Wealth Creation and Human Rights* (Cambridge University Press 2021) 1, 148.

Eriksen EO, 'Why a Charter of Fundamental Human Rights in the EU?' (2003) 16 Ratio Juris 352.

Eurojust, *Case-law by the Court of Justice of the European Union on the European Arrest Warrant* [2021].

European Citizenship report (2019) <file://adf/storage/C/P/CXP993/Downloads/eb91_citizenship_en.pdf> (accessed 24 May 2023).

European Commission, *Press Release, European Commission puts forward recommendations related to detention conditions* [2022] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7570 (accessed 15 May 2023).

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 May 2016* (Council of Europe 2017) CPT/Inf 1, 1, 20ff.

— —, *Report to the Greek Government on the ad hoc visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 November 2021 to 1 December 2021* (Council of Europe 2022) CPT/Inf 16, 1, 8ff.

— —, *Report to the Greek Government on the visits to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 18 April and 19 to 25 July 2016*, (Council of Europe 2017) CPT/Inf 25.

— —, *Report on its visit to the Netherlands from 2 to 13 May 2016 of 19 January 2017,* (Council of Europe 2017) CPT/Inf 1.

— —, *CPT urges European states to hold persons in remand detention only as a measure of last resort and in adequate conditions* (Council of Europe 2017).

— —, *Report on its visit to Belgium from 27 March to 6 April 2017* (in French) (Council of Europe 2018) CPT/Inf 1, 8.

— —, *Reports on the December 2019 periodic visit and July 2020 ad hoc visit to France and responses of the French authorities* (in French) (Council of Europe 2020) CPT/Inf (2021) 14 1.

— —, *31st General Report of the CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (Council of Europe 2021) 1.

— —, *Report on its visit to Cyprus from 2 to 9 February 2017* (Council of Europe 2018) CPT/Inf 16.

— —, *Report on its visit to Sweden from 18 to 29 January* 2021 (Council of Europe 2021) CPT/Inf 20.

— —, *Report on its visit to Latvia from 12 to 22 April 2016* (Council of Europe 2017) CPT/Inf 16.

— —, *Report on the September 2020 periodic visit to Spain and response of the Spanish authorities* (Council of Europe 2021) CPT/Inf (2021) 27.

— —, *CPT Standards* [2002] CPT/Inf/E 1 - Rev. 2011.

— —, *Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011*, CPT/Inf (2012) 2 4.

— —, *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015* (Council of Europe 2016).

— —, *2nd General Report on the CPT's activities* (Council of Europe 1992) Cf. CPT/Inf (92) 1.

— —, *Report to the Greek Government on the ad hoc visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 November 2021 to 1 December 2021* CPT/Inf (2022) 16.

European Convention Secretariat, Reactions to draft text CONV 802/03 – Analysis, CONV 821/03, 27 June 2003.

European Court of Human Rights, *Factsheet: Pilot judgments* (Council of Europe 2020) 1.

— —, Guide on case-law of the Convention: Prisoners' rights (Council of Europe 2022).

— —, *Thematic Report: Health-related issues in the case-law of the European Court of Human Rights* (Council of Europe 2015).

European Criminal Policy Initiative, 'Manifesto on European Criminal Policy' (2009) Zeitschrift für Internationale Strafrechtsdogmatik 707.

European Judicial Training Network, *Judicial Cooperation in Criminal Matters: Practical Case-Based Simulation (Counter-terrorism)* [2023] <https://ejtn.eu/activity/criminal-law/> (accessed 13 May 2023).

— —, *The functioning of the EAW in the EU in practice: improving trust in national criminal justice systems* [2023] https://traininghub.ejtn.eu/seminars-and-webinars/listing/1393-the-functioning-of-the-eaw-in-the-eu-in-practice-improving-trust-in-national-criminal-justice-systems (accessed 13 May 2023).

European Prison Observatory, Prisons in Europe. 2019 Report on European Prisons and Penitentiary Systems (Rome: epo, 2020) 1, 10.

European Public Prosecutor's Office, *EPPO Annual Report 2022* [2023].

European Union Agency for Fundamental Rights, *Criminal detention conditions in the European Union: rules and reality Luxembourg: Publications Office of the European Union* (FRA 2019).

Europris https://www.europris.org/agency/central-board-of-prison-service-pl__trashed/ (accessed 05 October 2023).

Eurostat data, available at: < https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics > (accessed 28 May 2023).

Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* (2016) 1, 32 <https://fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> (accessed 07 July 2023).

— —, Beyond surrender: Putting human rights at the heart of the European Arrest Warrant (2018) 20, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 20 October 2023).

— —, *Pre-Trial Detention Rates and the Rule of Law in the European Union April 2021 Briefing to the European Commission* (2021) <https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/> (accessed 24 July 2023).

— —: *European Parliament's proposals will not prevent abuse of European Arrest Warrants* (2021) https://www.fairtrials.org/news/european-parliament%E2%80%99s-proposals-will-not-prevent-abuse-european-arrest-warrants (accessed 25 May 2023).

Favuzza F, 'Torreggiani and Prison Overcrowding in Italy' (2017) 17 Human Rights Law Review 153.

Feeley MM and Simon H, 'Actuarial Justice: the Emerging New Criminal Law' in Nelken D (ed) *The Futures of Criminology* (Sage 1994) 1, 173.

— —, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 Criminology 449.

Feinberg J, 'The Expressive Function of Punishment' in Joel Feinberg (ed), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970) 1, 95.

— —, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243.

Ferri D and Martinico G, 'Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for Its Extensive Application' (2021) 27 European Public Law 685.

Fichera M, 'Mutual Trust in European Criminal Law' (2009) University of Edinburgh School of Law Working Paper 10/2009, 13 <https://ssrn.com/abstract=1371511> (accessed 22 June 2023).

Fikfak V and Izvorova L, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1.

Fletcher M, 'Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge' (2003) 66 The Modern Law Review 769.

Fletcher M, Lööf R, and Gilmore B, *EU Criminal Law and Justice* (Edward Elgar 2008).

Flew A, 'The Justification of Punishment' (1954) 29 Philosophy 291.

Flogaitis S, Zwart T and Fraser J (eds), *The European Court of Human Rights and its discontents* (Edward Elgar 2013).

Fontanelli F, 'Implementation of EU Law Through Domestic Measures After Fransson: The Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large' (2014) 39 EL Rev 682.

— —, 'The implementation of European Union law by Member States under Article 5 1(1) of the Charter of Fundamental Rights' (2014) 20 Columbia Journal of European Law 193.

Foucault M, *Des Espace Autres* (1967) <foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html> (accessed 24 February 2021).

Fromage D, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?' (2016) 35 Yearbook of European Law 5.

Fukuyama F, *The End of History and the Last Man* (The Free Press 1992).

Fyrnys M, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2019) 12 German Law German 1231.

Gardenes Santiago M, 'Las comunicaciones interpretativas de la Comision: concepto y valor normativo' (1992) 19 Revista de Instituciones Europeas 933.

Garfinkel H, 'Conditions of Successful Degradation Ceremonies' (1956) 61 American Journal of Sociology 420.

Garland D, *Punishment and Modern Society: A Study in Social Theory* (The University of Chicago Press 1990).

— —, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001).

Garnsey P, 'The Criminal Jurisdiction of Governors' (1968) 58 The Journal of Roman Studies 51.

Gáspár-Szilágyi S, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal for Crime, Criminal Law and Criminal Justice 197.

Gendreau P, Goggin C and Cullen FT, *The Effects of Prison Sentences on Recidivism* (Solicitor General 1999) <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf> (accessed 21 July 2023).

Gerards J, 'The Scope of ECHR Rights and Institutional Concerns' in Brems E and Gerards J (eds), *Shaping Rights in Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights* (Cambridge University Press 2014) 1, 84.

Giannakoula A, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals' (2015) 5 European Criminal Law Review 133.

Gibbs AH, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Taylor and Francis Group 2011).

— —, 'Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice' (2010) 17 European Law Journal 121.

Giddens A, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984).

Girling E, 'European identity, penal sensibilities and communities of sentiment' in Sarah Armstrong and Lesley McAra (eds) *Perspectives on punishment: the contours of control* (Oxford University Press 2006) 1, 69.

Glueck S, 'Principles of Rational Penal Code' (1928) 41 Harvard Law Review 453.

Greer S, Gerards J and Slowe R, Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges (Cambridge University Press 2018).

Greer S, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 Human Rights Law Review 101.

Grohs S, 'Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases' in Cremona M (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 1, 65.

Grossio L and Rosi M, 'The Ultimate (but not the Only) Remedy for Securing Fundamental Rights in the EAW System? Some Reflections on Puig Gordi and E. D. L.' (2023) 8 European Papers 547.

Groussot X and Pech L, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) 173 Fondation Robert Schuman https://ssrn.com/abstract=1628552 (accessed 24 July 2023).

Groussot X, Pech L, and Petursson GT, *The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication* (Eric Stein Working Paper 2011).

Grzelak A, 'ECJ Judgment in case C-123/08 *Dominic Wolzenburg*' (2012) Polish Review of International and European Law 191.

Guieu JM and Le Dréau C (eds), *Le « Congrès de l'Europe » à La Haye (1948-2008) (*Peter Lang 2010).

Guild E, 'Citizens, Immigrants, Terrorists and Others', in Steve Peers et al (eds), *The EU Charter of Fundamental Rights, Politics, Law and Policy* (Hart 2004) 1, 231.

— —, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice' (2004) 10 European Law Journal 218.

— —, 'Migration, security and European citizenship' in Isin E and Nyers P (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 1, 418, 422.

Guild E, Peers S and Tomkin J, *The EU citizenship directive: a commentary* (Oxford University Press 2019).

Guldemund R, Harding C, and Sherlock A, 'The European Community and Criminal Law' in Harding C et al (eds) *Criminal Justice in Europe: a Comparative Study* (1st edn, Clarendon press 1995) 1, 107.

Hackenbruch F, Betschka J and Höhne V*, Der Asylkompromiss der Ampel* (Der Tagesspiegel 2010) www.tagesspiegel.de (accessed 05 September 2023).

Hart HLA, 'The Presidential Address: Prolegomenon to the Principles of Punishment' (1959) 60 Proceedings of the Aristotelian Society 1.

Hailbronner K and Thym D, 'Case C-34/09 Gerardo Ruiz Zambrano v. Office National de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 CML Rev. 1253.

Halberstam D, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) Public Law and Legal Theory Research Paper no 432 https://iow.eui.eu/wp-content/uploads/sites/18/2015/04/Spaventa-09-Halberstam.pdf (accessed 24 September 2023).

— —*,* 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Dunoff JL and Trachtman JP (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009).

Hale J, 'Does Prison Work? A Comparative Analysis on Contemporary Prison Systems in England and Wales and Finland, 2000 to Present' (2020) 4 Wolverhampton Law Journal 64.

Hallstein W, *The Unity of European Culture and Policy of Uniting Europe* (1958) University of Pittsburgh aei.pitt.edu (accessed 02 March 2021).

Hamenstädt K, 'Mutual (dis-)trust in the Area of Freedom, Security and Justice?' (2021) 14 Review of European Administrative Law 5, 8.

Harcourt BE, 'The shaping of chance: Actuarial models and criminal profiling at the turn of the twenty-first century' (2003) 70 The University of Chicago Law Review 105.

Harleny TC, *The Foundations of European Community Law* (2nd edn, Clarendon Press 1988).

Harlow C and Rawlings R, 'Accountability and Law Enforcement: The Centralized EU Infringement Procedure' (2006) 31 European Law Review 447.

Harlow C, ‘The EU and law in context: the context’ (2022) 1 European Law Open 209.

Harris D et al (eds), *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018).

Hart HM, ‘The Aims of the Criminal Law’ (1958) 23 Law and Contemporary Problems 401.

Heard C and Fair F, *Pre-trial detention and its over-use: Evidence from ten countries* (Institute for Crime and Justice Policy Research 2019) https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf (accessed 07 July 2023).

Hecker DB, *Europaisches Stratfrecht* (3rd edn, Springer 2010).

Heffernan L, ‘The European Court System and Its Role in Shaping European Criminal Law’ in Ambos K and Rackow P (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 33.

Heidegger M, *Off the Beaten Track* (Cambridge University Press 2002).

Helenius D, ‘Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?’ (2014) 5 New Journal of European Criminal Law 349.

Helfer LR and Voeten E, ‘International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe’ (2014) 68 International Organization 77.

Helfer LR, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 European Journal of International Law 125.

Herlin-Karnell E, ‘Case comment Wolzenburg C-123/08’ (2010) 73 The Modern Law Review 824.

— —, ‘Constitutional Principles in the EU Area of Freedom, Security an Justice’ in Arcarazo DA and Murphy CC (eds), *EU Security and Justice Law* (Hart 2014) 1, 36.

— —, ‘Effectiveness and constitutional limits in European criminal law’ (2014) 5 New Journal of European Criminal Law 267.

— —, ‘EU Competence in Criminal Law after Lisbon’ in Biondi A, Eeckhout P and Ripley S (eds), *EU Law After Lisbon* (Oxford University Press 2012) 1, 333.

— —, ‘Is the Citizen Driving the EU’s Criminal Law Agenda?’ in Dougan M, Shuibhne NN and Spaventa E (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 1, 203.

— —, ‘The domination of security and the promise of justice: on justification and proportionality in Europe’s ‘Area of Freedom, Security and Justice’ (2017) 8 Transnational Legal Theory 79.

Hervey G, ‘Europe's human rights court struggles to lay down the law’ (POLITICO 2017) <https://www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/> (accessed 5 July 2023).

Hildebrandt M, ‘European criminal law and European identity’ (2007) 1 Criminal Law and Philosophy 57.

Hogemann ER, ‘Human rights beyond dichotomy between cultural universalism and relativism’ (2020) 14 The Age of Human Rights Journal 19.

Holmes OW, *The Common Law* (American Bar Association 2009).

Hong H, ‘Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in Dialogue of Courts: Solange-III and Aranyosi’ (2016) 12 European Constitutional Law Review 549.

Horgos L, ‘Thoughts about the Definition of Ius Puniendi in Legal Theory’ (2021) 1 Belügyi Szemle 9.

Huls N, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (TMC Asser Press 2009).

Hunault M, *Report of the Committee on Legal Affairs and Human Rights Situation of European prisons and pre-trial detention centres* [2004] Doc. 10097.

— —, *Report of the Committee on Legal Affairs and Human Rights: European Prisons Charter* [2006] Doc. 10922.

Iliopolou-Penot A, ‘Deconstructing the Former Edifice of Union Citizenship?’ (2016) 53 Common Market Law Review 1007.

Illardi J, ‘Prison radicalisation: The devil is in the detail’ (2010) Paper presented at the ARC Linkage Project on Radicalisation – Conference, Understanding Terrorism from an Australian Perspective: Radicalisation, De-Radicalisation and Counter Radicalisation, Monash University, Australia, 2010.

Isikiel T, ‘European Exceptionalism and the EU’s Accession to the ECHR’ (2016) 27 European Journal of International Law 565.

Jackson J et al, ‘Legitimacy and procedural justice in prisons’ (2010) 191 Prison service journal 4.

Jackson R, ‘Security, Democracy, and the Rhetoric of Counter-Terrorism’ (2005) 1 Democracy and Security 147.

Jacobs P, *Force-feeding of prisoners and detainees on hunger strike* (Interesentia 2012).

Jacot-Guillarmod O, *Droit communautaire et droit international public* (Librairie de l’université Georg 1979).

Jakab A and Kirchmair L, ‘Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights’ (2022) 24 Cambridge Yearbook of European Legal Studies 239.

Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

Jakab A and Kochenov D, ‘Introductory Remarks’ in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 3.

Jakab A, ‘Application of the EU CFR by National Courts in Purely Domestic Cases’ in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 252, 255.

James C, ‘Food, dignity, and the European Court of Human Rights’ (2023) Legal Studies 1.

Janse R, ‘The Evolution of the Political Criteria for Accession to the European Community, 1957-1973’ (2018) 24 European Law Journal 57.

Jansen G, ‘The need for a new roadmap of procedural safeguards: a lawyer’s perspective’ 22 (2021) ERA Forum 279.

Janssens C, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013).

Jescheck HH, 'Die Strafgewalt übernationaler Gemeinschaften' (1953) 65 Zeitschrift für die gesamte Strafrechtswissenschaft 496.

Jimeno-Bulnes M, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union' in Elspeth Guild and Florian Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008) 1, 171.

Jones J, '"Common Constitutional Traditions": Can the Meaning of Human Dignity Under German Law Guide the European Court of Justice?' (2004) Public Law 167.

— —, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281.

Jones T and Newburn T, 'Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics' (2006) 46 The British Journal of Criminology 781.

Joutsen M, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (2006) 25 HEUNI 7, 8 <http://old.heuni.fi/material/attachments/heuni/papers/6KtmuRpsd/HEUNI_papers_25.pdf> (accessed 24 July 2021).

Jovanovic MN, 'Enlargement of the EU: a Topsy-Turvy Endgame or Permanent Disillusionment' (2004) 19 Eastern Journal of Economic Integration 830.

Judt T, *A Grand Illusion? An Essay on Europe* (New York University Press 2011).

Kaila H, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in Cardonnel P et al (eds), *Constitutionalising the EU Judicial System* (Hart 2012) 1, 291.

Karsai K and Wörner L, 'European Union and Council of Europe', in Ambos K and Rackow P (eds) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023).

Karstedt S and Endtricht R , 'Crime And Punishment: Public Opinion And Political Law-And-Order Rhetoric In Europe 1996–2019' (2022) 62 The British Journal of Criminology 1116.

Kaufman E and Bosworth M, 'The prison and national identity: citizenship, punishment and the sovereign state' in Scott D (ed), *Why Prison?* (Cambridge University Press 2013) 1, 170.

Kelemen RD and Pavone T, *Forbearance and Enforcement at the European Commission: A Response to von der Leyen* (EU Law Enforcement 2022) https://eulawenforcement.com/?p=8299.

Kelemen RD, 'The European Union's Authoritarian Equilibrium' (2020) 27 Journal of European Public Policy 481.

Kelk C, *Nederlands detentierecht* (Gouda Quint 2000).

— —, *Recht voor gedetineerden* (Samsom 1978).

Kellerbauer M and Klamert M, 'Article 352 TFEU' in Manuel Kellerbauer, Marcus Klamert and Tomkin J (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2072ff.

Kende-Szűcs, *Introduction to the policies of the European Union* (Complex Publishing Company 2011).

Keyzer P (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia 2013).

Kirchner E and Sperling J, *EU Security Governance* (Manchester University Press 2007).

Kissinger H, *World Order* (Penguin Press 2014).

Klabbers J, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167.

Klamert M and Kochenov D, 'Article 2 TEU' in Kellerbauer M, Klamert M and Tomkin J (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 22ff.

Klamert M, 'What We Talk About When We Talk About Harmonisation' (2015) 17 Cambridge University Press 360.

Klein E, 'Self-contained Regime', in Wolfrum R (ed), *Max Planck Encyclopedia of Public International Law* (online edn) https://opil.ouplaw.com/home/EPIL (accessed 05 November 2023).

Klip A, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 109.

— —, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016)

Knook A, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 Common Market Law Review 367.

Kochenov D and Plender R, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2011) 37 Euro. L. Rev. 369.

Kochenov D, 'Article 7 TEU' in Kellerbauer M, Klamert M and Tomkin J (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 88.

— —, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in von Bogdandy A et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 1, 127.

— —, 'Ending the passport apartheid. The alternative to citizenship is no citizenship: A reply' (2020) 18 International Journal of Constitutional Law 1525.

— —, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15 Columbian Journal of European Law 169.

— —, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Year of International Law 145.

— —, 'The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the EU' in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 10.

Kokott J and Sobotta C, 'The Charter of Fundamental Rights of the European Union after Lisbon' (2010) EUI Working Paper No. 6, 7, http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf? sequence=3 (accessed 19 August 2023).

Kolber AJ, 'The Subjective Experience of Punishment' (2009) 109 Columbia Law Review 182, 188.

Konstadinides T, 'Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 Yearbook of European Law 227.

Kostakopoulou D, 'An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm' (2010) 19 European security 151.

— —, *EU Citizenship Law and Policy* (Edgar 2020).

Koulouris NK, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (Nomiki Vivliothiki 2009).

Kouroutakis AE, 'The Italian European Arrest Warrants for the Five Greeks Taking Part in Riots and Their Rejection by the Greek Authorities' (2016) 7 New Journal of European Criminal Law 295.

Krajewski M, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395.

Krisztina K, 'Ius Puniendi of the European Union' in Péter Hack and Koósné Mohácsi Barbara (eds) *Emberek őrzője Tanulmányok Lőrincz József tiszteletére* (Budapest 2014) 1, 117.

Kröger S, 'The End of Democracy as We Know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance' (2007) 29 Journal of European Integration 565.

Kutateladze B, 'Measuring state punitiveness in the United States' in Kury H and Shea E (eds), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (Universitatsverlag Dr. Brockmeter 2011) 1, 151.

— —, *Introducing a New Measurement of State Punitiveness and Testing it Across the United States* (ProQuest 2008).

Kwiecień R, The Primacy of European Union Law over National Law Under the Constitutional Treaty German Law Journal 6 2005 1479.

La Documentation Francaise, Ministère de la justice, L'Espace Judiciaire Européen. Actes du Colloque d'Avignon (Paris 1999) 1, 89.

Lampert H, 'Economic Policy and Social Policy' (1970) 5 Intereconomics 351.

Larsen LB, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Cardonnel P, Rosas A and Wahl N (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 1, 140.

Lavenex S, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 Journal of European Public Policy 762.

Lavranos N, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles', in Fontanelli F et al. (eds), Shaping Rule of Law through Dialogue: International and Supranational Experiences (Europa Law 2010) 119.

Łazowski A, 'The Sky is Not the Limit: Mutual Trust and Mutual Recognition aprés Aranyosi and Căldăraru' 14 *Croatian Yearbook of European Law and Policy* (2018) 18.

Leclerc S, 'Les communications de la Commission et le marché intérieur. A propos de l'arrêt rendu par la Cour de justice des Communautés européennes le 20 mars 1997 dans l'affaire C-57-95, Rec. (1997), p I-1640 à I-1652' (1998) 34 Cahiers de Droit Européen 161.

Legge J, *Confucian analects: The great learning, and The doctrine of the mean* (Dover Publications 1971).

Lenaerts K and Desomer M, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27 European Law Review 377.

Lenaerts K and Gutiérrez-Fons JA, 'The Place of the Charter in the EU Constitutional Edifice' in Peers S et al (Eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2013) 1, 1559.

Lenaerts K and Van Nuffel P, *EU Constitutional Law* (Oxford European Union Law Library 2021).

Lenaerts K, ‘EU Citizenship and Democracy’ (2016) 7 New Journal of European Criminal Law 164.

— —, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ [2012] 8 Eu Const L Rev 375.

— —, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’ (2017) 54 Common Market Law Review 805, 809,

— —, ‘The Kadi Saga and the Rule of Law within the EU’ (2014) 67 SMU L. REV. 707.

— —, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’ (All Souls College, University of Oxford 2015).

— —, ‘EU Citizenship and the European Court of Justice’s ’Stone-by-Stone’ Approach’ (2015) 1 Int’l Comp. Jurisprudence.

— —, ‘“Civis europaeus sum”’ in Cardonnel P et al (eds), *Constitutionalising the EU Judicial System* (Hart 2012) 1, 213.

Lessig L, ‘Social Meaning and Social Norms’ (1996) 144 U. PA. L. REV. 2181.

— —, ‘The Regulation of Social Meaning’ (1995) 62 U. CHI. L. REV. 943.

LFM Besselink, ‘The bite, the bark and the howl: Article 7 TEU and the rule of law initiatives’ in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 128.

Ligeti K, *Toward a Prosecutor for the European Union: Volume 1* (Hart 2012).

Lindner JF, ‘Grundrechtsschutz in Europa: System einer Kollisionsdogmatik’ (2007) 42 Eur 160.

Lipgens W, *Documents of the History of European Integration* (De Gruyter 1985).

— —, *A History of European Integration: 1945–1947* (Oxford University Press 1983).

Loschi C and Slominski P, ‘The EU hotspot approach in Italy: strengthening agency governance in the wake of the migration crisis?’ (2022) 44 Journal of European Integration 769.

Lize R Glas, ‘The European Court of Human Rights supervising the execution of its judgments’ (2019) 37 Netherlands Quarterly of Human Rights 228.

— —, ‘The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice’ (2017) 34 Netherlands Quarterly of Human Rights 41.

Llewellyn KN, *The Bramble Bush* (Oxford University Press 1953).

Lock T, ‘Article 1 CFR Human dignity’ in Kellerbauer M, Marcus Klamert and Tomkin J(eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2098.

— —, ‘Article 51 CFR’ in Kellerbauer M, Marcus Klamert and Tomkin J (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1, 2241.

— —, ‘Rights and Principles in the EU Charter of Fundamental Rights’ (2019) 56 Common Market Law Review 1201.

Loeffler CE and Nagin DS, ‘The impact of incarceration on recidivism’ (2021) 5 Annual Review of Criminology 133.

Luna E, ‘Sentencing’, in Dubber MD and Hörnle T (eds.) *The Oxford Handbook of Criminal Law* (Oxford University Press 2014).

Lutterbeck D, 'Blurring the dividing line: the convergence of internal and external security in Western Europe' (2005) 14 European security 231.

Lynch JP, 'A comparison of prison use in England, Canada, West Germany, and the United States: A test of the punitive hypothesis' (1988) 79 The Journal of Criminal Law and Criminology 180.

Lynch M, 'Theorizing punishment: Reflections on Wacquant's Punishing the Poor' (2011) 37 Critical Sociology 237.

MacLennan JF, 'Decentralized Enforcement of EC Law: Is the European Commission Still the Guardian of the Treaties?' (1997) 91 Proceedings of the Annual Meeting (American Society of International Law) 165.

Maculan E and Gil Gil A, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts' (2020) 40 Oxford Journal of Legal Studies 132.

Maduro MP, 'So Close and Yet So Far: The Paradoxes of Mutual Recognition' (2017) 14 j. eur. pub. pol'y 814.

Mahlmann M, 'Human dignity and autonomy in modern constitutional orders' in Rosenfeld M and Sajo A (eds), *The Oxford Handbook of comparative constitutional law* (Oxford University Press 2012) 1, 371.

— —, 'The Basic Law at 60: Human Dignity and the Culture of Republicanism' (2010) 11 German Law Journal 9.

Mahoney P, 'The European Court of Human Rights and its Ever-Growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition' in Flogaitis S, Zwart T and Fraser J (eds), *The European Court of Human Rights and its discontents: Turning Criticism into Strength* (Edward Elgar 2013) 1, 26.

Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017).

Mancano L, 'A New Hope? The Court of Justice Restores the Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System', in Brière C and Weyembergh A (eds), *The Needed Balances in EU Criminal Law* (Hart 2018) 1, 285ff.

— —, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61.

— —, 'The place of prisoners in European Union law?' (2016) 22 European Public Law 717.

— —, 'Trust Thy Neighbour? Compliance and Proximity to the EU through the Lens of Extradition' (2021) 40 Yearbook of European Law 475, 486.

— —, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury 2019).

Mancini GF (ed), *Democracy and Constitutionalism in the European Union* (Hart 2000).

Mangiameli S, 'The Union's Homogeneity and Its Common Values' in Blanke JH and Mangiameli S (eds), *The European Union after Lisbon* (Springer 2012) 1, 21.

Marguery T, 'EU citizenship and European arrest warrant: The same rights for all?' (2011) 27 Utrecht Journal of International and European Law 84.

— —, 'European Union Fundamental Rights and Member States Action in EU Criminal Law' (2013) 2 M.J. 282.

— —, ‘Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is ‘Exceptional’ Enough?’ (2016) 3 European Papers 943.

— —, ‘Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of Prisoners Framework Decisions’, (2018) 25 Maastricht Journal of European and Comparative Law 704.

Martufi A and Peristeridou C, ‘The Purposes of Pre-Trial Detention and the Quest for Alternatives’ (2020) European Journal of Crime, Criminal Law and Criminal Justice 153.

— —, ‘Towards an Evidence-Based Approach to Pre-trial Detention in Europe’ (2022) 28 European Journal of Criminal Policy and Research 357.

Martufi A, ‘Assessing the resilience of ‘social rehabilitation’ as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA’ (2018) 9 New Journal of European Criminal Law 43.

— —, ‘The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal’ (2019) 25 *Maastricht Journal of European and Comparative Law* 655.

Matthews R, ‘The myth of punitiveness’ (2005) 9 Theoretical Criminology 175.

Mavronicola N, ‘What is an “absolute right”? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12(4) Human Rights Law Review 723.

— —, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021).

Mayrhofer M, ‘The EU’s institutional human rights architecture’ in Wouters J et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 1, 117.

Mead GH, ‘The Psychology of Punitive Justice’ (1918) 13 The American Journal of Sociology 577.

Meyer F, ‘Rethinking European Criminal Law’ in Kai Ambos and Peter Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 461.

Micossi S, *Thirty Years of the Single European Market* (College of Europe 2016).

Miettinen S, *Criminal Law and Policy in the European Union* (1st edn, Taylor and Francis Group 2012).

Miglietti M, ‘The First Exercise of Article 83(2) TFEU under Review: An Assessment of the Essential Need of Introducing Criminal Sanctions’ (2014) 5 New Journal of European Criminal Law 5.

Miller M and Guggenheim M, ‘Pretrial Detention and Punishment’ (1990) 75 Minnesota Law Review 335.

Miranda Rodrigues A, ‘Fundamental rights and punishment: Is there an EU perspective?’ (2019) 10 New Journal of European Criminal Law 17, 20.

Mitsilegas V and and Mancano L, ‘Melloni: Primacy versus Rights?’ in Mitsilegas V, di Martino A and Mancano L (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart 2021) 1, 393.

Mitsilegas V, Monar J and Rees W, *The European Union and internal security: Guardian of the people?* (Palgrave Macmillan UK 2003).

Mitsilegas V, ‘Autonomous concepts, diversity management and mutual trust in Europe’s area of criminal justice’ (2020) 57 Common Market Law Review 45.

— —, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) 43 Common Market Law Review 1277.

— —, ‘The EU external border as a site of preventive (in)justice’ (2022) 28 European Law Journal 263.

— —, ‘The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust’ (2019) 5 Revista Brasileira de Direito Processual Penal 565.

— —, ‘*The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe’s Area of Criminal Justice’* (2019) Review of European Administrative Law 130.

— —, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 Yearbook of European Law 319.

— —, ‘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.

— —, ‘The Transformation of Criminal Law in the Area of Freedom, Security and Justice' (2007) 26 Yearbook of European Law 1.

— —, *EU Criminal Law* (2nd edn, Hart 2022).

— —, *EU Criminal Law after Lisbon: Rights, Trust and Transformation of Justice in Europe* (Hart 2016).

— —, ‘The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 Yearbook of European Law 319.

Mohay Á, *Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order* (EU Law Analysis 2019) <http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html> (accessed 24 July 2023).

Monar J, *The institutional dimension of the European Union's area of freedom, security and justice* (Peter Lang 2010).

— —, ‘Decision-Making in the Area of Freedom, Security and Justice’ in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 1, 67.

— —, ‘Deviations from and Alternatives to the Community Method in Justice and Home Affairs’ in Renaud Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011) 1, 118, 130.

— —, ‘The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs’ (2001) 39 Journal of Common Market Studies 747.

— —, *The External Dimension of the EU´s Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon* (SIEPS 2012).

Montaldo S, ‘On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights’ (2016) 1 European Papers 965.

Morgenstern C, ‘Need for Speed: Die neue Beschleunigungsfreude im Strafverfahren am Beispiel der Untersuchungshaft’ (2020) 40 Zeitschrift Für Rechtssoziologie 90.

— —, ‘Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards’ (2009) 9 ERA Forum 527.

Möstl M, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405

Müller JW, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 European Law Journal 141.

— —, Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order (Transatlantic Academy 2013) Working Paper No 3.

Murdoch J, *The treatment of prisoners: European standards* (Council of Europe 2006).

Murray JH, *Fundamental Rights in the European Community Legal Order* [2008] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2142&context=ilj&httpsredir=1&referer = (accessed 14 November 2022).

Murphy CC, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"' (2015) 6 Transnational Legal Theory.

Nagy CI, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's 'Federal Bill of Rights' to Member States' (2017) 27 Indiana International & Comparative Law Review 1.

— —, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne' (2020) 21 German Law Journal 838.

Neumann PR, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*. (International Centre for the Study of Radicalisation and Political Violence and the National Consortium for the Study of Terrorism and Responses to Terrorism 2010).

Nicolaidis K and Shaffer G, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 Law and Contemporary Problems 263,

Nicolaidis K, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy 682.

Nicolosi S, 'The Contribution of the Court of Justice to the Codification of the Founding Values of the European Union' (2015) 51 rev. der. com. eur. 613.

Nieto Martín A and Muñoz de Morales Romero M, 'The Office of the European Public Prosecutor and Related Offences: Deconstructing the Problem' in Asp A (ed), *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, Stockholm 2015) 1, 120.

Nilsson HG, 'From classical judicial cooperation to mutual recognition' (2006) 77 Dans Revue internationale de droit pénal 53.

— —, 'Mutual Trust or Mutual Mistrust?' in de Kerchove G and Weyembergh A (eds), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles 2005) 1, 29.

— —, 'Where Should the European Union Go in Developing Its Criminal Policy in the Future' (2014) 1 eucrim 21.

— —, 'How to Combine Minimum Rules with Maximum Legal Certainty' (2011) 4 Europarättslig Tidskrift 665.

Nolte N, Schulte-Rudzio F and Goral-Wood L, 'Prosecuting EU sanctions offences: will the EPPO take over in 2023?' (2022) Risk and compliance blog <https://riskandcompliance.freshfields.com/post/102i45t/prosecuting-eu-sanctions-offences-will-the-eppo-take-over-in-2023> (accessed 20 July 2023).

Nowak C, ‘Grundrechtsberechtigte und Grundrechtsadressaten’ in Sebastian F, Meselhaus M, and Nowak C (eds), *Handbuch der Europäischen Grundrechte* (Beck 2006) 1, 212.

Nugent N, *Government and Politics of the European Union* (Palgrave Macmillan 2003).

Nuotio K, ‘A legitimacy-based approach to EU criminal law: Maybe we are getting there, after all’ (2020) 11 New Journal of European Criminal Law 20.

O’Brien P, ‘The Prison on the Continent Europe 1865–1965’ in Morris N and Rothman DJ (eds), *The Oxford History of the Prison* (Oxford University Press 1995) 1, 199ff.

O’Meare N, *Essential Cases: EU Law* (5th edn, Oxford University Press 2021).

Öberg J, ‘Legal Diversity, Subsidiarity and Harmonisation of EU Regulatory Criminal Law’, Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Diversity* (Cambridge University Press 2016) 106, 109.

— —, ‘Normative justifications of EU criminal law: European public goods and transnational interests’ (2023) 27 European Law Journal 408.

— —, ‘Subsidiarity and EU Procedural Criminal Law’ (2015) 5 European Criminal Law Review 1, 19.

— —, ‘The European Public Prosecutor: Quintessential Supranational Criminal Law?’ (2021) 28 Maastricht Journal of European and Comparative Law 164.

— —, ‘Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure’ (2020) European Constitutional Law Review 1.

— —, ‘Exit, Voice and Consensus: A Legal and Political Analysis of the Emergency Brake in EU Criminal Policy’ (2021) 46 European Law Review 506, 530.

— —, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (1st edn, Hart 2017).

Odermatt J, ‘The Court of Justice of the European Union: International or Domestic Court?’ (2014) 3 Cambridge Journal of International and Comparative Law 696.

— —, ‘The European Union in International Law’, in Jed Odermatt (ed) *International Law and the European Union* (Cambridge University Press 2021) 1, 9ff.

Olsen TV, ‘Why and How Should the European Union Defend its Values?’ (2023) 29 Res Publica 69.

Oomen BM, ‘A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European court of human rights in the Netherlands’ (2015) 20 International Journal of Human Rights 407.

Ostropolski T, ‘The CJEU as Defender of Mutual Trust’ (2015) 2 New Journal of European Criminal Law 166.

Ouwerkerk JW, ‘Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?’ (2012) 3 New Journal of European Criminal Law 233.

— —, ‘EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter’s Scope of Application (Editorial) (2019) 27 european journal of crime, criminal law and criminal justice 89.

Packer HL, *The Limits of the Criminal Sanction* (Stanford University Press 1968).

Pakes FJ and Holt K, ‘The Transnational Prisoner: Exploring Themes and Trends Involving a Prison Deal with the Netherlands and Norway’ (2017) 54 The British Journal of Criminology 79.

Paliero CE, 'Consenso sociale e diritto penale' (1992) 35 Rivista italiana di diritto e procedura penale 849.

Papachristopoulos C and Di Nica D, 'To Err Twice: Methodological Pluralism Through the Lens of EU Prison Policy' (forthcoming) Goettingen Journal of International Law.

Papachristopoulos C, 'On the legitimacy of force-feeding of prisoners and detainees on hunger strike under the European Convention and the European Court of Human Rights' (2019) Poiniki Dikaiosini (Criminal Justice) 1304.

— —, 'On the Legitimacy of the European Prison Charter' (forthcoming) Maklu.

— —, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 6 European Papers 311.

— —, 'The tale of the European sandcastle: On the convergence and divergence of national prison systems across the European Union' (2019) 2 Freedom, Security & Justice: European Legal Studies 120.

— —, *"Let gentleness my strong enforcement be…?" Prisoner rights in the AFSJ* (2022) EULEN https://eulawenforcement.com/?p=8273 (accessed 26 November 2023).

Passport-free travel from Estonia to Portugal (Spiegel Online 2007) <https://www.spiegel.de/international/europe/security-fears-as-borders-vanish-passport-free-travel-from-estonia-to-portugal-a-524170.html> (accessed 04 September 2020).

Patberg M, *Constituent Power in the European Union* (Oxford University Press 2020).

Peers S, 'Mutual Recognition and Criminal law in the European Union: Has the Council Got it Wrong?' (2004) 41 Common Market Law Review 5.

— —, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeuand- (accessed 01 April 2022).

— —, *EU Justice and Home Affairs Law* (4th edn, Oxford European Union Law Library 2016).

— —, *The Hague Programme: Annotation of final version, approved 5 November 2004* <http://www.statewatch.org/news/2004/nov> (accessed 5 November 2021).

— —, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 German Law Journal 213.

— —, 'Benefits for EU Citizens: A U-Turn by the Court of Justice' (2015) 74 cambridge l.j. 195.

— —, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"' (2011) Statewatch analysis 1, 1 , https://www.statewatch.org/media/documents/analyses/no-148-dublin-mutual-trust.pdf> (accessed 24 July 2023).

Penrose MM, 'Creating an International Prison' (2016) 38 Houston Journal of International Law 425.

Pernice I, 'The Treaty of Lisbon and Fundamental Rights' in Griller S and Ziller J (eds) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008).

Petrić D, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law 451.

Piechowicz M, 'Evolution of Schengen: An Example of Enhanced Cooperation and Differentiated Integration Model within the Area of Freedom Security and Justice' (2017) 46 Polish Political Science Yearbook 121.

Pinto M, 'Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht Journal of International and European Law 161.

Pires AP, 'Quelques obstacles à une mutation du droit pénal' (1995) 26 Revue générale de droit 133.

Piris JC, *The Lisbon Treaty: a Legal and Political Analysis* (1st edn, Cambridge University Press 2010).

Poli S and Tzanou M, 'The Kadi Rulings: A Survey of the Literature' (2009) 28 Y.B. EUR. L. 533.

Popelier P, Gentile G and van Zimmeren E, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2022) 27 European Law Journal, 167.

Potacs M, *Wertkonforme Auslegung des Unionsrechts* (Nomos 2016).

Pound R, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

Prechal AS, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5. Extending the competences of the EU 51 CFREU.

Prechal AS, 'Mutual trust before the court of justice of the European Union' (2017) 2 European Papers 75.

President Barroso, *State of the Union Address* (EP, 2012, Speech/12/596).

Prosser T, 'Insiders and outsiders on a European scale' (2016) 23 European Journal of Industrial Relations 135.

— —, 'Towards a Critical Public Law' (1982) 9 Journal of Law and Society 1.

Quinn G, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849.

Rainey B, Wicks E and Ovey A (eds), *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2020) 1, 59.

Ramos VC, Luchtman M, and Munteanu G, 'Improving Defence Rights Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings' (2020) 3 eucrim 230.

Raz J, 'Right Based Moralities' in Waldron J (ed), *Theories of Rights* (Oxford University Press 1984) 1, 182.

Reinisch A, *Essentials of EU Law* (2nd edn, Cambridge University Press 2012).

Ribstein LE, 'Law v. Trust' (2001) 81 Boston University Law Review 553.

Rizcallah C, 'The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration' (2019) 25 European Law Journal 37.

Rizcallah C, 'The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice: A critical look at the Court of Justice's stone-by-stone approach' (2023) Maastricht Journal of European and Comparative Law https://journals.sagepub.com/doi/10.1177/1023263X231205826 (accessed 30 October 2023).

Rodriguez PM, 'Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero dl 2013, Stefano Melloni' (2013) 30 Revista general de derecho europeo 1.

Roper SD, 'Compliance with the European Convention on Human Rights: Testing Competing Theoretical Perspectives with post-Communist Countries' (2017) 45 East European Quarterly 123, 137.

Rosas A, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudencija/Jurisprudence 1269.

Rosas A and Armati L, *EU Constitutional Law: An Introduction* (3rd edn, Hart 2018).

Rothschild-Elyassi G, Koehler J and Simon J, 'Actuarial Justice' in Deflem M (ed) *The Handbook of Social Control* (Wiley 2018) 1, 194ff.

Ruck SK (ed), Paterson on Prisons: The collected papers of Sir Alexander Paterson (Muller 1951).

Ruggie JG, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 International Organization 139.

Sabine GH, 'The Concept of the State as Power' (1920) 29 The Philosophical Review 301.

Sadurski W, 'Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2009) 16 Columbia Journal of European Law 385.

Sands P and Klein P, *Bowett's Law of International Institutions* (5th edn, Sweet & Maxwell 2001).

Sarmiento D, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267.

Satzger H, 'The Harmonisation of Criminal Sanctions in the European Union - A New Approach' (2019) 2 eucrim 115.

— —, 'Mutual Recognition in Times of Crisis: Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant (2018) European Criminal Law Review 317.

Sauter W, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439.

Schallmoser NM, 'The European arrest warrant and fundamental rights' (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 135.

Scheppele KL, Kochenov D, and Grabowska-Moroz B, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3.

Scheppele KL, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (2016) Verfassungsblog https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/ (accessed 04 October 2023).

Schermers H and Blokker N, *International Institutional Law* (4th edn, Mārtiņus Nijhoff 2003).

Schilling T, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389.

Schmidt SK, 'Mutual Recognition as a New Mode of Governance' 92007) 14 J. EUR. PUB. POL'Y 667.

Schroeder W, 'Limits to European Harmonisation of Criminal Law' (2020) 2 eucrim 144.

Schütze R, 'Three "Bills of Rights" for the European Union' (2011) Yearbook of European Law 131.

— —, *European constitutional law* (Cambridge University Press 2012).

Schwarz M, ‘Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice’ (2018) 24 European Law Journal 124.

Scott J and Sturm S, ‘Courts as Catalysts: Rethinking the Judicial Role in New Governance’ (2007) 13 Columbia Journal of European Law 565, 572.

Selanec NB and Petrić D, ‘Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law’ (2021) 17 European Constitutional Law Review 498.

Sellier É and Weyembergh A (eds), *Criminal Procedures and Cross-Border Cooperation In The Eu’s Area Of Criminal Justice: Together But Apart?* (éditions de l’Université de Bruxelles 2020).

Shapiro M, ‘Comparative Law and Comparative Politics’ (1981) 53 Southern California Law Review 537.

Sharpe J, *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Council of Europe 2010).

Shelke S, Jyoti Dharm Theories of Punishment: Changing Trends in Penology.

Sieber U, ‘The Forces behind the Harmonisation of Criminal Law’, in Delmas-Marty M, Pieth M and Sieber U (eds), *Les Chemins de l'harmonisation pénale* (Société de Legislation Comparé 2008) 1, 385.

Simester AP et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (5th edn, Hart Publishing 2013).

Simma B and Pulkowski D, ‘Leges Speciales and Self-contained Regimes, Responsibility in the Context of the European Union Legal Order’ in Crawford J, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1, 152.

Simon J, ‘‘Entitlement to cruelty’: Neo-liberalism and the punitive mentality in the United States’ in Stenson K and Sullivan RR (eds) *Crime, risk and justice: The politics of crime control in liberal democracies* (Willan 2001) 1, 125.

Simpson G, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).

Sjursen H, ‘The EU as a Normative Power: How Can This Be?’ (2006) 13 J. EUR. PUB. POL’Y 235.

Smismans SS, ‘The European Union’s Fundamental Rights Myth’ (2010) 48 Journal of Common Market Studies 45.

Smith E, ‘Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe’s Area of Freedom, Justice and Security’ (2013) 1 New Journal of European Criminal Law 82.

— —, ‘The Evolution and Application of EU Membership Conditionality’ in Cremona M (ed), *The Enlargement of the European Union* (Oxford University Press 2003) 1, 105.

Smith M, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge 2010).

Snacken S and Van Zyl Smit D, ‘The prisoner as rechtsburger: a European perspective’ in Franken SAA, De Langen M and Moerings M (eds), *Constante waarden. Liber Amicorum Prof.mr. Constantijn Kelk* (Boom Juridische Uitgevers 2008).

Snacken S, Kristel Beyens and Hilde Tubex, ‘Changing Prison Populations in Western Countries: Fate or Policy?’ (1995) 3 European Journal of Crime, Criminal Law and Criminal Justice 18, 40.

Snacken S, ‘A Reductionist Penal Policy and European Human Rights Standards’ (2006) 12 European Journal of Criminal Policy and Research 143.

— —, ‘Human Dignity and Prisoners’ Rights in Europe’ (2021) 50 Crime and Justice 301.

— —, ‘Human Dignity and/or Human Rights for Prisoners? A Belgian Example’ (2015) 27 Neue Kriminalpolitik 181.

Snyder F, ‘New Directions in European Community Law’ (1987) 14 Journal of Law and Society 167.

Soo A, ‘Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures’ (2020) 20 ERA Forum 327.

Sotis C, ‘Criminaliser sans punir: Réflexion sur le pouvoir d’incrimination (directe et indirecte) de l’Union européenne prévu par le traité de Lisbonne’ (2010) 65 Revue de science criminelle et de droit pénal comparé 773.

Sparks JR and Bottoms AE, ‘Legitimacy and Order in Prisons’ *(*1995) 46 The British Journal of Sociology 45.

Spaventa E, ‘A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13’ (2015) 22 Maastricht journal of European and comparative law 35.

— —, ‘Earned Citizenship’ in Dimitry Kochenov (ed) EU *Citizenship and Federalism* (Cambridge University Press 2017).

Spencer JR, ‘Why Is the Harmonisation of Penal Law Necessary?’, in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences 2002) 1, 43.

Spieker LD, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’ (2019) 20 German Law Journal 1182.

Spiermann O, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’ (1999) 10 European Journal of International Law 763.

Spiro PJ, ‘Expatriating Terrorists’ (2014) 82 Fordham Law Review 2169, 2171.

Stafford G, ‘The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think. Part 2: The Hole in the Roof’ (2019) ECJ Talk https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed 01 September 2023).

Stajnko J, Weingerl P and Šepec M, ‘Further Areas’ in Ambos K (ed) *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 206.

Ştefan O, ‘Soft Law and the Enforcement of EU Law’ in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 200.

Stevens L et al, ‘Incapacitation by pre-trial detention’ in Malsch M and Duker M (eds), *Incapacitation: Trends and New Perspectives* (1st edn, Ashgate Publishing 2012) 1, 97.

Stiansen Ø and Voeten E, ‘Backlash and judicial restraint: Evidence from the European Court of Human Rights’ (2020) 65 International Studies Quarterly 770.

Streinz R, ‘Principles and Values in the European Union’ in Hatje A annd Tichý L (eds), *Liability of Member States for the Violation of Fundamental values* (2018) 1, 11.

Sullivan ET and Frase RS, *Proportionality Principles in American Law* (Oxford University Press 2009).

Summers SJ, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press 2022).

Sunstein CR, 'On the Expressive Function of Law' (1996) 144 U. PA. L. REV. 2021.

Syrpis P, 'The relationship between primary and secondary law in the EU' (2015) 52 Common Market Law Review 461.

Szente Z, 'Challenging the Basic Values: Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 1, 456.

Szklanna A, 'Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues' in Benedek W et al (eds) *European Yearbook on Human Rights* (Intersentia 2018) 1, 445.

Tamahana BZ, *Law as a means to an end: threat to the rule of law* (Cambridge University Press 2006).

— —, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell International Law Journal 209.

Taylor C, *Irreducibly Social Goods: Philosophical Arguments* (Harvard University Press 1997).

Terpan F, 'Soft Law in the European Union: The Changing Nature of EU Law' (2014) 21 European Law Journal 68.

The Secretary of State for Foreign and Commonwealth Affairs, *Prospects for the European Union in 2006 and retrospective of the UK's Presidency of the EU, 1 July to 31 December 2005* [2006] Cm 6735.

The Telegraph, *The European Court of Human Rights has neither Authority nor Legitimacy* (The Telegraph 2012)

Thomas PA, 'Editorial' (1974) 1 British Journal of Law and Society (later Journal of Law and Society) 1.

Thucydides, *The History of the Peloponnesian War* (Richard Crawley trans, Project Gutenberg 2003) 5.89 < https://www.gutenberg.org/files/7142/7142-h/7142-h.htm> (accessed 20 July 2023).

Thym D, 'Introduction: The Judicial Deconstruction of Union Citizenship' in Thym D (ed), *Questioning EU Citizenship* (Bloomsbury 2017) 1.

Tiryakian EA, 'Durkheim's "Two Laws of Penal Evolution" (1964) Journal for the Scientific Study of Religion 261.

Tizzano A, 'The Role of the ECJ in the Protection of Fundamental Rights' in Arnull A, Eckhout P and Tridimas T (eds.) *Continuity and Change in EU Law: Essays in Honour of Francis Jacobs* (Oxford University Press 2008).

Tonry M, 'Determinants of Penal Policies' (2007) 36 Crime and Justice 1.

— —, 'Punishments, Politics, and Prisons in Western Countries' (2022) 51 Crime and Justice 7.

Torres Pérez A, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308.

Toggenburg GN and Grimheden J, 'The Rule of Law and the Role of Fundamental Rights Seven Practical Pointers' in Closa C and Kochenov D (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 1, 166.

Treib O et al, 'Modes of Governance: Towards a Conceptual Clarification' (2007) 14 Journal of European Public Policy 1.

Trenchsel S and Summers S, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006).

Tridimas T, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361.

— —, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006).

— —, 'Judicial Federalism and the European Court of Justice' in J Fedtke and BS Markezinis (eds), *Patterns of Federalism and Regionalism: Lessons for the UK* (Hart 2006) 1, 149.

— —, 'The Court of Justice and Judicial Activism' (1997) 22 European Law Review 199.

Triffterer O, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (Albert 1966).

Triggs GD, *International Law: Contemporary Principles and Practices* (Butterworths 2006).

Trotter S, 'Hope's Relations: A Theory of the 'Right to Hope' in European Human Rights Law' (2022) 22 Human Rights Law Review 1.

Trubek DM, 'Max Weber on Law and the Rise of Capitalism' (1972) 1972 Wisconsin Law Review 720.

Tulkens F, 'Droits de l'homme et prison. Jurisprudence de la nouvelle Cour européenne des droits de l'homme' in de Schutter O and Kaminski D (eds) *L'institution du droit pénitentiaire. Enjeux de la reconnaissance de droits aux détenus* (Bruylant 2002) 1, 255ff.

— —, 'Human Rights as the Good and the Bad Conscience of Penal Law' in Snacken S and Dumortier E (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2011) 1, 160.

— —, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577.

Tully J, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).

Tuori K, 'The pluralism of European fundamental rights law', in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edgar 2017) 1, 35.

Turner JI, 'The Expressive Dimension of EU Criminal Law' (2012) 60 American Journal of Comparative Law 555.

UNFOLLOW (2012) Interview with Minister of Public Order Nikos Dendias by A Zenakos and L Charalampopoulos https://www.youtube.com/watch?v=IWe9lDm7wDM (accessed 05 November 2021).

van den Brink M, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (2019) 25 eur. l.j. 21.

van den Brink T, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU' (2017) 19 Cambridge Yearbook of European Legal Studies 211.

Van Drooghenbroeck S and Rizcallah C, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

van Eijken H and Marguery T, 'The Federal Imbedding of Citizens in the European Union Member States' Criminal Law; Or How EU Citizenship Is Shaping Criminal Law' in Kochenov D (ed), *European Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2016) 1, 561.

van Eijken H and de Vries S, 'A New Route Into the Promised Land? Being a European Citizen After Ruiz Zambrano' (2011) 36 Eur. L. Rev. 704.

Van Elsuwege P, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law' (2011) Legal Issues of Economic Integration 263.

van Ginneken EFJC and Hayes D, ''Just' punishment? Offenders' views on the meaning and severity of punishment' (2017) 17 Criminology and Criminal Justice 62.

van Ginneken EFJC and Palmen J, 'Is There a Relationship Between Prison Conditions and Recidivism?' (2022) Justice Quarterly 106.

Van Hoecke M, 'Methodology of Comparative Legal Research Law and Method' (2015) Law and Method 1.

Van Kalmthout A et al, 'Introductory summary' in van Kalmthout A, Knapen MM and Morgenstern C (eds), *Pre-trial detention in the European Union* (Wolf Publisher 2009) 1, 49.

van Nifterik G, 'Grotius and the Origin of the Ruler's Right to Punish' (2008) 26 Grotiana Koninklijke Brill NV 396.

van Ooik R, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and Nikolas Lavranos (eds), *Interface Between EU Law and National Law* (1st edn, Europa Law 2007) 1, 13,.

van Zyl Smit D and Ashworth A, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 The Modern Law Review 541.

van Zyl Smit D and Mulgrew R, *Handbook on the International Transfer of Sentenced Persons* (United Nations 2012).

van Zyl Smit D and Snacken S, 'Shaping penal policy from above? The role of the Grand Chamber of the European Court of Human Rights' in Crawford A (ed) *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 1, 168.

— —, Principles of European prison law and policy: penology and human rights (Oxford University Press 2009).

van Zyl Smit D, 'Humanising imprisonment: a European project?' (2006) 12 European Journal of Criminal Policy Research 107.

— —, 'Prison Law' in Dubber MD and Hörnle T (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2015).

— —, 'Regulation of Prison Conditions' (2010) 39 Crime and Justice 503, 554.

— —, 'International Prison Standards and Transnational Criminal Justice' (2019) 97 Irvine Journal of International, Transnational, and Comparative Law 261.

Verbist V*, Reverse Discrimination in the European Union: A Recurring Balancing Act* (Cambridge University Press 2018).

Vermeulen G and De Bondt W, Justice, Home Affairs and Security: European and International Institutional and Policy Development (Maklu 2015).

Vermeulen G et al, *Cross-Border Execution of Judgements Involving Deprivation of Liberty in the EU* (Maklu 2011).

Vermeulen G, 'Where Do We Currently Stand with Harmonisation in Europe?', in Klip A and van der Wilt (eds), *Harmonisation and harmonising measures in criminal law* (Royal Netherlands Academy of Arts and Sciences 2002) 1, 73.

Vervaele JAE, 'Harmonised Union Policies and the Harmonisation of Substantive Criminal Law' in Galli F and Weyembergh A (eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université de Bruxelles 2012) 1, 57.

— —, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in Geelhoed W, Erkelens LH and Mei AWH (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (T.M.C. Asser Press, 2018) 1, 11.

von Bogdandy A and Ioannidis M, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51 Common Market Law Review 298.

von Bogdandy A and Spieker LD, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391.

— —, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case Law' in Bobek M and Adams-Prassl J (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020).

von Bogdandy A et al, 'Reverse Solange: Protecting the essence of fundamental rights against EU Member States' (2012) 49 Common Market Law Review 489.

von Bogdandy A, 'Founding Principles', in Bast J and von Bogdandy A (eds), *Principles of European Constitutional Law* (2nd edn, Bloomsbury 2010).

— —, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705.

— —, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) CMLRev 1307.

von Hirsch A and Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1.

von Hirsch A, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55.

Von Jhering R, *Law As a Means to an End* (Husik trans, Boston 1913, reprint 1999).

Wade ML, 'Cross-Border Crimes', in Ambos K and Rackow P (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 1, 182.

— —, 'True EU citizenship as a precursor to genuine criminal justice in Europe: an analysis of EU citizenship as it relates to a sustainable area of freedom, security and justice' (2020) 31 Criminal Law Forum 291.

— —, 'The EPPO and the pitfalls of actuarial justice' (2021) 28 Maastricht Journal of European and Comparative Law 265.

Wahl T, 'AG: Postponement of Surrender in Case of Serious Health Risk' (2022) 4 eucrim 253.

Walker N, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 361.

Walters MD, *Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge University Press 2020).

Wassenberg B, *History Of The Council Of Europe* (Council of Europe 2013).

Wassmann P, *Do Open Borders Tempt a Saint? Evidence from Schengen on Crime Rates in German Border Regions* (Beiträge zur Jahrestagung des Vereins für Socialpolitik 2016: Demographischer Wandel - Session: Spillover Effects 2016) <https://www.econstor.eu/handle/10419/145878> (accessed 24 July 2023).

Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

Weatherill S, 'Competence Creep and Competence Control' (2004) Yearbook of European Law 1.

Weber M, *Economy and Society: An Outline of Interpretive Sociology* (Fischoff E et al trans, University of California Press 1978).

Weigend T, 'Assuming the defendant is not guilty: The presumption of innocence in the German System of Criminal Justice' (2014) 8 Criminal Law and Philosophy 285.

Weijters G et al, *Recidive onder justitiabelen in Nederland: Verslag over de periode 2006-2018 [Recidivism among justice-involved persons in the Netherlands: Report over 2006-2018]* (Wetenschappelijk Onderzoeks- en Documentatiecentrum 2019).

Weiler JHH and Haltern UR, 'The Autonomy of the Community Legal Order: Through the Looking Glass' (1996) 37 Harvard International Law Journal 411.

Weiler JHH, 'Deciphering the Political and Legal DNA of European Integration' in Dickson J and Eleftheriadis P (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

— —, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal order of the European Communities', (1986) 61 Wash. L. Rev. 1103.

— —, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.

Wenzelburger G and König PD, 'The liberal dream of smart detention? Algorithms and the politics of pretrial detention in the US states' (2022) 44 Law & Policy 325.

Werle G, Principles of International Criminal Law (2nd edn, Asser Press 2009).

Werth R, 'Risk and punishment: The recent history and uncertain future of actuarial, algorithmic, and "evidence-based" penal techniques' (2018) 13 Sociology Compass 1.

Wessel RA, 'The EU and International Law' in Ramses A Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2nd edn, Hart 2020).

Weyembergh A and Pinelli L, 'Detention conditions in the issuing Member State as a ground for non-execution of the European Arrest Warrant: state of play and challenges ahead' (2022) 12 European Criminal Law Review 25.

Weyembergh A and Wieczorek I, 'Is There an EU Criminal Policy?' in Colson R and Field S (eds), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 1, 30ff.

Weyembergh A, 'Introduction' in Galli F and Weyembergh A (eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Editions de l'Université de Bruxelles 2012) 1, 9.

— —, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions* (Editions de l'Université de Bruxelles 2004).

White S, 'European Law: The Corpus Juris: a bold step' (1999) 17 Amicus curiae 23.

Whitman JQ, *Harsh justice: Criminal punishment and the widening divide between America and Europe* (Oxford University Press 2003).

Wieczorek I, 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2019) 25 Maastricht Journal of European and Comparative Law 655.

— —, 'EU Harmonisation of Rules on Detention: Is EU Competence (Article 82(2)b TFEU) Fit for Purpose?' (2022) 28 European Journal of Criminal Policy and Research 465.

— —, 'The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice' (2023) 24 European Law Journal 378.

— —, *The Legitimacy of EU Criminal Law* (Hart 2020).

— —, 'The procedural rights directives as part of a broader paradigm shift in EU Criminal Law' in Gambardella I and Davioeu V (eds), *Directives on Procedural Rights in Criminal Matters: 15 Years after the Roadmap, where do we stand, where do we go?* (EU Law Live 2023) 1, 5.

Willems A, 'Mutual trust as a term of art in EU criminal law: revealing its hybrid character' (2016) 9 European Journal of Legal Studies 211.

— —, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468.

— —, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021).

William D Bales and Alex R Piquero, 'Assessing the impact of imprisonment on recidivism' (2012) 8 Journal of Experimental Criminology 71.

Williams AT, 'Human Rights in the EU' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 1, 249.

— —, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549.

— —, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion to Iraq' (2006) 31 EL Rev 27.

— —, *The ethos of Europe: Values, law and justice in the EU* (Cambridge University Press 2010).

Wilms G, *Protecting Fundamental Values in the European Union Through the Rule of Law* (RSCAS Books 2017).

Winter LB, 'Bypassing or Intensifying the Dialogue between Courts? The Impact of *Melloni* at the National Level' in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart 2021) 1, 404.

Wischmeye T, 'Generating Trust through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"' (2016) 17 German Law Journal 339.

Wolfers A, '"National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 485.

World Health Organisation, *Status report on prison health in the WHO European Region 2022* (World Health Organisation 2023).

World Prison Brief https://www.prisonstudies.org/country/poland (accessed 05 October 2023).

Wouters J and Ovádek M (eds), The European Union and Human Rights: Analysis, Cases, and Materials (Oxford University Press 2021).

Wouters J, 'From an Economic Community to a Union of Values: the Emergence of the EU's Commitment to Human Rights' in Jan Wouters et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 1, 11.

— —, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 1 European Papers 255.

Wyatt D, 'New Legal Order, or Old?' (1982) 7 European Law Review 147.

Xanthopoulou E, 'The European Arrest Warrant in a context of distrust: Is the Court taking rights seriously?' (2022) 28 European Law Journal 218.

Xenakis S and Cheliotis LK, 'Carceral moderation and the Janus face of international pressure: A long view of Greece's engagement with the European Convention of Human Rights' (2018) 70 Law and Social Change 37.

Yaroshenko O M et al, 'The impact of the European court of human rights on the development of rights in health care' (2022) 15 International Journal of Human Rights in Healthcare 501.

Yeung K, *Securing Compliance: A Principled Approach* (Hart 2004) 1, 11.

Yukhnenko D, Sridhar S and Fazel S, 'A systematic review of criminal recidivism rates worldwide: 3-year update' (2020) 4 Wellcome Open Research 28.

Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 Netherlands Quarterly of Human Rights 385.

Zapatero LA and de Morales Romero MM, 'Droit Penal europeen et Traité de Lisbonne: Le cas de l'harmonisation autonome (article 83.1 TFEU)' in Giudicelli-Delage G and Lazerges C (eds), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne* (Société de législation compare 2012) 1, 113.

Zedner L, 'Pre-crime and post-criminology?' (2007) 11 Theoretical Criminology 261.

Ziegler KS, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds) *Research Handbook on EU Human Rights Law* (Edward Elgar 2017) 1, 267.

— —, 'Grundfreiheiten und soziale Dimensionen des Binnenmarktes - die Verfassung als Impuls?' (2004) 3 Europarecht 13.

— —, 'International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation' in Orakhelashvili A (ed), *Research Handbook on the Theory and History of International* Law (Edward Elgar 2011) 1, 268.

Zimring FE, 'Imprisonment rates and the new politics of criminal punishment' (2001) 3 Punishment and Society, 161.

— —, 'The scale of imprisonment in the United States: Twentieth century patterns and twenty-first century prospects' (2010) The Journal of Criminal Law and Criminology 1225.

Zoumpoulakis K, 'Approximation of criminal sanctions in the European Union: A wild goose chase?' (2022) 13 New Journal of European Criminal Law 333.

— —, 'From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion' (2020) 5 European Papers 1289.

Zucca L, ‘Monism and Fundamental Rights’ in Dickson J and Eleftheriadis P (eds), *The Philosophical Foundations of the EU* (Oxford University Press 2012) 1, 331.

Zwaak LF, ‘Effectiveness and fulfillment of the judgements on human rights: the experience of the European System’ (2007) San José IIDH 331, 333.

Μανιτάκης Α, ‘Η Αθηναϊκή Δημοκρατία ως παράδειγμα αυτοπροσδιορισμού του πλήθους μέσω της αυτοκυβέρνησης του Δήμου’ στο Αλεξανδρίδου Ε (εκδ) *Τιμητικός Τόμος για τον Ιωάννη Μανωλεδάκη* (τόμος ΙΙΙ Σάκκουλας 2007) 1, 43ff.

Φραγκίσκος ΕΝ, *Η των ονομάτων επίσκεψις* (ΚΝΕ/ΕΙΕ 1994).